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HISTORY OF BAR ADMISSION AND THE ATTORNEY LICENSING PROCESS

What makes a person an attorney? What allows them to carry a law license, represent individuals in Court and hold themselves out to the public as a lawyer? What requirements do they have to meet ? First, there are a few rudimentary basics that need to be addressed. We have two sets of governments in our nation; federal and state. Each has their own set of laws, with citizens in a state being bound both by the federal law and the law of their particular state. The United States is comprised of three branches of government which are the executive, legislative and judiciary. Each state is comprised of three similar branches.

The first and most important branch is the Legislative branch which consists of Congress in the federal government and state legislatures for the state governments. Congress is charged with enacting federal laws, and state legislatures enact state laws. State legislatures also typically have a variety of other duties and powers. Included in these other duties and powers is generally the ability to set the rules and standards for the issuance of professional licenses in the various occupations (excluding law). The second branch is the Executive which is headed by the President in the federal government, and the Governors for the state governments. The Executive supervises and directs various administrative agencies and is charged with the responsibility of seeing that the laws are administered properly. Third on the totem pole, is the Judiciary consisting of federal courts and state courts charged with resolving disputes pertaining to the law and also interpreting the law.

Members of most professions are licensed by agencies (typically, referred to as "Boards") that are under the supervision and direction of the Legislative branch of government in most states. The professions typically licensed by Legislative agencies include accounting, medicine, dentistry, architecture, and a wide host of other professions. There is one major exception. That is the practice of law. Lawyers today are rarely licensed by agencies under the direction and supervision of the State legislature. They are typically licensed by the Judiciary branch of government. The Judiciary's power to license attorneys has only been firmly established in this nation as a phenomenon of the 20th century. Prior to the 1930s, it was a hotly contested issue, with many state legislatures successfully claiming the power. Most citizens are not aware of this and Courts typically mislead the public into believing that their power to license attorneys has been undisputed since the formation of this nation. Their misleading assertion lacks candor and is not supported by historical facts. The result of the Judiciary successfully grabbing control of the licensing power in the early 20th century is that rules, procedures and protections that apply to the licensing of every other profession are for the most part inapplicable to the licensing of lawyers. The Judicial administrative agency vested with the power to license attorneys is typically known as the Board of Bar Examiners. This book will demonstrate how within the context of the State Bar admissions process, it is an unconstitutional licensing agency unlike that of any other profession.

When I first entered law school at the age of 32, I was already a Certified Public Accountant. I was therefore somewhat familiar with the licensing process for a professional. The requirements to become a CPA were as follows. First, I needed a minimum number of accounting credit hours from college. Second, I needed two years of public accounting experience. Third, I had to pass a comprehensive examination known as the CPA exam. The CPA exam in the early 1980s when I took it, was comprised of four parts. Few individuals passed all four parts in one sitting. As I recall, the

percentage that did so was about 5%. I accomplished the feat, passed all four parts in one sitting and was certified at age 24.

The CPA exam is a uniform exam, which means that whether you sit for the exam in Arizona or New Jersey, you answer the exact same questions. Although each state sets its own grading standards for passing the exam, the questions are the exact same in every state. Consequently, if you pass the exam in New Jersey, you can transfer the grades to another state, such as Arizona and obtain certification. As part of the CPA application form, you typically provide basic information detailing recent addresses you have lived at, places of employment, education and must disclose whether you have ever been convicted of a crime. For the most part, that's about all there is to it. Once you're certified in one state, you can use that license to easily gain reciprocity in another state. For instance in my own case, although I originally passed the exam in New Jersey, I was certified in Arizona, and then obtained reciprocity in other states just by filing the paper work and paying the necessary fees.

I was shocked to learn in law school that the process to obtain a law license was immensely more complex, and not nearly as objective. Instead of being admitted when you satisfied a clear set of definable criteria, the attorney licensing process was designed to foster denial of admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners. Applicants could be denied admission for being cavalier, glib, facetious, smart-alecky, being unable to pay debts, participating in civil suits, writing letters to express their opinions about the legal profession or a wide host of other blatantly unconstitutional grounds. Purportedly, such admission denials are designed to ensure that attorneys possess the "requisite character" needed to "protect the public" from dishonest lawyers and incompetent legal services. Essentially however, the criteria are so subjective and vague that they allow the Bar to deny admission simply based on whether they "like" the Applicant or not. This obviously creates an environment whereby qualified Applicants are regularly denied admission due to their race, appearance, attitude, or economic standing in society. Facially, the Bar does not deny admission on the basis of race, but as a matter of substance due to the subjective nature of the application process, such denials are common and the admission standards foster the opportunity. Its' disturbing history certainly confirms the intent.

The criterion to become an attorney in most states is as follows. First, you need to graduate from an ABA accredited law school. This usually takes three years, although it can be accomplished in two and a half, as I did. There are a few states that allow an Applicant to sit for the Bar exam if they've graduated from a non-accredited law school, and the ABA accreditation process is certainly less than commendable. It has been subjected to justified legal attack in recent years by the U.S. Justice Department. Nevertheless, currently the normal route to licensure is to graduate from an ABA accredited law school.

Second, the Applicant needs to pass the Bar exam. Unlike the uniform CPA exam which is exactly the same from state to state, the Bar exam varies widely between the states. Only a portion of it is uniform which is known as the MBE (Multistate Bar Exam). The MBE is an objective, multiple choice examination. Most states however, also require the Applicant to take a state specific exam which is comprised of essay questions. Since the state portion consists of an essay exam which is subjectively graded, the admissions committee is able to exclude applicants based on their subjective appraisal of an Applicant's ideas and attitudes as expressed in answers to the essay questions. Many states require lawyers who have passed the MBE in one state, to sit for the MBE exam again when applying to their state. That obviously makes no sense. Unlike the CPA Boards, the Bar Boards do not typically respect passing of the uniform MBE portion in another state, unless the Applicant has also actively engaged in the practice of law for 5 out of 7 years. Many attorneys such as myself, have never practiced law.

The third requirement is the real kicker. The Applicant must pass a so-called "moral character" review to determine if they possess the "moral character and fitness" necessary to become a lawyer (I know it seems like a contradiction in terms, based on the disrespect most Nonattorney citizens have for the "character" of lawyers). The CPA licensing process equivalent of character review generally

consists of answering the question, "Have you ever been convicted of a crime?" If the Applicant truthfully answers "No," the criterion is met. If the answer is "Yes," the Applicant normally must provide all relevant details and circumstances. The Applicant may also be required to come in for an interview with the CPA Board to personally answer questions about their criminal conviction. The Applicant may then be admitted or rejected based on the nature of the crime and the explanation rendered. In any event, it is a nice, clear, bright line, articulate standard. If you've never been convicted of a crime, then you pass. If you have been convicted of a crime, then you may or may not be admitted depending on the case.

The State Bar's moral character review process is immensely more complex. There is no clear bright line, objective standard. It is wholly subjective in nature and encompasses a wide range of vague questions. The answers can be interpreted by the Admissions committee in any manner they please. Essentially, as a matter of substance and pragmatism, they can use the answers to exclude Applicants based on race, appearance, attitude, economic standing or any other criteria they choose. The questions are intentionally designed to be so comprehensive and detailed, that it is virtually impossible to provide complete and accurate answers. Essentially, the questions are designed to promote immaterial errors, at which point the Admissions committee gains the power to falsely assert the Applicant lied on the application. Such a finding in and of itself constitutes grounds for denial of admission.

The most vulnerable point of logic facing the State Bar Boards of Examiners is that if indeed the character questions are designed to ensure moral character and protect the public as the Bars ostensibly assert, rather than foster the legal profession's anticompetitive, economic interests and prejudicial attitudes, then why don't licensed attorneys have to answer the same questions on a periodic basis? Currently, once you pass the admissions hurdle for a state, you never have to provide that state with comprehensive character information again.

Obviously, a person's current character can not be assessed as "moral" based solely on answers to character questions which are based on events that are five, ten or twenty years remote in time. If the character questions are essential to protecting the public, then all licensed attorneys and judges should be required to answer the questions on a regular and periodic basis. To do otherwise, results in the Nonattorney Bar Applicant being held to a higher standard of moral character compared to licensed attorneys and Judges.

This violation of the Equal Protection Clause to the U.S. Constitution makes the State Bar Boards of Examiners particularly vulnerable to attack and exposes the frailty of their position. **Put simply, the average Nonattorney citizen recognizes that is unjust to hold licensed attorneys purportedly subject to the ethical rules of conduct, to a lower standard of moral character assessment than a Nonattorney Bar Applicant.** The primary focus of this book is on the character review portion of the attorney licensing process, since that is the area where the Applicant is exposed to the most subjective, prejudicial, and arbitrary nature of the process. Essentially, at the whim and mercy of his future competitors.

So how did this irrational nightmare begin? During the Revolutionary War? The early 1800s? The Civil War? The late 1800s? Certainly, one would not think it was a product of the 20th century, but that is precisely the case. The modern State Bar Admissions' process is a product of the Depression era and the ABA's (American Bar Association) political rise in the early 20th century to establishing control over the Judiciary branch of government. What the ABA and its' child organization the NCBE (National Conference of Bar Examiners) did, was capitalize on the economic weakness of the Nonattorney general public at their most vulnerable period of time (the Depression) to establish the power of the legal monopoly. When the Depression came, the general public was economically helpless. People just wanted to get food on their table and housing for their family. Their vulnerability could be capitalized on by the ABA. Bar organizations guided by the NCBE in the 1930s, began severely restricting the admissions process, continuously making it more and more difficult. The admissions process as we know it today, is a product of the Depression. A time when lawyers like all

others were experiencing financial difficulties and were willing to implement desperate measures to better their economic position at the expense of Nonattorneys. At the same time they restricted Bar admission standards, they widened the scope of what constitutes "legal services" by enacting irrational prohibitions against what is called the "unauthorized practice of law (UPL)." Their concept was simple. Expand their allocated segment of the marketplace by enacting irrational UPL prohibitions and then reduce the supply of lawyers available to service that market by enacting irrational moral character standards that allowed Bar admission to be restricted on a subjective basis. **The end result after applying economic principles of supply and demand, would then obviously be a lower number of lawyers to service an expanded market with higher legal fees enjoyed by attorneys.**

In early colonial times, the process of becoming a lawyer was haphazard at best and varied widely from one colony to another. The road to becoming a lawyer during those times for some great Americans was as follows. Patrick Henry's primary source of "law school" training consisted of listening attentively to conversations of members of the Bar at Shelton's Tavern, which he frequented regularly to drink. Purportedly, he set off to take the bar examination which was an oral exam, having studied for less than two months. Henry took his "oral exam" from George Wythe (later to become Thomas Jefferson's tutor). Wythe had begun his legal practice under the auspices of Zachary Lewis, who was the father of Henry's close friend John Lewis. Henry passed and Wythe became the first signator on Henry's license. Henry then took the next portion of his "oral exam" from the esteemed John Randolph, who upon learning that Wythe had signed the license also agreed to become a signator.[4] Thomas Jefferson became a law student at the age of nineteen studying under the private tutelage of Wythe. Perhaps the most famous U.S. Supreme Court Justice ever, John Marshall enrolled in William and Mary law school on May 1, 1780 and had his law license just a few months later. [5] It does not take a genius to recognize that licensure during those times was predicated most simply on who you knew, and not what you knew. That is what the legal profession has always wanted to preserve. It was inarguably a morally reprehensible start to the nation's legal profession, but admittedly somewhat characteristic of the English tradition from which it was derived.

The rise of Jacksonian Democracy in the first part of the nineteenth century eliminated the few educational requirements that were necessary to become a lawyer and the 19th century is characterized primarily by lawyers that educated themselves or read under the tutelage of another lawyer. As late as 1900, few states even required a law degree for admission to the Bar. For those students that did attend law school, the standard course in 1850 was one year. Very few law schools required more. The famous Justice Oliver Wendel Holmes entered Harvard Law School in the fall of 1864 and received his degree in June, 1866 even though he had stopped attending the lectures. The concept of the three year law degree typically required today, was unheard of throughout the entire nineteenth century.[6]

Admission requirements to the Bar began tightening up during the last part of the nineteenth century. Between 1880 and 1920, most states adopted admission procedures including the publication of Applicant's names, probationary admissions, recommendations by the local bar, and investigation by character committees. By 1917, three quarters of the states had centralized certification authority in Boards of Bar Examiners. It was also during the close of the nineteenth century that the American Bar Association, organized in 1878 to protect the anticompetitive interests of the legal profession, at the expense of the general public began spearheading a campaign for higher professional standards. Ostensibly, for public relations purposes this was to protect the public from the delivery of incompetent legal services. Over 100 years later, most members of society would probably agree that the purported goal, even if it were not disingenuous has certainly not been achieved.

Typically, candidates denied admission on the disingenuous ground that they were "unworthy," and "morally weak," were Immigrants, Black, Women or Jewish. In 1874, George Strong advocated more stringent admission requirements to Columbia Law School on the ground that this would:

"keep out the little scrubs whom the school now promotes from the grocery-counters . . . to be gentlemen of the Bar."[7]

Historical evidence irrefutably confirms that the rise of the monstrosity known as the ABA is attributable to the role of subservience the legal profession occupied throughout most of the nineteenth century. The Civil War resulted in lawyers being relegated to a negligible political force. After the Civil War, a number of cases established that the right for a person to practice a profession was precisely that ; a "Right" rather than a "Privilege." In fact, the United States Supreme Court conclusively decided the issue shortly after the war in *Ex Parte Garland*, 71 U.S. (Wall) 333 (1866). Cases also established that the power to license lawyers vested in the Legislature, rather than the Judiciary. New York in 1860, *In re Cooper*, 22 N.Y. 67 ; California in 1864, *Ex parte Yale*, 24 California 241; and North Carolina in 1906, *re Applicants for License to Practice Law*, 143 N.C. 1. *Cooper* was considered the leading case in the nation on the issue. Lawyers quite simply put were "on the run." Left to stand, those cases would have resulted in a legal profession with a properly diminished capacity to exploit the public in order to foster their self-serving economic interests and societal notions of "group thought." The ABA mobilized in 1878 as a political force to ensure the attorney's stature, power and privilege within society. Their initial concern was neither the Bar admissions process or the "unauthorized practice of law." Rather instead, they had no alternative but to first wrest control of the licensing process. If they could obtain the power to license attorneys, then they could set the standards and control the market for legal services.

The ABA initiated a strategic attack plan to seize the licensing power and succeeded through a series of litigations. Their success was distinctly attributable to the fact that the individuals who decided the cases, (i.e. Judges) were attorneys themselves and willing to capitalize on the opportunity presented. Pennsylvania played a dominant role, ruling in the case, *In re Splane*, 123 Pa. 527 (1888) :

"No judge is bound to admit, nor can be compelled to admit, a person to practice law who is not properly qualified, or whose moral character is bad . . . . Whether he shall be admitted or whether he shall be disbarred is a judicial and not a legislative question."

By 1932, Arizona (*in re Bailey*, 30 Ar. 407(1929)), Wisconsin (*State v. Cannon*, 240 N.W. 441 (1932)), South Dakota (*Danforth v. Egan*, 23 S.D. 43 (1909)), Illinois (*People ex rel Illinois State Bar Association* 342 Ill. 462 (1931)), and numerous other states had followed. The power to license attorneys was seized by the Judiciary, in cases the Judiciary itself ruled on, similar to how they seized the power to interpret law in the seminal case of *Marbury v. Madison* in 1803. In the process of seizing the power to license attorneys, the legal profession also attempted to neutralize the U.S. Supreme Court's opinion in *Ex Parte Garland*, which had conclusively established that the ability to engage in the practice of law was a "Right," rather than a "Privilege." State Supreme Courts having secured the licensing power began falsely asserting that exercise of the power was a "*Privilege*," rather than a "*Right.*" The exact same notion of "*Privilege*" that England had adopted and which inspired our drive for independence. The legal profession was then poised to enact prohibitions against the "unauthorized practice of law" and to irrationally restrict admission to the Bar. They did so with vigorous fever. They seized the licensing power with their own Judges. They would now use it to expand their market and reduce the number of available attorneys to service that market. The result would be higher legal fees at the general public's expense. They would accomplish their goal by having the audacity to falsely assert they were trying to protect the public.

UPL and Bar admission restrictions were the two final objectives to raise the Judiciary above the Executive and Legislative branches of government. The Judiciary already had grabbed the power to interpret law in *Marbury v. Madison*. By seizing the licensing power, they would control the individuals who presented the legal arguments. They would control them by controlling their livelihood.

Essentially, the notion can be easily summarized as, "control the man's livelihood and ability to feed his family, and you control the man." Newly enacted minimum requirements for admission to the Bar were also designed to stem the flood of those whose inadequate command of the "King's English" had allegedly debased the profession. At the first NCBE Conference in 1933, the former Chairman of the ABA's section on Legal Education and Admission stated:

> "sometimes you have wonderful character evidence displayed even though the applicant is not well educated or his parents were born in Russia."[8]

In the 1920s the ABA's Section of Legal Education and Admissions, began its' quest to control admission standards. The rise of the ABA's Bar Admission Section unsurprisingly paralleled the rise of their UPL Section (Unauthorized Practice of Law). In 1928, Pennsylvania led the way by implementing a registration system under which prospective Bar candidates would face a character investigation at the beginning of law school and when applying for admission. This illegitimate process was subsequently adopted by other states, but admirably abandoned by Pennsylvania. The character interview under the law student registration program was used to dissuade the purportedly "unworthy" from pursuing a legal career. Pennsylvania's definition of "unworthy" was quite elastic. Those rejected in 1929 included individuals deemed "dull," "colorless," "subnormal," "shifty," "smooth," "arrogant," "conceited," and "slovenly." A substantial number of candidates reportedly lacked a "proper sense of right and wrong," others had not "moral or intellectual stamina," appreciation of "social duty," or "well-defined ideas on religion."[9]

I detract now a bit. I am currently a member of the Pennsylvania Bar. The foregoing information found in Professor Deborah Rhode's historic article, *Moral Character as a Professional Credential* was published in 1985. Professor Rhode is a law professor at Stanford Law School. Her ideas in this area, as well as her concepts related to UPL (Unauthorized Practice of Law) guide my own to a large degree.[10, 11] She has essentially been the foremost authority, (until me) regarding these subjects. I applied for admission to the Pennsylvania Bar in 1995. At that time, Pennsylvania's character questionnaire was the least cumbersome of all the State Bars, although it still included several unconstitutional inquiries. I know this because I requested applications from every single State Bar in the nation. The early issues of the Bar Examiner magazine from the 1930s, refer often to the "admirable" character review process of the Pennsylvania Bar. Pennsylvania was the nation's leader in restricting Bar admissions, and then took the commendable step of diametrically reversing course. For the most part, they abandoned their irrational admission program. They went from being the most unconstitutional State Bar in the early 1930s, to perhaps the fairest in the nation currently.

I graduated from law school in 1994. During my last semester, a flyer was handed out to students indicating that law student character registration would probably be implemented for all new students. Since then, the concept has gained steam in many states. Many law schools and some State Bars began requiring law student registration again in the 1990s. This demonstrates how the legal profession's unjust, self-interested concepts which drove the admissions process to become more stringent in the 1930s are still flourishing today at the expense of the general public.

In 1993, the ABA published a pamphlet titled, "The ABAs First Section - Assuring a Qualified Bar", by Susan K. Boyd. It discussed the early years of the Bar Admission Section. It recognized that the legal profession throughout the early 1900s was particularly concerned about the economic effect the influx of immigrants was having on the profession and seeking ways to exclude them. The ABA's 1993 pamphlet discusses how in 1915, future ABA president Walter George Smith of Pennsylvania stated at the meeting of the Legal Education section :

> "We have in the Eastern cities representatives of the most ancient race of which we have knowledge coming up to be admitted to the practice of law. . . . those men who have come to the Bar without the incalculable advantage of having been brought up in the American family life, can hardly be taught the ethics of the profession as adequately as we would desire."[12]

The 1993 ABA pamphlet also recognized that bigotry and prejudice permeated the Bar and law school world. It acknowledged that there was egregious discrimination against African-Americans, Jews, Catholics, Immigrants and Women. The importance of the information source for these concessions is as follows. During the expansion period of the Bar Admission Section in the 1920s, 1930s, and 1940s, the ABA utilized false propaganda stressing that the reason for curtailing State Bar admissions was to protect the public. Essentially, the ABA wanted to fool the public into believing the purpose of these Sections was not to enhance the economic interests of the legal profession, but instead to protect citizens from dishonest and incompetent Nonattorneys. The publication of the 1993 pamphlet by the ABA demonstrates the ABA appears ready to concede such. Their recent "confession," supports the premise that admission restrictions were originally designed for anticompetitive purposes. They were not designed or ever used to protect the public from incompetent attorneys, as the ABA falsely led the public to believe for so many years. In order to demonstrate in today's world that the restrictions serve the primary purpose of protecting the public, the legal profession would logically need to show some intervening factor which negates the original intent. To my knowledge, no intervening factor exists.

The National Conference of Bar Examiners held its first meeting on September 16, 1931. It began publishing a magazine titled "The Bar Examiner" which is still published today. Most members of the public don't even know these committees exist or what they have done to monopolize the delivery of legal services. The monopoly allows incompetent attorneys who support the profession's economic interests to profit when litigants go to prison, parents lose custody of their children, families lose their property, litigants lose civil cases, etc.. The concept from the State Bar's perspective is, "lawyers first, the public second, if at all." Here are some interesting quotes from an article titled "Attorney Fees and Costs" written by Oregon attorney, Paul Saucy, circa 1992-1994. The article was published by the Oregon State Bar in Chapter 6 of a Continuing Legal Education Manual designed to be read by Oregon attorneys. How the Oregon State Bar could be so stupid as to publish these concepts and promote such within the context of continuing education is beyond me. The Oregon State Bar manual written for Oregon attorneys reads :

> "Remember how much more important it is to feed and clothe your family than it is to help a client with her particular problem."
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> "If you feel awkward about withdrawing, dictate the withdrawal papers while looking at that photograph of your family on your desk."
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> "One suggestion is to place a photograph of your family on your desk in plain sight so that each time you think about how large the client's retainer should be your gaze will fall upon your family."
>
> "Note that I also provide for an increase in my hourly rate without prior notice to the client."[13]

In 1996, I realized that the NCBE's magazine, "The Bar Examiner" was the cornerstone in conjunction with the ABA's Legal Education and Bar Admissions Section, and its' UPL committee, to the State Bar's economic protectionism. I wanted to read prior issues of the magazine. Past issues were

in law school libraries. The magazine was not however, carried by any public libraries that I looked into. I was living in New Jersey and quickly learned that to be allowed admittance into most of the law school libraries in the area, all I needed to do was present my Bar card showing that I was a licensed attorney. I did so numerous times at the Seton Hall Law Library. Each time I did it, a certain thought process went through my mind. It was simple in nature and as follows. If I were not a licensed attorney, then I would not be able to gain access to this magazine. I am constantly saddened by the thought that law schools which are in large part funded by students paying tuition with student loans guaranteed by the federal government, exclude the general public from using their facilities. So there I was, reading issues of the "Bar Examiner" dating back to the early 1930's, spending 10 cents per sheet to photocopy virtually every single applicable article on the issue of character from 1931-1946. Crinkled old books with yellowed pages that revealed the diabolical foundation of our nation's legal profession in the 20th century. No one in the law school library even gave me a second thought, or could have cared less about what I was researching. But I felt that I was on to the hottest find of the century.

The foregoing paragraph was intended to be the end of this short chapter, but something interesting occurred subsequently. In January, 2001 I went back to the Seton Hall Law Library to do some research. Although I was virtually certain that I had photocopied the most pertinent articles of the Bar Examiner magazine, I decided to take another look to see if I missed anything. But, they were gone. The library maintained virtually all other dated information including appellate opinions from certain states dating back to the early 1800s. The Bar Examiner magazine however, had been taken off the shelf. I went to the computer index catalog and discovered that the "Bar Examiner" had been transferred to microfiche, with one significant exception. The microfiche only included issues of the magazine going back to 1980. Everything else from the early 1930s through 1979 was apparently now unavailable. The most pertinent and incriminating articles ever written about the legal profession, by those who control the profession itself, seemed to be no longer available for research at all. Previously, to gain access to the old Bar Examiner articles, I had to be an attorney and show my Bar card. Now, it seemed that no one could gain access to them. As will be demonstrated herein, the profession's concern about those articles is well-warranted. The State Bars don't want the public to know what is in those old articles that form the foundation of the Bar admission process. But I got them. When you read Chapter 15 of this book, you will truly be shocked at what the irrational supporters of the State Bar monopoly wrote in the 1930s and 1940s.