The Supreme Court and State Regulation of the Legal Profession

By ROBERT J. MARTINEAU*

Introduction

For many decades the legal profession was thought to be exclusively under the control of the states and virtually immune from supervision by the United States Supreme Court. Since 1945 more and more issues involving the legal profession have been brought to that Court; and, since 1957, it has found various federal constitutional and statutory provisions violated by states' efforts to control the practice of law. Each individual decision or group of decisions has prompted substantial comment and criticism by legal scholars. To date, however, there has been no attempt to discover if there are any common themes running through the Supreme Court decisions relating to the legal profession which would reveal the Court's present view and how it is likely to deal with other matters concerning the legal profession that may be brought before it in the future. The purpose of this article is to provide such a comprehensive treatment for consideration by state supreme courts, state regulatory agencies, state and local bar associations, and attorneys and prospective attorneys, all of whom are directly affected by the Supreme Court's actions.

The decisions of the Supreme Court on the legal profession can be classified in several different ways. The most obvious is chronological. The year 1957 marked the turning point in the Supreme Court's relationship with regulation of the bar. Prior to that time, the Court had consistently refused to find any federal ques-

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tion or constitutional violations in the activities of state courts, legislatures or bar groups in regulating the bar. In 1957, however, the Court began to scrutinize very critically these types of activities, finding violations of equal protection, procedural due process, First Amendment and other fundamental rights, as well as federal statutes.

Another method of classification is by subject matter. A review of the cases shows that they deal with three main areas—admission, discipline and practice. These classifications are not mutually exclusive and thus there is some overlap. Nonetheless, these groupings serve as a basis for analyzing the decisions and will be used in this article.

I. The Historical Perspective

Any review of the Supreme Court's relationship with the legal profession must begin with the development of the regulation of the bar both in England and the United States. The English system is to some degree distinctive because of the division of its legal profession into barristers and solicitors. There were differences as to education, admission and discipline. Regulations as to each were made by the judges, the Inns of Court and Parliament.[1]

1. Roscoe Pound describes the difference in the seventeenth century in the following terms: "The judges, the Inns of Court, and Parliament began to make distinct regulations for attorneys and for barristers.

"As to barristers, the judges had long before delegated to or perhaps more truly acquiesced in leaving to the Inns of Court their power of admitting to practice in the courts. Those whom the Benchers had called to the bar of the Inn were received by the courts as qualified practitioners. On the other hand, attorneys were admitted directly by the court in which they sought to practice. With respect to discipline, the barrister was directly under the control of the Inn which had called him to the bar. He could be disbarred either by the Benchers of his Inn or by the judges. But the judges seldom acted and Parliament made no attempt to supersede or supplement the control by the Inns of Court.

"In contrast, the attorneys were strictly regulated both by Parliament and by the judges. Medieval statutes gave the courts power both to control and to admit them. All through the sixteenth and seventeenth centuries this control became increasingly strict. Orders of court were made as to admission of attorneys, requiring examination, and as to conduct and discipline. The courts were very severe in enforcing these orders. In 1605 a statute regulated the rendering of accounts to clients, provided penalties for fraud and negligence, and sought to eliminate unqualified practitioners.

"As to personnel, the expense of education at the Inns of Court led to a marked difference. The barristers were younger sons of the nobility or gentry, or were men of independent means. The attorneys were recruited from clerks. Indeed, the nature of their work was largely clerical and in their mode of appointment as well as the requirements of their calling, their contacts were with the clerical staff of the courts, as the contacts of the barristers

In the American colonies regulation of the bar paralleled the establishment of organized judicial systems. After efforts to get along without attorneys failed, three different systems of regulation had developed by the time of the Revolution. Four colonies followed the English system, with each court admitting attorneys to practice before it. Four other colonies adhered to a rule of comity where an attorney admitted in one court was authorized to practice before any other court. Five colonies had a centralized admission system, with control exercised by the colony's highest court or the royal governor.[2] A detailed examination of the situation in each of the colonies shows that each system had its origin in or was recognized by legislative acts.[3] The organized bar originated during this era also, particularly in New England.[4]

After the Revolution, there was a gradual elimination, by legislative act, of formal requirements for admission to the bar. By 1860, only nine of thirty-nine states or territories had such requirements.[5] A revival occurred after 1870, with bar associations leading the way in seeking to impose educational and other requirements on admission to the bar.[6] To some degree this effort brought about a contest between the courts and the legislatures for control over the bar. The courts gained ultimate authority, yet recognized a le-

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were with the judges.

"At first the King's Bench and the Common Pleas had each its own roll of attorneys. The Exchequer had a staff of clerks who acted as attorneys. But more and more the same person came to act as attorney in all the common-law courts. An order of 1564 sought to prevent this. It was not effective, however, and the attorneys came to be competent to practice in each common-law court. Also, because of their being regarded more or less as part of the clerical staff of the court, they were required to be in constant attendance and were exempt from suit except in their own court on the roll of which they were carried. The orders of court at the time required that one who sought admission as an attorney must have served five years as a 'common solicitor,' i.e., an agent not admitted as an attorney, or a clerk to a judge, serjeant, barrister or attorney. The practice came to be to prepare by serving as an attorney's clerk.

"In the seventeenth century the term 'barrister' came into general use in place of the older 'apprentice at law.' It is first found in connection with utter (i.e., outer) barristers. Plowden insisted on being called a 'learned apprentice of the law' even after he became a serjeant in 1558." R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 99-101 (1953)(footnotes omitted). *See also* C. WARREN, A HISTORY OF THE AMERICAN BAR 146-56 (1966).

2. R. POUND, *supra* note 1, at 145-46.
3. *Id.* at 147-56.
4. *Id.* at 163-73.
5. *Id.* at 227-28.
6. *Id.* at 273-78.

gitimate role for the legislatures. In each state it is the supreme court, with or without the legislative approval, that dictates the standards for education, admission and discipline of attorneys.[7]

The federal courts require a separate admission to practice in addition to that imposed by the states, though admission in the federal courts has always been based upon admission in a state court.[8] The federal courts do not have their own bar examinations, boards of law examiners, disciplinary agencies, or standards of legal ethics. However, the federal courts do not automatically disbar an attorney who has been disbarred by a state court. Instead, they decide for themselves if the conduct merits this extreme penalty.[9]

II. The Cases

A. Admission

While the states have always controlled admission to their own bars, the formal requirements which now exist have not always been prevalent. As previously noted, in 1860 only nine of thirty-nine states or territories had formal requirements for admission to the bar. Some states had constitutional provisions or statutes permitting virtually any person to practice law.[10] This situation changed dramatically after 1870, and now every state has substantial requirements for admission to its bar. Almost all states require graduation from an American Bar Association accredited law school, passage of a bar examination, and good moral character.[11] Many states also have a residency requirement.[12]

Because of the lack of state-imposed requirements, it is not surprising that the first case challenging a denial of admission by a state was not decided by the Supreme Court until 1872. In

7. L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 281, 286-89 (1971).

8. *Id.* at 300-04; C. WARREN, *supra* note 1, at 242-43; Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1724 (1967). Federal courts may be in the process of imposing additional qualifications. Spears, *Federal Court Admission Standards—A 45 Year Success Story*, 83 F.R.D. 235 (1979).

9. Theard v. United States, 354 U.S. 278 (1957).

10. R. POUND, *supra* note 1, at 225-26.

11. RULES FOR ADMISSION TO THE BAR (West 1979).

12. *Id. See also* Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979)(residency requirement held to violate the privileges and immunities clause of the Federal Constitution).

Bradwell v. Illinois,[13] the question before the Court was whether the Illinois Supreme Court could, consistent with the Fourteenth Amendment, refuse to admit a woman to practice solely because of her sex. Under an Illinois statute, a person could practice law in that state only by obtaining a license issued by two justices of the Illinois Supreme Court. The only eligibility requirement was that the applicant obtain a certificate of good moral character from a county court. The Illinois Supreme Court, even though it agreed that she possessed all the necessary qualifications, refused to issue a license to Mrs. Myra Bradwell.[14]

The United States Supreme Court considered the case, although the Illinois Supreme Court did not reach the federal constitutional issues raised by Mrs. Bradwell.[15] In an opinion by Justice Miller, the Court held that Mrs. Bradwell was a citizen of Illinois and that the privileges and immunities clause of the United States Constitution did not protect a citizen against the actions of the state of which the citizen is a resident. The Court also stated that although the Fourteenth Amendment does protect a person from the deprivation by a state of the privileges and immunities flowing from United States citizenship,

> the right to admission to practice in the courts of a State is not one of them. . . . [T]he right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking

13. 83 U.S. (16 Wall.) 130 (1872).

14. *In re* Bradwell, 55 Ill. 535 (1869). The court stated that although the statute governing admission to the bar did not expressly restrict it in determining who could be admitted, the court felt it was bound by two limitations: (1) terms of admission should promote the administration of justice, and (2) no persons or class of persons should be admitted who were not intended by the legislature to be admitted even though their exclusion was not expressly prohibited by statute. Relying on the historical fact that women attorneys were both unknown in England at the time Illinois became a state and unknown in Illinois at the time the legislature authorized the supreme court to admit attorneys, the court said that it was not a judicial function, but a legislative one, to change the law in this regard. The court concluded by stating: "If the legislature shall choose to remove the existing barriers, and authorize us to issue licenses equally to men and women, we shall cheerfully obey, trusting to the good sense and sound judgment of women themselves, to seek those departments of the practice in which they can labor without reasonable objection." *Id.* at 542. The Illinois Supreme Court later changed its view by claiming for itself the power to control admission to practice. *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899). Women were admitted to practice in Illinois in 1872 by virtue of a legislative act. Schuchardt v. People, 99 Ill. 501 (1881).

15. *In re* Bradwell, 55 Ill. 535, 541 (1869).

such license.[16]

A concurring opinion pointed to the differences between the male and female which proved conclusively that the right to practice law could not be claimed as a fundamental privilege or immunity.[17] The concurring Justices concluded that it was the duty of the legislature to determine who should practice law.

The next case to come before the Court, *In re Lockwood*,[18] also involved a woman seeking admission to practice. Belva Lockwood, an experienced attorney, was denied admission to practice in Virginia despite a statute which authorized admission to the bar of any person who had been admitted to the bar of another state.[19] Following *Bradwell*, the Court held that admission to practice law was not a privilege or immunity of a citizen of the United States.

Fifty-one years elapsed before the Supreme Court again had to face a bar admission problem. *In re Summers*[20] resulted from a denial by the Illinois Supreme Court of the admission of an applicant because he was a conscientious objector to the use of force for any purpose. Resolving a threshold jurisdictional issue, the Court concluded that

> a claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court.[21]

As to the merits, the majority viewed Summers' pacifist belief

16. 83 U.S. at 139.

17. "[T]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." *Id.* at 141-42 (Bradley, J., joined by Field & Swayne, JJ., concurring). Justice Marshall quoted these remarks in a footnote in a concurring opinion in Dothard v. Rawlinson, 433 U.S. 321, 344 (1977), commenting that the *Bradwell* case has been "long since discredited." Chase, C.J., dissented without opinion.

18. 154 U.S. 116 (1894).

19. The Court noted that Ms. Lockwood was a member of the bar of the United States Supreme Court, the Supreme Court of the District of Columbia and of several other states, but commented that there was nothing in the record to indicate of what state she was a citizen. *Id.* at 116-17.

20. 325 U.S. 561 (1945).

21. *Id.* at 568-69. Illinois had taken the position that its supreme court, in acting on bar applications, was performing a ministerial rather than a judicial act. *Id.* at 565-66.

as precluding him from serving in the Illinois militia even though such service was required by the Illinois Constitution. The Court, for the first time and without discussion, acknowledged that the Fourteenth Amendment did apply to bar admission questions. The Court examined the cases which upheld the power of the federal government to deny citizenship to persons who would not agree to pledge military service and which did not recognize a constitutionally mandated religious exception to that power,[22] and decided that Illinois had equal power to deny admission to practice.[23]

The first case in which the Supreme Court reversed a denial of admission occurred in 1957. In *Schware v. Board of Bar Examiners*,[24] the Court found that New Mexico had denied Schware due process by refusing him permission to take the bar examination. It held that his membership in the Communist Party, his use of aliases and his arrest (but no conviction) record, all of which occurred over twenty years prior to the Court's decision, did not rationally justify a finding of lack of good moral character upon which the denial was based. Justice Black, writing for the majority, further held that a state cannot exclude a person from the practice of law in a manner or for reasons that violate the Fourteenth Amendment; that a state can require qualifications of good moral character or proficiency in the law, but any qualification must bear a rational relationship to the applicant's fitness or capacity to practice law; and that a state cannot, in applying permissible standards, exclude applicants when there is no basis for finding that a standard is not met or when the action is invidiously discriminatory.[25]

The Court found the latter principle to have been violated by

22. *See, e.g.*, United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).

23. 325 U.S. at 573. The Court held that "[i]t is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship." *Id.* Justice Black wrote a dissenting opinion in which Justices Douglas, Murphy and Rutledge concurred. He argued that Illinois was using a test oath to bar a person from a profession and this was unconstitutional, citing the dissents in the denial of citizenship cases. *Id.* at 576-78.

24. 353 U.S. 232 (1957). Black, J., delivered the opinion of the Court. Frankfurter, J., and Harlan, J., joined by Clark, J., dissented.

25. *Id.* at 238-39.

New Mexico, and on that basis reversed.[26] It found that New Mexico was unjustified in taking Communist Party membership in the 1930's as conclusive evidence of lack of good character.

On the same day the Court handed down the *Schware* decision, it also decided the first of a series of cases involving applicants' refusal to answer questions about membership in various types of organizations, usually those identified as Communist. In *Konigsberg v. State Bar of California*[27] (*Konigsberg I*), the applicant was denied admission to the bar because he refused, in hearings before the State Committee of Bar Examiners, to answer questions concerning possible Communist Party membership. The formal reasons for the denial were that he failed to show good moral character and failed to show that he did not advocate the overthrow of the federal or state governments by force or other unconstitutional means. The Supreme Court, in another opinion by Justice Black, first stated that the issue was not whether California could constitutionally deny admission solely on an applicant's refusal to answer questions concerning political associations; rather, the question was whether the evidence in the record supported any reasonable doubts as to Konigsberg's good character or loyalty. The Court concluded that it did not, finding that Communist Party membership in 1941 was not sufficient evidence of lack of good moral character, nor was it evidence of advocacy of the violent overthrow of the federal or state government. Konigsberg had, in fact, expressly stated to the Committee his opposition to violent overthrow of government. The Court reaffirmed "the importance of leaving States free to select their own bars," but stated that "it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."[28] It also restated its central position that "past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that [an applicant] is disloyal or a person of bad character."[29]

26. The only disagreement between the majority and dissenting opinions was that, while the majority was of the view that New Mexico had based its action on the three factors noted above, the dissenting justices read the record to indicate that the controlling element for the New Mexico decision was the prior communist activity.

27. 353 U.S. 252 (1957).

28. *Id.* at 273.

29. *Id.* Three justices dissented on jurisdictional grounds. Justices Harlan and Clark

The decision did not, however, resolve the matter. On remand, Konigsberg was again refused admission, thus requiring the Court to consider the matter a second time in *Konigsberg v. State Bar of California*[30] *(Konigsberg II)*. This time, California expressly asserted that a ground for denial of admission was the refusal to answer questions concerning Communist affiliation. Justice Harlan, who had dissented in *Konigsberg I*, wrote the majority opinion, deciding against Konigsberg. With four justices dissenting, the Court held that "the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications."[31] The Court noted that the applicant would have to be given due warning of the consequences of his refusal to answer relevant questions,[32] but found that he had been given the necessary warning in this case.[33] The Court also concluded that the applicant did not have a privilege under the Fourteenth Amendment to refuse to answer questions concerning Communist Party membership.

On the same day as the *Konigsberg II* decision, the Court, in another opinion by Justice Harlan, also decided *In re Anastaplo*.[34] Anastaplo had been denied admission to the Illinois bar also because of a refusal to answer questions concerning Communist Party membership. On the basis of *Konigsberg II*, the Court affirmed, again with four justices dissenting. Justice Harlan stated that *Konigsberg II* settled two basic issues: first, that it is

> not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in *Konigsberg*, to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications; [and secondly that] the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the

contended that the issue was whether a state could deny bar admission to those who refuse to answer questions about fitness for the bar.

30. 366 U.S. 36 (1961).
31. *Id.* at 44.
32. *Id.* at 46.
33. *Id.* at 49.
34. 366 U.S. 82 (1961).

> Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment.[35]

The Court noted that here there was no independent evidence that Anastaplo, unlike Konigsberg, may have been a member of the Communist Party. Justice Harlan concluded that "it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications [for the bar] is prompted by information which it already has about him from other sources, or arises merely from a good faith belief in the need for exploratory or testing questioning of the applicant."[36] The Court did find two issues here that were not in *Konigsberg:* it questioned whether adequate warning was given as to the consequences of refusing to answer relevant questions, and it also questioned whether the exclusion in this case was arbitrary and discriminatory. The majority answered the first question in the affirmative, citing *Konigsberg I* for the proposition that there was a constitutional right to such a warning.[37] On the second issue, the Court made it clear that Illinois was permitted to deny admission only as long as Anastaplo refused to answer relevant questions. Thus, in the words of the Court, Anastaplo held "the key to admission in his own hands."[38]

Ten years later the Court decided the last three cases dealing with questions to bar applicants. The Court was more evenly split than in the past, with Justice Stewart providing the swing vote. In two cases, *Baird v. Arizona*[39] and *In re Stolar*,[40] the Court reversed the denial of admission to the bar of two applicants who had refused to answer questions on the state's applications. There was no majority opinion in either case.[41] The opinion in *Baird* by Justice Black began with a confession that "[s]harp conflicts and close di-

35. *Id.* at 88-89.

36. *Id.* at 90.

37. *Id.* at 90-91. There was no express holding on point in *Konigsberg I*, though the statement appears in dicta. 353 U.S. at 261.

38. 366 U.S. at 97. Justice Black's dissenting opinion was based on his objection to the majority's unwillingness to accept his absolute approach to the Fourteenth Amendment. *Id.* at 279-81.

39. 401 U.S. 1 (1971).

40. 401 U.S. 23 (1971).

41. Black, J., was joined by Douglas, Brennan and Marshall, JJ., Stewart, J., concurred; Blackmun, J., joined by Burger, C.J., Harlan and White, JJ., dissented; White, J., wrote a separate opinion.

visions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution."[42]

In *Baird*, the applicant refused to answer a question as to membership in the Communist Party or organizations advocating overthrow of the federal government by force or violence, although she had listed on the application all of the organizations of which she had been a member since age sixteen. Justice Black stated that

> the First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. . . . When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. Of course Arizona has a legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law.[43]

After noting the information about her qualifications, Justice Black stated that

> whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes. . . . [W]e hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law.[44]

Justice Black concluded that there was nothing in the record to show that Baird was not morally or professionally fit to serve honorably and well as a member of the legal profession.

Justice Stewart viewed the matter somewhat differently. He cited *Konigsberg II* and *Anastaplo* in support of the statement that "under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission

42. 401 U.S. at 2-3.
43. *Id.* at 6-7 (citations omitted).
44. *Id.* at 7-8.

to the Bar is not as such unconstitutional."[45] However, in this case, he felt Arizona had gone further in asking Baird about membership in any organization that advocated violent overthrow of the government. The defect in this question was that it was not limited to "knowing membership."[46] In addition, Justice Stewart believed that Arizona's reasons for asking the question made it clear that it was an inquiry into political beliefs, because the questioning committee "would recommend denial of admission solely because of an applicant's beliefs that the respondent found objectionable."[47]

The dissenters, based on different factual conclusions, believed that an affirmative answer to the disputed question would not have resulted in automatic disqualification, but would only cause further investigation.[48] For the dissent, the membership inquiry was relevant because Arizona had a legitimate interest in ensuring that attorneys practicing in its courts refrained from forceful and violent overthrow of the government.

The disputed questions in *In re Stolar*[49] were somewhat different from those in *Baird*. Stolar answered in the negative a question concerning membership in the Communist Party, but refused to answer a question concerning membership in any organization which advocated overthrow of the government by force, and refused to list organizations in which he was or had been a member. Thus Baird answered a question that Stolar refused to answer, and vice versa. Justice Black again took the position that asking for the list of organizations to which a person belonged was a violation of the Fourteenth Amendment because a person might refuse to join an organization, fearing that it may hinder his admission to the

45. *Id.* at 9 (Stewart, J., concurring).

46. Citing Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971), and United States v. Robel, 389 U.S. 258 (1967), Justice Stewart stated the rule that "mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals." 401 U.S. at 9 (Stewart, J., concurring).

47. 401 U.S. at 9 (Stewart, J., concurring). The Bar Committee, in a memorandum filed in the Supreme Court, stated that the purpose of its question was to investigate whether or not the applicant presently believed in the violent overthrow of the government. The Committee stated it would oppose admission of a person who had such a belief. *Id.* at 8 n.8.

48. They based their conclusion on the same material relied on by the majority. *See* note 47 *supra*.

49. 401 U.S. 23 (1971).

bar. Bar admission could not be denied on the basis of beliefs, including beliefs on the subject of violent overthrow of the government. Therefore, a state could not question an applicant on membership in organizations if the only relevance of such questioning was to discover the beliefs of the applicant. Justice Stewart concurred in the judgment on the basis that under *Baird* the question as to membership in an organization advocating violent overthrow was prohibited, and under *Shelton v. Tucker*[50] a person could not be compelled to list the organizations to which he belongs.[51] Justice Harlan's opinion (also applicable to *Baird*) emphasized the fact that the bar admission authorities were not interested in purely philosophical beliefs; rather, the applicants, in refusing to answer the questions, were obstructing the bar authorities' legitimate inquiry into an applicant's likelihood of engaging in or inciting violent opposition to the government.[52] This was consistent with his opinions in *Konigsberg II* and *Anastaplo*.[53]

The third case decided in 1971 was *Law Students Civil Rights Research Council v. Wadmond*.[54] Unlike the *Baird* and *Stolar* decisions, all nine Justices agreed on the result in two of the five issues, with four Justices dissenting on three issues. The two issues upon which there was unanimity were that a state could establish character and general fitness standards and that it could require the applicant to take an oath to support the federal and state constitutions.

The first issue on which there was disagreement was whether it was a violation of the applicant's right to privacy to require that his character references submit affidavits which would state how often the reference had visited the applicant in his home. The majority found that the privacy claim "border[ed] on the frivolous."[55] More difficult was the requirement that the applicant furnish proof

50. 364 U.S. 479 (1960).

51. 401 U.S. at 34.

52. *Id.* at 34-36.

53. In his dissent Justice Blackmun, speaking for himself, the Chief Justice and Justices Harlan and White, conceded the questions about organization memberships were invalid under Shelton v. Tucker, 364 U.S. 479 (1960). He did not agree, however, that a state could not ask about knowing membership in an organization that advocated violent overthrow of the government and willingness to participate in that activity. 401 U.S. at 33-34.

54. 401 U.S. 154 (1971). Stewart, J., delivered the opinion of the Court; Harlan, J., concurred; Black, J., joined by Douglas, J., and Marshall, J., joined by Brennan, J., dissented.

55. *Id.* at 160.

that he "believes in the form of government of the United States and is loyal to such government."[56] Justice Stewart stated that this language, standing alone, created "substantial constitutional questions, both as to the burden of proof permissible in such a context under the due process clause of the Fourteenth Amendment . . . and as to the permissible scope of inquiring into an applicant's political beliefs under the First and Fourteenth Amendments."[57] The Court accepted, however, the representations from New York that its rule did not place the burden of proof on an applicant; the "form of government" referred only to the Constitution, and the "belief" and "loyalty" in the oath meant no more than the willingness and ability to take an oath to support the Constitution. On the basis of those assurances, the Court found no constitutional defect. There was no showing of an intent to penalize political beliefs. At most, the object of the rule was to insure that the taker of the oath did not do so on a *pro forma* basis while in fact disagreeing with it.

The New York application had two questions, each divided into two parts, to which the appellants objected. Question 26(a) asked about knowing membership in any organization advocating or teaching violent overthrow of the government, while 26(b) asked whether, during the period of membership, the applicant had a specific intent to further the organizational aim of overthrowing the government by violent means. Question 27 inquired as to whether the applicant was able to take the required oath in good faith without reservation.

The Court had no difficulty in upholding the constitutional validity of both questions. As to Question 26, the opinion noted that

> [w]e have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable. . . . It is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer.[58]

56. *Id.* at 161.
57. *Id.* at 162 (citation omitted).
58. *Id.* at 165-66.

The portion of Question 27 relating to the oath was also upheld, for the same reasons that the oath requirement of the rule had been upheld.

The appellants also mounted a fundamental challenge to the entire screening process. They argued that despite the validity of individual questions or requirements, the screening system itself represented "so constant a threat to applicants that constitutional deprivations will be inevitable."[59] The Court rejected this argument, noting that accepting it would allow only the most minimal screening of character for serious deficiencies, with the deterrent and punitive effects of post-admission discipline remaining the principal means of policing the bar. The Court held that the choice between the two approaches was one of policy, to be made by the state and not by the Court.[60]

The dissenters objected on the grounds that New York improperly placed the burden of proof on the applicant, inquired into political beliefs, denied a benefit on the basis of beliefs only, attempted to test the sincerity of an oath and, contrary to *Baird* and *Stolar*, asked questions about membership in certain organizations. Justice Black also raised a new objection—the fact that lawyers constituted the examining committee. He stated that

> [d]iscipline or denial of admission should only take place after notice and hearing before an unquestionably impartial tribunal. I must repeat once again that consistently with due process of law, applicants for a profession cannot be turned over to the whim of their prospective competitors to determine their right to practice.[61]

Willner v. Committee on Character and Fitness[62] presented a question of procedural due process. In that case an applicant for the New York Bar was denied admission on several occasions over a twenty-five year period based on an unfavorable report from the character committee. He was never advised of the reasons for the refusal, nor was he given the opportunity to refute those reasons, or to confront any persons who may have provided information against him. As is typical in bar admission cases, the procedure utilized in the state court did not develop an adequate record nor

59. *Id.* at 167.
60. *Id.*
61. *Id.* at 185 (Black, J., joined by Douglas, J., dissenting).
62. 373 U.S. 96 (1963).

definition of issues, but the Supreme Court nonetheless decided the principal issue in the case. Speaking for a majority of seven, Justice Douglas stated that Willner "was clearly entitled to notice of and a hearing on the ground for his rejection either before the Committee or before the Appellate Division."[63] Because he was not afforded such a hearing, he had been denied his procedural due process rights.[64]

The last case dealing with an initial admission, *In re Griffiths*,[65] involved the requirement of the State of Connecticut that a person must be a citizen of the United States to be admitted to practice in that state. The applicant was a resident alien married to a United States citizen, and a graduate of an American law school. The Court decided seven to two, in an opinion by Justice Powell, that Connecticut had not carried the "heavy burden of justification" required of a state attempting to impose a classification based on alienage. To avoid violating the equal protection clause of the Fourteenth Amendment, the state "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."[66] Connecticut first argued that an attorney is an officer of the court with certain statutory powers, and that an alien has divided loyalties which may interfere with his ability to serve the court system or his clients. Rejecting this argument, the Court said that the state could make a judgment on a case-by-case basis as to an individual applicant's fitness to practice law, but had no basis to ex-

63. *Id.* at 105.

64. *Id.* at 106. Although the opinion discussed confrontation and cross-examination, it was unclear whether the Court was asserting the applicant's right only to a hearing or also to confrontation and cross-examination. Justice Goldberg, in a concurring opinion, stated that "in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence . . . against him and be accorded an adequate opportunity to rebut this evidence. . . . [T]his does not mean that in every case confrontation and cross-examination are automatically required." *Id.* at 107. Whether or not they are required will depend upon the source of the derogatory information, with confrontation and cross-examination required when the applicant questions a source's reliability or veracity. For Justice Goldberg, reversal was necessary because the applicant had no right of confrontation and because the record suggested that the admission denial may have been based on "contradicted information supplied by informers whose credibility was challenged by the applicant." *Id.* at 109.

65. 413 U.S. 717 (1973).

66. *Id.* at 721-22.

clude all aliens.[67] The Court also dismissed Connecticut's argument that an attorney, as an officer of the court, was also an officer of the government and that the federal and state constitutions imposed many disqualifications upon aliens in the governmental process.[68] The Court noted that an attorney, while an officer of the court, is not an officer of the government or a formulator of governmental policy.

The Court has decided two cases involving the right of attorneys admitted in one state to practice in another. In *Martin v. Walton*,[69] an attorney who was admitted in both Missouri and Kansas was prohibited from appearing in Kansas without a Kansas attorney as co-counsel.[70] The Supreme Court, in a *per curiam* opinion, dismissed the appeal for want of a substantial federal question, stating that the rules on their face and as applied in the instant case did not contravene the Fourteenth Amendment. Justices Douglas and Black dissented, finding that the reasons given by the Kansas Supreme Court for the rules, which involved the ability to serve process upon attorneys practicing in Kansas courts and familiarity with Kansas law and procedures, did not apply to the appellant because he lived in Kansas and half his practice was in that state. Justice Douglas felt that the law as applied bore no relation to the targeted evil and thus it was unconstitutional to bar the appellant from practicing in Kansas.[71]

In *Leis v. Flynt*[72] an attorney, admitted in one state, sought admission in another state for the purpose of handling a specific case.[73] The issue was whether Ohio was obligated to hold a hearing, apply reasonably clear legal standards, and give a rational basis for its decision, before it could prevent an out-of-state attorney from

67. *Id.* at 722-23.

68. *Id.* at 723. Chief Justice Burger and Justice Rehnquist dissented, the latter's opinion also applying to another case decided the same day which held that a state could not automatically bar aliens from the state's civil service. *See* Sugarman v. Dougall, 413 U.S. 634 (1973).

69. 368 U.S. 25 (1961).

70. Two Kansas rules had the effect of preventing an attorney who was admitted in Kansas and in another state and who regularly practiced in the other state from practicing in Kansas courts without a Kansas co-counsel.

71. 368 U.S. at 28. Justice Douglas conceded, however, that the rules would be constitutional if applied to an attorney who, although admitted in Kansas, practiced only in Missouri.

72. 439 U.S. 438 (1979).

73. This process is usually referred to as admission *pro hac vice*.

appearing in a specific case. In a *per curiam* opinion supported by five Justices, the Court summarily reversed a decision by the Sixth Circuit and held that there was neither a state nor a federal right to appear *pro hac vice*. The majority noted that *pro hac vice* appearances were customary in the states and were to be encouraged in view of the high mobility of the bar and the trend toward specialization; but they were not supported by a right granted by statute or the Constitution. The Court emphasized the fact that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."[74]

The major thrust of Justice Stevens' dissent was that either the nature of the interest in *pro hac vice* admissions or the implicit promise of Ohio to permit such admissions was sufficient to create an interest protected by the due process clause of the Fourteenth Amendment. Consequently the minority would require a hearing, standards and a statement of reasons for denial.[75]

The majority opinion referred to three prior cases[76] that sustained state rules excluding out-of-state attorneys from practice absolutely or on a case-by-case basis. The minority distinguished these cases, however, stating that two of them related only to the establishment of permanent practices in states in which an attorney was not licensed, while the third involved a substantive due process claim rather than a claim that the rule was being applied discriminatorily. Two of the cases were summarily affirmed without opinion and the third was dismissed for want of a substantial federal question.

B. Discipline

The role of state courts in discipline of attorneys has always been clearer than their role in admission because a judicial order has always been required to impose discipline upon attorneys. Notwithstanding this, only three cases involving discipline of attorneys by state courts have been decided by the Supreme Court, all on

74. 439 U.S. at 442.

75. *Id.* at 456. Justices Brennan and Marshall joined the minority opinion. Justice White did not join in either opinion, but wanted certiorari granted and the matter set for oral argument.

76. *Id.* at 443 (citing Norfolk & Western R.R. v. Beatty, 423 U.S. 1009 (1975); Brown v. Supreme Court of Virginia, 414 U.S. 1034 (1973); Kovrak v. Ginsburg, 358 U.S. 52 (1958)).

procedural due process grounds.[77]

In 1961 the Supreme Court decided the merits of the first involving lawyer discipline. The Court, in *Cohen v. Hurley*,[78] decided that a state could disbar a lawyer for refusal to answer questions in a judicial inquiry into "ambulance chasing," even though the refusal was based upon a state privilege against self-incrimination. Two issues were presented: first, did the Fourteenth Amendment prevent making refusal to answer a question a *per se* ground for disbarment, and second, is disbarment prohibited when the refusal is based on the privilege against self-incrimination? The Court held that the first issue was resolved by *Konigsberg II* and *Anastaplo*.[79] After reciting the traditional power of English and American courts to discipline attorneys, the Court defined the second issue before it as "whether arbitrary or discriminatory state action can be found"[80] in the effect of New York's exercise of the state

77. Two earlier cases raised similar issues but were not decided on the merits. The first case came from the Supreme Court of the Territory of Minnesota. The territorial status of the court limits the opinion's usefulness as a gloss on states' power, but some of the comments made by Chief Justice Taney in *Ex parte* Secombe, 60 U.S. 9 (1856), aid in understanding the Court's views on attorney discipline in the middle of the nineteenth century. Secombe had been disbarred by the Minnesota Supreme Court because he did not maintain the respect due the courts and judicial officers of Minnesota. He sought a writ of mandamus in the Supreme Court to compel the Minnesota court to set aside an order disbarring him. The Court held that because the disbarment was a judicial act within the scope of the court's jurisdiction and discretion, mandamus was not available to review the decision. Chief Justice Taney went beyond the jurisdictional issue, discussing both general principles relating to the authority of a court to disbar, and the specifics of the Minnesota situation. He stated that "it has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." *Id.* at 13. The Court noted also that the power must be exercised by a sound and just discretion, protecting the rights and independence of the bar and the court. *Id.*

The next case, Manning v. Freuch, 133 U.S. 186 (1890), involved an action for damages by an attorney against three persons who had acted as judges of a special federal court (the Court of Commissioners of Alabama Claims of the United States, initially created by an Act of Congress, approved June 23, 1874, Chapter 459) and who had prohibited the attorney from practicing in that court. The state court had held that the defendants were protected by the doctrine of judicial immunity. The Supreme Court held that there was no federal question involved (even though the legal existence of the federal court was challenged) and dismissed the writ. Thus, the Court did not reach the issue of the power of courts generally to discipline attorneys.

78. 366 U.S. 117 (1961). The *Cohen* opinion was handed down on the same day as those in *Konigsberg II* and *Anastaplo*. All three opinions were written by Justice Harlan. *See* notes 30-40 and accompanying text *supra*.

79. 366 U.S. at 123-25.

80. *Id.* at 125.

privilege against self-incrimination. The majority answered in the negative, viewing the problem as one of professional discipline rather than as imposition of a penalty for invoking a constitutional privilege.[81]

The Court also dealt with two other arguments: that the Fourteenth Amendment provides a federal constitutional right against self-incrimination and that lawyers were being put in a special class suffering disabilities not imposed upon others. The Court cited several cases which had rejected the former proposition.[82] Regarding the second, the Court stated that

> [w]e do not hold that lawyers, because of their special status in society, can *therefore* be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these injuries.[83]

Six years later in *Spevack v. Klein*,[84] however, *Cohen v. Hurley* was expressly overruled. *Spevack* involved a disbarment of a New York lawyer for refusal to produce records or to testify at a judicial inquiry. Justice Douglas wrote the plurality opinion overruling *Cohen* on the ground that *Malloy v. Hogan*[85] held that the Fourteenth Amendment included the Fifth Amendment's privilege against self-incrimination. The plurality further held that this privilege extended to lawyers in disbarment proceedings.[86] Justice Douglas expressly adopted the dissent's view in *Cohen* that any penalty for invoking the Fifth Amendment, including disbarment, was prohibited. The opinion did not reach the question of whether the protection extended to the production of records because, at all levels of the disbarment proceeding other than in the New York Court of Appeals, it was assumed that the privilege did apply. Jus-

81. *Id.* at 125-26.

82. *Id.* at 128-29.

83. *Id.* at 129-30 (emphasis in original). Chief Justice Warren and Justices Black, Douglas and Brennan dissented.

84. 385 U.S. 511 (1967). Douglas, J., joined by Warren, C.J., and Black and Brennan, JJ., wrote the plurality opinion; Fortas, J., concurred separately; Harlan, J., joined by Clark, Stewart and White, JJ., dissented.

85. 378 U.S. 1 (1964).

86. 385 U.S. at 514-16. Justice Fortas' concurrence was based upon his view that government employees, unlike lawyers, were not entitled to claim the protection of the self-incrimination clause.

tice Harlan, in his dissent, argued that *Malloy v. Hogan* did not require the overruling of *Cohen v. Hurley*. For him, the issue was whether the disbarment of an attorney for failure to provide information concerning charges of professional misconduct impermissibly violated the constitutional protection. He advocated the use of the balancing test between the interests of the individual in the constitutional privilege and those of society in seeking the information. Justice Harlan did not believe the result in *Spevack* to be justified by prior decisions on the protection afforded by the privilege, and ignored the justification of the state's need to protect its judicial system.

In re Ruffalo[87] was a case involving disbarment by a federal court, but it turned on the constitutionality of a state disbarment proceeding. Ruffalo had been disbarred by a federal district court and by the United States Court of Appeals for the Sixth Circuit based upon his disbarment by the Ohio Supreme Court. The Court, in an opinion by Justice Douglas, held that the Ohio procedure violated due process, and that as a result the federal disbarment also violated due process.

The defect in the Ohio proceedings was determined to be that the charge upon which the disbarment was based was not included in the original charges but was added to them only after the attorney and others had testified in the disbarment proceeding itself. The additional charge was based on that testimony. The attorney's motion to strike the additional charge was denied but he had been granted a continuance to respond to it. In viewing the Ohio procedure, the Court noted that cases involving disbarment in the federal courts had established that an attorney is entitled to fair notice of the charges against him and an opportunity for explanation and defense, and that because the proceeding is adversary and quasi-criminal in nature,[88] the charge must be known before the proceedings begin. Applying these principles to the facts before it, the Court concluded that the procedure becomes "a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."[89] The Court then concluded that because of the absence of fair notice as to the ex-

87. 390 U.S. 544 (1968).
88. *Id. See In re* Gault, 387 U.S. 1 (1967).
89. 390 U.S. at 551.

tent of the grievance procedure and the precise nature of the charges, Ruffalo had been denied due process of law in the Ohio proceeding and that federal disbarment could therefore not be based upon it.[90]

C. Practice

Several cases involving issues of how an attorney practices law or what he must do (or not do) to remain qualified to practice law have reached the Supreme Court. In *Lathrop v. Donohue*[91] a challenge was made to compulsory membership in the Wisconsin State Bar by a Wisconsin attorney who objected to paying the annual $15 membership fee. He argued that it was unconstitutional for him to be compelled by that state's supreme court[92] "to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation."[93]

The Court found that mandatory bar membership[94] was not unconstitutional. Justice Brennan wrote the plurality opinion.[95] The heart of the issue, as viewed by the Wisconsin Supreme Court and accepted in Justice Brennan's opinion, was the requirement that a Wisconsin attorney pay $15 each year to support some political activities with which the attorney may disagree. The opinion

90. *Id.* at 552. Harlan, J. and White, J., joined by Marshall, J., filed concurring opinions.

91. 367 U.S. 820 (1961).

92. Membership in the state bar was made compulsory by the Wisconsin Supreme Court, which also imposed a membership fee. Before dealing with the substantive issues, the Court first resolved the procedural question of whether the supreme court order making state bar membership mandatory was a "statute" within the meaning of 28 U.S.C. § 1257(c), thus making appeal an appropriate remedy. The Court unanimously concluded that it was, finding that the challenged order of the Wisconsin Supreme Court did not result from litigation but "[r]ather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. . . . As such, the action had the characteristics of legislation." 367 U.S. at 827 (citation omitted).

93. *Id.*

94. A bar association to which a person must belong as a condition of a license to practice law was originally called an "integrated" bar. When the term "integrated" took on an almost exclusively racial connotation, the designation of "unified" bar was used. The author believes the more accurate terminology to be "mandatory" bar membership.

95. 367 U.S. 820 (1961). Brennan, J., was joined by Warren, C.J., and Clark and Stewart, JJ.; Harlan J., joined by Frankfurter, J., & Whittaker, J., concurred separately; Black, J., & Douglas, J., each dissented separately.

reviewed the legislative activities of the state bar and concluded that they did not constitute a major part of the total activities of the organization. On that basis, the plurality concluded that Wisconsin,

> in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engaged in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.[96]

Lathrop also complained that his freedom of speech was impinged by the mandatory bar membership. The plurality found no basis in the record for deciding that question. At no point did Lathrop show how any position taken by the state bar on a political matter was inconsistent with his own beliefs. There was also nothing in the record to show how much the state bar spent on political action to which Lathrop objected. Justice Brennan concluded by stating that the plurality did not decide the issue of whether an attorney could be compelled by a state to contribute financial support to political activities he opposes.[97]

The Supreme Court has written only one opinion dealing with state efforts to control the unauthorized practice of law. In *Sperry v. Florida*[98] the state sought to enjoin a non-lawyer, admitted to practice before the Patent Office, from engaging in any activities relating to his patent practice in Florida. The Court, in a unani-

96. *Id.* at 843.

97. *Id.* at 847-48. Justices Harlan and Frankfurter disagreed with the plurality only on the question of the constitutionality of the use of bar dues for political activity opposed by an individual attorney. They believed that the issue had no merit. They could see no distinction between freedom of assocation, which the plurality held was not violated, and freedom of speech involved in the political activity. Justice Whittaker based his short concurrence on his view of the practice of law as a privilege and not a right.

Justice Black also believed that the political activity question should be decided. His view was, of course, contrary to the three concurring justices. He believed it a clear violation of the First Amendment to compel a person to support a cause to which he is opposed. Justice Douglas went one step further, opposing even the requirement than an attorney belong to a bar association.

98. 373 U.S. 379 (1963).

mous opinion by Chief Justice Warren, held that federal regulation of practice before the Patent Office and activities relating thereto overrode any contrary state regulation by virtue of the supremacy clause.

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.[99]

The Court viewed the legislative history as clearly indicating a congressional intent to permit non-lawyers to act as patent agents. One issue left unresolved by the Court was whether a non-lawyer who is licensed to practice by the Patent Office can identify himself as a patent "attorney." The legislative history quoted by the Court suggests that Congress drew a distinction between a non-lawyer patent agent and a patent attorney.[100] The Court acknowledged that Florida had a substantial interest in the subject and could have validly prohibited the questioned conduct in the absence of federal legislation. The Court also expressly did not question Florida's authority to define the conduct as constituting the practice of law.

The power of a state court to punish an attorney for conduct in the course of litigation was tested in *Holt v. Virginia*.[101] The case arose when an attorney, Dawley, was charged with contempt of court in a libel case. He hired another attorney, Holt, to represent him in the contempt proceeding. Dawley filed a motion to disqualify the judge, and it was denied. He then filed a motion for a change of venue. At the hearing on that motion Holt appeared for Dawley and read the motion in open court. The judge found its content personally offensive and summarily held Dawley and Holt in contempt of court and fined each $50. The Supreme Court of Appeals of Virginia upheld the convictions on the ground that the motion heaped insults on the judge and was an attempt to smear him. The Supreme Court reversed both convictions in an eight-to-

99. *Id.* at 385.

100. *Id.* at 395. This issue was not decided, however. Sperry ceased using the designation "attorney" and the issue became moot.

101. 381 U.S. 131 (1965).

one decision authored by Justice Black.

Although Dawley was an attorney, he was found in contempt for his acts as a litigant. Holt, on the other hand, was convicted solely on the basis of his acts as an attorney. However, the Court made no such distinction in its analysis because it viewed the case as one involving the due process right to a fair trial.[102] This right, the Court held, included the right to an unbiased tribunal, and a motion for change of venue to achieve a fair tribunal is essential for the protection of that right. "Consequently, neither Dawley nor his counsel could consistently with due process be convicted for contempt for filing these motions unless it might be thought that there is something about the language used which would justify the conviction."[103] The Court concluded that the language used in the change of venue motion was nothing more than that necessary to accuse the judge of bias, the basis for the change of venue motion.

State efforts to control solicitation of legal business have come before the Court in two general areas: one relating to the activities of attorneys and the other to the activities of non-attorneys. Three of the four non-attorney cases involved unions. The non-union case, *NAACP v. Button*,[104] arose out of an attempt by Virginia to restrict the activities of the National Association for the Advancement of Colored People during the late 1950's and early 1960's at the height of the Civil Rights Movement. The Virginia legislature had amended the state's anti-solicitation statute to make illegal the employment of an attorney in connection with a judicial proceeding when the employer was not a party to the proceeding nor had any pecuniary interest in it. Under this statute, the NAACP would be prohibited from supplying counsel to persons who wanted to attack racial discrimination in court.

The Supreme Court, in a six-to-three decision, declared the statute unconstitutional. Justice Brennan, writing for the majority of five, declared that the statute violated the First Amendment rights of the NAACP and its members. The Court found that, for the NAACP, litigation was probably its most effective means of political association. The Court read the statute broadly as "proscrib-

102. Justice Harlan dissented, arguing that the difference between the Supreme Court and the Virginia courts on the professional propriety of the attorneys' actions did not rise to constitutional proportions. *Id.* at 138.

103. *Id.* at 136-37.

104. 371 U.S. 415 (1963).

ing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys."[105] One argument made on behalf of the statute was that the interest of Virginia in regulating the legal profession justified the limitation of First Amendment rights; specifically, that defining improper solicitation fell within the traditional purview of state regulation of professional conduct. The Court rejected this argument, saying that "a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. . . . However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record."[106] The Court approved the traditional restrictions on attorneys misusing the legal process, but did not find such conduct in the case before it.[107]

In a series of three cases decided between 1964 and 1971, the Court resolved several issues relating to union members employing attorneys, with union assistance, to handle legal claims. All three cases, *Brotherhood of Railroad Trainmen v. Virginia*,[108] *United Mine Workers v. Illinois State Bar*,[109] and *United Transportation Union v. State Bar of Michigan*[110] turned upon First Amendment protection of this union activity. In *Brotherhood of Railroad Trainmen*, the union advised its members not to settle injury

105. *Id.* at 433.

106. *Id.* at 439. The Court went on to note that "[m]alicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. . . . Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar, regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest." *Id.* at 439-40.

Justice Harlan wrote a dissenting opinion, in which Justices Clark and Stewart concurred, because he believed the "striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession." *Id.* at 448.

107. *Id.* at 442-43. The Court also voiced some concern over possible lay control over litigation, but did not feel that issue was raised by the activities of the NAACP, particularly because there were no monetary interests involved.

However, Justice Harlan, in his dissent, likened the challenged statute to traditional prohibitions against soliciting legal business, arguing that limitations on solicitation were not addressed solely to those activities which had a pecuniary objective. It was more important to prevent an interference with the attorney-client relationship that could result when the attorney is employed by a third party. *Id.* at 459-60.

108. 377 U.S. 1 (1964).

109. 389 U.S. 217 (1967).

110. 401 U.S. 576 (1971).

claims without the advice of a lawyer and recommended certain attorneys to handle the claims. In *United Mine Workers*, the union employed a licensed attorney on a salary basis to represent any of its members who desired to prosecute workmen's compensation claims before a state agency. *United Transportation Union* involved a union practice of recommending certain Chicago attorneys who would not charge a contingent fee of more than 25% to members with possible Federal Employers' Liability Act claims. Justice Black wrote the majority opinion in each of the three cases, with Justice Harlan consistently dissenting.

Brotherhood of Railroad Trainmen relied primarily upon *NAACP v. Button*[111] for the proposition that regulation of the professions cannot justify an infringement of a First Amendment freedom.[112] The opinion also expressly extended constitutional protection to attorneys who accepted employment under such union plans.

Justice Black, in his opinion for seven members of the Court in *United Mine Workers*, relied on both *NAACP* and *Brotherhood of Railroad Trainmen*. He rejected arguments that *NAACP* was limited to simply advising members about attorneys. The combined holdings of these two cases thus was found to protect the use of employed counsel to represent members' private claims. The Court also stressed that the prohibition was not necessary to protect the state's interest in high standards of legal ethics.[113]

The majority in *United Transportation Union* relied upon the three previous cases and found the challenged activity covered by those decisions.[114]

Cases involving state regulation of the bar have usually come

111. 371 U.S. 415 (1963). *See* notes 104-07 and accompanying text *supra*.

112. Justices Clark and Harlan observed, in dissenting opinions, that *NAACP v. Button* was premised upon the fact that the litigation in those cases was designed to secure constitutionally protected civil rights and not personal injury claims. They viewed the union plan as one involving great potential danger, which the state could prevent through its power to regulate the bar. *Id.* at 452-65.

113. 389 U.S. at 225. Justice Harlan's dissent was again based upon his strong views in support of state regulation of the legal profession and prohibition of the unauthorized practice of law. He protested that states should be free to regulate their bars without interference from the Supreme Court in the absence of demonstrated arbitrary or discriminatory regulation.

114. 401 U.S. at 585-86. Justice Harlan dissented only in part, distinguishing union activities shown in the other cases. Here, he saw no improper union activity to justify the regulation.

to the Supreme Court in clusters, with one or more related issues dominating for a limited period of time. The last of these clusters involves four cases dealing with attempts by the states to prohibit solicitation by attorneys.

In *Goldfarb v. Virginia State Bar*,[115] two non-attorneys challenged a minimum fee schedule adopted by a county bar association but enforced by the Virginia State Bar through its disciplinary procedure. The plaintiffs charged that the schedule and its enforcement violated section 1 of the Sherman Anti-Trust Act.[116] The Court, in a unanimous[117] opinion by Chief Justice Burger, held that the mandatory fee schedule in question did constitute price fixing and was thus a restraint on trade in violation of the federal statute. The fee was a 1% charge on the sales price for a title examination of real estate. Although the state bar had never filed charges against anyone for violating a fee schedule, it had issued an opinion stating that habitually charging fees below the minimum fee schedule would constitute solicitation.

The opinion considered four questions. The first was whether the acts of the county and state bar associations constituted price fixing. The Court held they did because the schedule was not merely advisory but "was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms. . .; the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding."[118] The second question was whether or not the fee schedule affected interstate commerce. The Court found that it did because substantial funds for purchasing homes in the affected county came from outside Virginia, and because a title examination was a requirement of obtaining the funds. The Court concluded that "a title examination is an integral part of an interstate transaction. . . ."[119]

The third question presented to the Court was whether the Sherman Act was intended to apply to the learned professions. The Court found neither an explicit nor implicit exemption of the

115. 421 U.S. 773 (1975).
116. 15 U.S.C. §§ 1-7 (1976).
117. Justice Powell took no part in the case.
118. 421 U.S. at 781-82.
119. *Id.* at 784.

professions from the Act.[120]

Finally, the Court settled a question raised by both the county bar (a voluntary organization) and the state bar (a mandatory bar), each of which claimed to fall within the "state action" exemption to the Sherman Act. The Court rejected these claims. It found that the Supreme Court of Appeals of Virginia did not adopt the fee schedule nor a rule making the schedule mandatory. In fact, the supreme court's rules governing the state bar provided that an attorney should not be controlled by a fee schedule in setting his fees. Even though attorneys were required to belong to the state bar and even though for certain purposes it could be considered a state agency, the Virginia Supreme Court did not expressly direct the state bar to adopt fee schedules or to enforce them. Consequently, the state bar's activities as to fee schedules were not state action.[121]

The opinion concluded by acknowledging that states have a "compelling interest" in the practice of professions, and that they have broad licensing and regulatory power. They may in some instances restrict some forms of competition they regard as

> demoralizing to the ethical standards of a profession. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.'. . . In holding that certain anticompetitive conduct of lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.[122]

Advertising by attorneys, long banned as a form of solicitation, came before the Court in *Bates v. State Bar of Arizona*.[123] Two Arizona attorneys were censured by the Arizona Supreme Court for advertising in contravention of the Code of Professional Responsibility adopted by that court and binding upon Arizona attorneys. The attorneys argued that the ban violated both the First Amendment and the Sherman Act. The Supreme Court, in an opinion by Justice Blackmun joined by four other justices, held that the advertising ban was within the state action exemption to

120. *Id.* at 785-88.

121. *Id.* at 791. The Court reached the same conclusion regarding the county bar association, based upon its purely voluntary character. *Id.* at 792.

122. *Id.* at 792-93 (citations omitted).

123. 433 U.S. 350 (1977).

the Sherman Act, but violated the First Amendment rights of attorneys. The other four justices[124] agreed with the decision on the Sherman Act claim, but disagreed with the majority on the First Amendment question.

All members of the Court had no difficulty in finding state action in the advertising ban, which was adopted and enforced by the state supreme court. *Goldfarb* was easily distinguished because of the lack of involvement of the Virginia Supreme Court in adopting or enforcing the minimum fee schedule in that case.

The analysis of the First Amendment problem was far more difficult. The Court defined the issue narrowly, stating that it was concerned only with advertising the prices of routine legal services. It was not concerned with the quality of the ads, nor did the Court deal with the issue of in-person solicitation. The state bar offered several justifications for the advertising ban.[125] Justice Blackmun found each of them either without merit or supportive of a contrary position. But the Court did not hold that advertising by attorneys could not be regulated at all. Valid regulations would include those covering false, deceptive or misleading advertising and claims as to the quality of services and in-person solicitation. The Court suggested that, as with all advertising, lawyers could be subjected to reasonable restrictions as to time, place and manner, and the Court specifically stated that advertising on the electronic broadcast media would warrant special consideration. The Court concluded that

> [t]he constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of

124. Chief Justice Burger and Justices Powell and Rehnquist each wrote separate opinions, with Justice Stewart concurring in part with the Powell opinion.

125. These were: 1) the adverse effect on professionalism, *i.e.*, that advertising will bring about commercialization, erode the client's trust in his attorney, and tarnish the image of the profession; 2) advertising is inherently misleading because legal services are too individualized, the consumer does not know what services he needs, and the essential factor of skill is ignored; 3) advertising will foment litigation; 4) advertising has the undesirable economic effects of increasing the cost of legal services to the public while making it more difficult for persons to enter the profession; 5) the quality of service is diminished because of the need to stay within the advertised price; and 6) any restriction less than a wholesale ban will be too difficult to enforce. *Id.* at 368-79.

the First Amendment.[126]

The next two opinions of the Supreme Court on solicitation by attorneys were handed down on the same day. Justice Powell wrote both opinions, which reached opposite results. The first, *In re Primus*,[127] arose out of efforts by the American Civil Liberties Union to assist women in South Carolina who had been sterilized as a condition of receiving public assistance. An attorney in private practice but who was affiliated with the ACLU spoke to a meeting about the legal rights of such women. After the meeting the ACLU informed the attorney that it would provide legal representation to women who had been sterilized. The attorney, after learning that one of the women who attended the meeting was interested in filing suit based on sterilization, wrote to her advising her of the ACLU's offer. On the basis of the letter, the attorney was publicly reprimanded by the South Carolina Supreme Court for violating the ban on solicitation contained in the state's Code of Professional Responsibility.

Justice Powell found the issue to be whether a state may punish an attorney who, "seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a non-profit organization with which the lawyer and her associates are affiliated."[128] The opinion began by noting that the case concerned the tension between contending values of freedom of expression and state regulation of the bar. Justice Powell, quoting *Goldfarb*, cited the states' broad power and great interest in the legal profession arising from the essential role attorneys play in the administration of justice.[129] Essentially, the case turned on whether the conduct of Primus was found to be within the ambit of *NAACP v. Button*[130] and the three

126. *Id.* at 384. Justice Powell wrote the principal dissent. In his view, professional services by their nature are not routine and a lay person would not have enough information to judge the nature of the advertised product. He also thought that neither the bar nor state disciplinary agencies could make sure that advertising was not false or misleading. Finally, he said that the Court's ruling would weaken each state's traditional control over the bar, and the possibility of experimentation implicit in that control, for the very marginal benefit to be gained by the public from the type of advertising permitted by the decision. *Id.* at 391-97.

127. 436 U.S. 412 (1978).

128. *Id.* at 414.

129. *Id.* at 422.

130. *See* notes 104-07 and accompanying text *supra*.

union solicitation cases.[131] The Court held that it was, and that the First Amendment right thus prevailed over the state's authority over the bar. In large part the decision was based on a finding that the ACLU's involvement in litigation was not for financial gain; rather, it was a form of political expression similar to that engaged in by the NAACP. The Court concluded that disciplinary rules which prohibit an ACLU attorney from advising a lay person that he may retain the organization's free legal services "have a distinct potential for dampening the kind of 'cooperative activity that would make advocacy of litigation meaningful'. . . as well as for permitting discretionary enforcement against unpopular causes."[132]

The Court also emphasized that a higher standard is applied when political expression or activity is at issue. They compared this to the lesser standard tolerated when purely commercial activity is present, as in the companion case decided the same day. Potential danger may suffice to permit a general restriction of the latter, but in the former "a State must regulate with significantly greater precision."[133] The opinion was careful to explain, after references to *Bates v. State Bar of Arizona*[134] and *Ohralik v. Ohio State Bar Association*,[135] that "nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of non-profit organizations, or their members, having characteristics like those of the NAACP or the ACLU."[136]

Ohralik v. Ohio State Bar Association,[137] decided the same day as *Primus*, was the other end of the solicitation spectrum. In this case, attorney Ohralik was suspended indefinitely by the Ohio Supreme Court for violating two Disciplinary Rules of Ohio's Code of Professional Responsibility.[138] The Supreme Court affirmed the

131. *See* notes 108-11 and accompanying text *supra*.

132. *Id.* at 433 (citing *NAACP v. Button*).

133. *Id.* at 438.

134. *See* notes 105-06 and accompanying text *supra*.

135. *See* notes 137-42 and accompanying text *infra*.

136. 436 U.S. at 439. Justices Blackmun and Marshall concurred with some qualifications, while Justice Rehnquist dissented on the ground that the individual contact by Primus with the potential litigant went beyond the *NAACP* case.

137. 436 U.S. 447 (1978).

138. Disciplinary Rule 2-103(A) prohibits an attorney from recommending employment of himself to a non-lawyer who has not sought his advice on the question. Disciplinary Rule 2-104(A) directs that an attorney who has given unsolicited advice that a non-lawyer should retain counsel shall not accept employment resulting from the advice.

suspension.[139]

The facts presented a classic case of in-person solicitation. Ohralik contacted two persons who had been injured in an automobile accident. He visited one in the hospital on two occasions and on the second visit obtained a written contingent fee agreement. He made an oral agreement with the other, whom he had contacted on the day she left the hospital. Subsequently, both persons discharged him and he sued one of them for breach of contract, obtaining part of an insurance recovery in settlement of his claim. He also sued the other, but dropped the suit after he was suspended by the Ohio Supreme Court.

Ohralik claimed that his soliciting activity was protected by the First Amendment and that he came within the protection of the *Bates* decision. The Court rejected this argument. It began its consideration of the question by noting that the solicitation of business by an attorney through direct, in-person contact with the prospective client "has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client."[140] *Bates* did not predetermine the result here because "[t]he entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition."[141] The Court stressed that although some commercial speech is constitutionally protected, it enjoys lesser protection than non-commercial speech. Moreover, the Court noted that all conduct is not protected simply because it involves some speech. The Court found in-person solicitation to be a business transaction in which speech is an essential but subordinate part. Having thus characterized Ohralik's transactions, the Court applied a lower standard of judicial scrutiny to the regulation than that applied in *Bates*. The opinion weighed the slight free speech component against the state's interest in regulating the type of conduct in question. It found the state's regulatory interest very strong because of the role of the legal profession and because of the substan-

139. Justice Marshall concurred in the judgment and partially concurred in the opinion. Justice Rehnquist concurred in the judgment, and Justice Brennan did not participate in the case.

140. *Id.* at 454.

141. *Id.* at 455.

tive evils of solicitation including fraud, undue influence, intimidation and overreaching. The Court stated that it was not necessary to find a specific injury to the two solicited clients. Rather, it viewed the disciplinary rules as preventive measures and found that the state's assessment for the potential of harm was justified. It would be too difficult to require the state to show actual harm because the solicitation was not, like the advertising in *Bates*, done in the open and subject to public scrutiny; thus, effective oversight and regulation would be impossible. The Court then reviewed the facts in the case, concluding that they presented "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate[d] the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public."[142]

The most recent case decided by the Supreme Court was *Supreme Court of Virginia v. Consumers Union*,[143] an opinion handed down in June 1980. The case arose out of the effort in 1974 by the Consumers Union to publish a legal services directory. Lawyers in Virginia refused to participate because of the ban on advertising then contained in the Code of Professional Responsibility adopted in Virginia. The Consumers Union and others then filed an action under 42 U.S.C. § 1983[144] against the Virginia Supreme Court, the American and Virginia Bar Associations, and several individuals including the state chief justice. The plaintiffs sought a declaration that the defendants had violated their freedom of expression rights and also sought a permanent injunction against enforcement of that portion of the Code that banned advertising. At the request of the defendants, the case was postponed on the basis that the American Bar Association and the state bar were preparing amendments to the Code to relax the prohibition against advertising. Notwithstanding a change in the ABA Code and a request from the state bar, the Virginia Supreme Court refused to change the Code. The district court then proceeded to hear the case on the merits. It held the ban on advertising unconstitutional, permanently enjoining defendants from enforcing any part of it except the prohibition against advertising fees other than for initial

142. *Id.* at 468.

143. 446 U.S. 719 (1980).

144. This section provides a statutory remedy for constitutional violations which occur under color of state law.

consultation. Both sides appealed, but while the appeal was pending *Bates v. State Bar of Arizona* was decided. In light of *Bates*, the Supreme Court remanded the case for further consideration. On remand, the district court again declared the section of the Code at issue unconstitutional and enjoined its enforcement. The plaintiffs then moved for an award of attorney's fees.[145] The district court held that the Virginia Supreme Court and its chief justice were liable to pay a fee but that the state bar and its officers were not because they had originally requested the state supreme court to change the ban on advertising. The district court based its decision as to liability of the supreme court and the chief justice on their refusal to amend the Code in light of *Bates*.

On appeal, the Supreme Court, in a unanimous opinion[146] by Justice White, vacated and remanded. The Court held that the Virginia court, when it adopted the Code of Professional Responsibility and refused to amend it, was acting in a legislative capacity and was entitled to the same absolute immunity as legislators for its actions of a legislative nature. The Court also held that the state supreme court was entitled to judicial immunity for any action of an adjudicative nature in a disciplinary proceeding. The state court also, however, had the authority to initiate proceedings against attorneys. This enforcement power, the Court said, made the Virginia court and its members proper defendants in a suit for declaratory and injunctive relief. The Court had previously recognized that prosecutors, although immune from damages liability,[147] were subject to § 1983 suits seeking injunctive relief.[148]

The Court did not consider, however, that the district court had properly exercised its discretion in ordering the Virginia court and its chief justice to pay attorney's fees to the plaintiffs. The basis for the award was the Virginia court's refusal to amend the Code of Professional Responsibility. This action, or non-action, was an aspect of the court's legislative, rather than enforcement, function for which it was immune from suit. The Court concluded: "Because the Virginia court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations

145. This is authorized under 42 U.S.C. § 1988.
146. Justice Powell took no part in this case.
147. Imbler v. Pachtman, 424 U.S. 409 (1976).
148. Gerstein v. Pugh, 420 U.S. 103 (1975); *Ex parte* Young, 209 U.S. 123 (1908).

centering on the exercise or non-exercise of the state court's legislative powers."[149]

The opinion left open the issue of whether an award for attorney's fees against both the state bar and the Virginia court for their enforcement roles might be obtained. The Court was of the view that unless than were some special circumstances not shown in the record, an award against both the state bar and the Virginia court premised on their enforcement functions would be proper. The case was remanded for further proceedings, with the district court invited, if not directed, to award attorney's fees to the plaintiffs.

D. The Federal Bar

The Supreme Court has acted in a number of matters involving regulation of attorneys who practice or seek to practice in the federal courts, including the Supreme Court. For the most part, opinions written in these matters are not relevant to the Supreme Court's decisions on state regulation of the legal profession because of the limited role the Supreme Court has in the latter. There are, however, a few opinions in which the Supreme Court has stated views that may be relevant to state regulation of the bar, on the nature of the legal profession or the interest of an attorney in the practice of law.

In its first opinion discussing the legal profession, *Ex parte Burr*,[150] the Court balanced the competing interests of the attorney's right to practice his profession and the necessity for courts to maintain the respectability of the bar. The Court left the responsibility for weighing these competing interests to the discretion of the admitting court. It stated that that court should exercise its power with great caution, though it is a power necessary for the preservation of decorum and the respectability of the profession.

One federal case cited with any regularity in state regulation cases is *Ex parte Garland*.[151] There, the Court held unconstitutional, as violating the ban on ex post facto punishments, an act of Congress passed in 1865 requiring attorneys admitted to practice in the federal courts to take a supplementary oath that they had

149. 446 U.S. at 739.
150. 22 U.S. (9 Wheat.) 529 (1824).
151. 71 U.S. (4 Wall.) 333 (1866).

neither held nor exercised any office in a government hostile to the United States. The Court stated that an attorney admitted in a federal court is not an officer of the United States, but an officer of the federal court. He holds his office during good behavior and can be deprived of it only for misconduct ascertained and declared by the admitting court, after an opportunity to be heard. Admission and explusion are exercises of the judicial power. An attorney's right to practice after admission can be taken away only for reasons of moral or professional delinquency. Congress can prescribe the qualifications for admission, but it cannot use that power to punish past conduct in violation of the ex post facto prohibition of the Constitution.

In *Bradley v. Fisher*[152] the Court upheld the disbarment of an attorney by the Supreme Court of the District of Columbia, noting that all courts having the authority to admit attorneys to practice also have the power to disbar them.[153] That power should not be exercised, however, without notice and an opportunity to be heard. Nor should disbarment be ordered where a lesser penalty will accomplish the end sought. The Court also emphasized that an attorney must at all times, in and out of court, maintain the respect due to the courts and judicial officers.

Ex parte Wall[154] raised the question of whether an attorney may be disbarred upon conviction of an offense committed while not acting as an attorney. The Court held that a conviction was not always a prerequisite, but that the circumstances in each case should dictate whether disbarment should be required. The Court held also that there is no right to a jury trial in a disbarment for cause situation.

Theard v. United States[155] involved the issue of whether disbarment in a state court was grounds for automatic disbarment in federal court. In holding it was not, the Court in an opinion by Justice Frankfurter commented on the relationship between the federal courts and state control of the legal profession.

> It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. California* and *Schware v. Board of Bar Examiners* to sit in judg-

152. 80 U.S. (13 Wall.) 335 (1871).
153. *See also Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873).
154. 107 U.S. 265 (1882).
155. 354 U.S. 278 (1957).

> ment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. " 'Membership in the bar is a privilege burdened with conditions.' The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in "good standing" so to do.[156]

III. Analysis

Although the review of the Supreme Court opinions concerning state regulation of the legal profession in section II is divided on the basis of three subject matters, this division is not appropriate for an analysis of the opinions because many of the principles developed by the Court are equally applicable to each of the divisions. For this reason, all of the opinions will be treated as a single group and the various principles will be viewed as applicable to all areas of state regulation of the bar unless otherwise specifically noted.

A. Supreme Court Review of State Regulation of the Legal Profession

The Supreme Court has repeatedly recognized the primary in-

156. *Id.* at 278 (quoting *In re* Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917) and People *ex rel.* Karlin v. Cukin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928)) (citations omitted).

In re Sawyer, 360 U.S. 622 (1959), an attorney discipline case which arose in the territorial courts of Hawaii, is an often cited case involving the extent to which an attorney's speech outside the courtroom can be the basis for discipline. It can give little guidance, however. There were two conflicting opinions each of which gained four adherents.

terest of the states in regulating the bar. In *Bradwell v. Illinois*[157] and *In re Lockwood*[158] the Court went so far as to hold that neither the Fourteenth Amendment nor the privileges and immunities clause of the Federal Constitution applied to the admission to practice law and, presumably, to other aspects of state regulation of the bar. The effect of these two cases, decided in 1872 and 1894, was such that it was not until 1945 that the Court in *In re Summers*[159] wrote an opinion on the merits of a claim that a federal right was violated by a state in a denial of admission to the bar. Even after *Summers* the Court reiterated on several occasions the principle that control of the bar was a matter for the states. The strongest expression of this was in *Goldfarb v. Virginia State Bar*[160] where the Court found that the state had a "compelling interest" in regulating the legal profession because attorneys are essential to the administration of justice, which is itself a primary function of government. This broad statement was repeated in *In re Primus*[161] and in *Ohralik v. Ohio State Bar Association.*[162] In many of its other opinions the Court has expressed a similar view, but in less emphatic terms. In *Schware v. Board of Bar Examiners*[163] the Court said that a state can impose requirements upon applicants relating to good moral character and professional qualification. This statement has been repeated in a number of opinions, including *Baird v. State Bar of Arizona*[164] and *Law Students Civil Rights Research Council v. Wadmond.*[165]

As often as the Supreme Court has affirmed state control over the bar, it has repeated and emphasized the limitation first stated in *In re Summers,*[166] that the exercise of that power is subject to restrictions by federal constitutional and statutory law. In

157. 83 U.S. (16 Wall.) 130 (1872). *See* notes 13-17 and accompanying text *supra.*

158. 154 U.S. 116 (1894). *See* notes 18-19 and accompanying text *supra.*

159. 325 U.S. 561 (1945). *See* notes 20-23 and accompanying text *supra.*

160. 421 U.S. 773, 792 (1975). *See* notes 115-22 and accompanying text *supra.* The Court did make an even stronger statement in Theard v. United States, 354 U.S. 278 (1957), but that case did not directly involve state regulation of the legal profession but rather control by the federal courts over attorneys practicing in those courts. *See* the quotation at note 156, *supra.* In any event, *Theard* reflects a philosophy that is no longer accepted on the Supreme Court.

161. 436 U.S. 412, 422 (1978). *See* notes 127-32 and accompanying text *supra.*

162. 436 U.S. 447, 460 (1978). *See* notes 137-49 and accompanying text *supra.*

163. 353 U.S. 232, 239 (1957). *See* notes 24-26 and accompanying text *supra.*

164. 401 U.S. 1, 7 (1971). *See* notes 39-48 and accompanying text *supra.*

165. 401 U.S. 154, 159 (1971). *See* notes 54-61 and accompanying text *supra.*

166. 325 U.S. at 571. *See* notes 20-23 and accompanying text *supra.*

Schware, the Court outlined these restrictions: a state cannot deny admission to the bar in a manner or for reasons that violate the Fourteenth Amendment; the qualifications imposed by a state must bear a rational relationship to the applicant's capacity to practice law; and a state cannot act in an arbitrary or discriminatory manner in bar matters.[167] The "rational relationship" test was used in *In re Griffiths*.[168] *Konigsberg v. State Bar of California*[169] repeated the third principle and, in addition, said that a state cannot exercise its regulatory power in such a way as to impinge on First Amendment freedoms. In *NAACP v. Button*[170] the Court held that the state may not ignore or violate constitutional rights in a bar regulatory matter.

Spevack v. Klein,[171] *Willner v. Committee on Character and Fitness*[172] and *In re Ruffalo*[173] found the Fifth Amendment applicable in bar regulatory proceedings.

Sperry v. Florida[174] and *Goldfarb* applied the supremacy clause to bar regulatory matters, stating that rights granted by federal law cannot be infringed in the name of regulation of the bar. *Goldfarb* and *Bates v. State Bar of Arizona*[175] also, however, support the application of any state action exemption to federal law when the action is taken by a body exercising the state's regulatory power. Bar associations, even those in which membership is required by state law, do not qualify for the state action exemption unless they are carrying on an activity mandated or approved by a state body such as a legislature or state supreme court.

The Supreme Court uses a balancing approach in this area, similar to that used in many other areas of conflict between competing rights or different constitutional provisions.[176] The Court recognizes the legitimate interest of the state in regulating the bar, but this interest cannot supersede federal constitutional and statutory rights. The Court's opinions lead to the conclusion that state

167. 353 U.S. at 238-39.
168. 413 U.S. 717 (1973). *See* notes 65-68 and accompanying text *supra*.
169. 353 U.S. 252, 273 (1957). *See* notes 27-29 and accompanying text *supra*.
170. 371 U.S. 415, 439 (1963). *See* notes 104-07 and accompanying text *supra*.
171. 385 U.S. 511 (1967). *See* notes 84-86 and accompanying text *supra*.
172. 373 U.S. 96 (1963). *See* notes 62-64 and accompanying text *supra*.
173. 390 U.S. 544 (1968). *See* notes 87-90 and accompanying text *supra*.
174. 373 U.S. 379 (1963). *See* notes 98-101 and accompanying text *supra*.
175. 433 U.S. 350 (1977). *See* notes 123-26 and accompanying text *supra*.
176. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 718-22 (1978).

activity in regulating the bar stands on no higher a level than the state's exercise of any of its other governmental powers and is to be judged by the same standards as any other governmental action. The best example of this is found in the two in-person solicitation cases, *Primus* and *Ohralik*, in which the Court examined the type of activity involved, characterized one as a form of political expression and the other as essentially commercial activity, weighed the value of the speech against the interests that the state sought to protect, and found a ban on political expression invalid, while upholding the ban on commercial speech.

Those concerned with regulation of the bar apparently assume that, because of the traditional role of the state in this area, the classic characterization of the practice of law as a privilege and not a right, and the once traditional reluctance of the Supreme Court to interefere with that role, bar regulatory action has a tacit exemption from federal court oversight. Though that view may have been correct a half century ago, it certainly has not been valid since the late 1950's. The running debate between Justices Black and Harlan, as reflected in the cases decided between 1957 and 1970, is no longer relevant except for historical purposes. There is no apparent disposition on the part of any member of the present Court (except perhaps Justice Rehnquist) to defer to the states in regulating the bar. States can no longer assume that their regulatory actions are presumptively correct or entitled to any special deference. This policy applies whether the state action is directed at admission, discipline, post-admission activities, or solicitation by attorneys and non-attorneys.

B. Procedure

Procedural problems have caused difficulty in some cases brought before the Supreme Court, and have been the principal issue in several other cases. The lack of a clearly defined procedure for raising and resolving issues of a person's qualifications for admission to the bar, particularly those involving moral character, has made it difficult for the Court to ascertain the timeliness of raising federal issues or the propriety of their disposal at the state level. From the first admission case, *Bradwell*, to the most recent, *Griffiths*,[177] review in the Supreme Court has been complicated by

177. *See generally* notes 10-66 and accompanying text *supra*.

the lack of a clear record and confusion over the roles of bar association committees, bar examiner groups, local courts, appellate courts and a state's highest court. In *Bradwell*, two justices of the Illinois Supreme Court, upon a certificate of the applicants' moral character issued by a county court, granted licenses to practice law. There were no standards for granting or denying the certificate in any statute or rule, and there existed no procedure in a statute or rule for seeking the certificates or for challenging their denial by hearing or otherwise. In *Willner* the applicant was not advised of the reasons for the denial of admission and, thus, had no opportunity to refute the evidence against him. When the bar committee reported to the state court, the denial was accepted, again with no procedure for Willner to rebut the disparaging evidence.

Griffiths demonstrates an even more irrational procedure. There, the application, filed with the clerk of the trial court, was referred to a committee of the county bar association. Its recommendation that Griffiths' application be denied because she was an alien was then submitted to a general meeting of the county bar association which voted to accept the report of the committee. The matter would have ended there had not Ms. Griffiths taken the initiative of instituting an action in the superior court for a decree permitting her to take the bar examination. Only then were the legal issues involved presented to the body controlling admissions.[178]

When an application for admission to the bar is thought to be defective for some reason, the applicant should not be required to file suit to bring the validity of the application before the court that has control over the admissions. If the initial body reviewing the application has dispositive authority, then there should be a simple procedure for an appeal to the court with jurisdiction over admissions. If the initial body only serves in an advisory capacity, then there should be a means for the applicant to respond to the recommendation prior to action being taken on it. Under no circumstances should an application be subject to a vote at a general meeting of a county bar association. Personal, professional and moral qualifications are not appropriate issues for an exercise in democracy.

Willner has established the minimum constitutional require-

178. Application of Griffiths, 162 Conn. 249, 294 A.2d 281 (1972).

ments for an admissions procedure—the right to be informed of and to have a hearing on the possible grounds of rejection. Arguably the case also supports a requirement of the right of confrontation and cross-examination if the evidence against the applicant came from individuals. *Willner* appears to require only one evidentiary hearing. If the hearing body only makes a recommendation to a higher body, it is unclear whether there is a right either to an oral presentation or to submit written views to the latter body. Given the restrictions on oral argument in appellate courts today and the many types of proceedings in which there is a right to an oral presentation only before an advisory person or body, it does not appear likely that a right to an oral presentation before a state supreme court on a bar admission proceeding would be allowed. Possibly, due process would still be satisfied if there were no provision for submitting written memoranda to the ultimate authority, provided that the applicant had a full opportunity to present his arguments at an earlier hearing. Notwithstanding this, the better procedure would be to allow all concerned parties to file memoranda with the determinative body, to give both the benefit of their views and the appearance of fairness.

The lack of formalized procedure in the discipline process causes less severe difficulties, probably due to the difference in the purpose of the process. The admission procedure is designed to handle the large majority of cases that do not involve major problems. The discipline procedure exists only for the purpose of dealing with an allegation of misconduct. Necessarily built into the discipline process is a procedure for the filing and answering of charges, an evidentiary hearing before a tribunal, a decision on the merits and an appeal. A record is made and federal issues can be raised and decided in the state proceeding. Therefore few discipline cases raise procedural issues identifying, arguing and deciding federal issues.

Of the three discipline cases decided on the merits by the Supreme Court, only one, *Ruffalo*, dealt expressly with procedural due process. It established the following principles: first, that an attorney in a disciplinary proceeding is entitled to the due process requirements of notice and the opportunity to be heard; second, that the disciplinary proceeding is adversary and quasi-criminal in nature; and third, that the charges must be known before the proceeding begins and cannot be subsequently amended on the basis

of testimony given in the proceeding.[179]

Spevack, while deciding only that refusal to testify in a disciplinary proceeding by itself does not constitute grounds for disbarment, also raises the related procedural due process question of whether an attorney can be compelled to testify in a disciplinary proceeding. Under *Cohen*, the two questions were not answered in the same manner; under *Spevack* they were. *Spevack* thus stands for the principle that an attorney cannot be compelled to testify in a disciplinary proceeding after invoking the privilege against self-incrimination.

Unfortunately these principles raise more questions than they answer. While there is not much difficulty with the requirements of notice and an opportunity to be heard, the effect of classifying a disciplinary proceeding as adversary and quasi-criminal in nature is unclear. Justice Douglas cited *In re Gault*[180] in support of his statement that the disciplinary proceeding was adversary and quasi-criminal. *Gault* involved a juvenile court proceeding on a petition for a determination of delinquency. The Court stated that such a proceeding need not conform with all of the requirements, of a criminal trial or even the usual administrative hearing. It did, however, hold that "notice, to comply with due process requirements must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' "[181] *Ruffalo* is simply a refinement of this rule as it relates to amendment of charges on the basis of evidence given at a hearing on the original complaint.

Gault also held that where imprisonment is a possibility, there is a right to counsel or the right to have counsel appointed if the defendant is indigent.[182] Disbarment proceedings would not involve the possibility of imprisonment and thus *Gault*, viewed narrowly, would not mandate counsel in a disciplinary action. However, such a proceeding could result in the loss of many valuable rights, substantially affecting a person's reputation. Thus, there may be some basis for extending *Gault* to disciplinary proceedings.

179. *See* notes 87-90 and accompanying text *supra*.
180. 387 U.S. 1 (1967).
181. *Id.* at 33.
182. *Id.* at 41.

In summary, *Spevack* and *Ruffalo* appear to establish that an attorney subject to a disciplinary proceeding is entitled to procedural due process that includes advance notice of the details of the charges, prohibition against amendments made after testimony is taken and, when evidence given by a witness is disputed, confrontation and cross-examination. Although not expressly held, it is likely that there is a right to be represented by counsel in a disciplinary proceeding because of its quasi-criminal nature as expressed in *Ruffalo*. Whether the state is required to provide counsel to an indigent defendant in a disciplinary proceeding is still an open question.[183]

In an effort to develop a model procedure for discipline cases, the American Bar Association has developed Standards for Lawyer Disciplinary and Disability Proceedings.[184] These standards comply with all of the Supreme Court cases to date and go beyond them in many areas.[185] Consequently, they can be safely used by a state in revising its discipline procedure.

There is far less guidance, however, in developing an admissions procedure. As previously noted, *Willner* imposes only minimal due process requirements.[186] No organization such as the American Bar Association has had a representative group review the entire matter and propose procedural standards similar to those relating to the discipline process. The National Conference of Bar Examiners has developed a model rule, but the committee that drafted it consisted almost exclusively of bar admission authorities and thus cannot be considered a group representative of a variety of interests.[187]

A model rule should be clear as to the person or body respon-

183. For a discussion of a closely related problem, see Cohn, *The Limited Due Process Rights of Judges in Disciplinary Proceedings*, 63 JUDICATURE 232 (1979).

184. ABA, STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS (1979).

185. An area in which the standards follow, but do not go beyond due process requirements as established by the Supreme Court, is in combining prosecutorial and adjudicatory functions in a single body. This is permitted by Withrow v. Larkin, 421 U.S. 35 (1975). The combination of functions appears unwise, because of the possibility of injustice arising out of the same body performing essentially conflicting functions and because of the appearance of unfairness. For a comprehensive attack on a state's disciplinary procedure that was rebuffed on abstention grounds, see Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976).

186. *See* notes 62-64 and accompanying text *supra*.

187. National Conference of Bar Examiners, *Proposed Model Code of Rules for Admission to the Practice of Law*, 40 BAR EXAMINER 129 (1971).

sible for each step in the admission process, how an application is taken from one step to the next, and who is responsible for moving the application through each step in the process. Without this, an application may not be acted upon in a timely manner. It must also clearly state that those who act for the admitting authority are doing so as an arm of that authority and not as a representative of a bar association. This will reduce the possibility that the denial of an application is based more upon a desire to reduce competition than upon the merits. The rules should also state whether and by whom any of the requirements can be waived, and, if one exists, the procedure for seeking a waiver.

The admissions procedure should require formal orders and opinions which can serve as the basis for review at a higher level. This is particularly important when a dispute reaches the state supreme court and federal constitutional issues are involved. Seeking review in the United States Supreme Court when there is no formal order and no statement of the reasons for denial causes difficulty for both the applicant and the Court.

The rules should also reflect the actual requirements imposed upon applicants. No state should defend an admission rule with the argument that the rule does not really mean what it says. This was the situation in *Law Students Civil Rights Research Council,* where New York argued that a requirement that an applicant furnish proof that he "believes in the form of government of the United States and is loyal to such government" meant only that the applicant had to be willing to take an oath to support the Constitution.[188] If that was all that New York required, the rules should have so stated.

C. Qualifications for Admission to the Bar

As previously noted in Section II A[189] the Supreme Court has subjected state requirements for admission to the bar to two general limitations: they must be reasonably related to the practice of law and they must not violate an applicant's federal constitutional rights. Each Supreme Court opinion also approves or disapproves a specific qualification imposed by a state. For example, a state can require an applicant to take an oath to support the state and fed-

188. *See* notes 55-58 and accompanying text *supra.*
189. *See* notes 10-76 and accompanying text *supra.*

eral constitutions.[190] A state can also, the *Summers* court ruled, exclude an applicant who refuses to pledge to serve in the state militia.[191] This decision relied on prior cases, since overruled, permitting the United States to deny citizenship to persons who did not promise to serve in the armed forces,[192] and is thus probably no longer good law.

A state can establish a screening process for applicants and require them to respond to questions concerning their qualifications to practice law.[193]

A state cannot, however, ask an applicant to list all of the organizations to which he has belonged.[194] While it can ask about membership in an organization that advocates violent overthrow of the government, it may do so only if the question is limited to knowing membership by one who has the specific intent to further the organization's goals.[195] A state can ask about membership in the Communist Party as a preliminary to further inquiry about the nature of the affiliation.[196]

No issue has caused greater disagreement on the Court than the authority of a state to deny admission to an applicant who refuses to answer questions about membership in an organization that advocates violent overthrow of the government. The Court has vacillated on the issue, depending on which position is able to garner enough concurrences to prevail in a specific case. Since the most recent cases were decided in 1971,[197] the rules have not changed for nine years and are now accepted as the controlling principles.

Under these cases, an applicant who refuses to answer a question which the state is permitted to ask can be denied admission.

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190. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). *See also* notes 54-61 and accompanying text *supra.*

191. *See* note 21 and cases cited therein *supra.*

192. Gerouard v. United States, 328 U.S. 61 (1946).

193. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

194. *In re* Stolar, 401 U.S. 23 (1971).

195. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 165 (1971).

196. *Id.* at 165-66. The difficulty in attempting to reconcile Baird v. State Bar of Arizona, 401 U.S. 1, *In re* Stolar, 401 U.S. 23 and Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, all decided on February 23, 1971, is commented upon in Note, *Bar Admission Procedures: Inquiry into Political Beliefs and Associations*, 22 DEPAUL L. REV. 524 (1972).

197. *See* note 196 and cases cited therein *supra.*

It must be clear that the questions are not directed only at the discovery of beliefs but at the likelihood of the applicant to act in a manner inconsistent with proper conduct of an attorney. It must also be clear that an answer to the question will not by itself result in the denial of admission, but will lead only to a further investigation of matters that are legitimate subjects of inquiry. It is also necessary that the applicant be warned of the consequences of his refusal to answer.[198]

The Court has held that a state may not deny admission solely on grounds of citizenship. In *Griffiths*, the Court found that the state had not shown a sufficient relationship between citizenship and the practice of law to justify the requirement. Later in *Ambach v. Norwick*[199] the Court held that a state could bar resident aliens from teaching public school. The Court found that teaching in public schools was a governmental function and distinguished *Griffiths* on this basis. A similar result might be obtained in cases involving bar admission if the relationship between a lawyer and the function of the courts was emphasized. This relationship is the basis for the courts' holding that regulation of the bar is a part of the judicial, rather than legislative, power, and thus, it may be accepted by the Supreme Court as the basis for a different result than *Griffiths*.

Although some issues concerning bar admission appear to be settled, there are many aspects of the process which have not been subjected to Supreme Court scrutiny. These include residency[200] and age requirements, permitting some persons to be admitted on the diploma privilege while requiring others to take a bar examination,[201] permitting some but not all out-of-state attorneys to be admitted on motion,[202] the potential conflict of interest in having at-

198. *In re* Anastaplo, 366 U.S. 82 (1961).

199. 441 U.S. 68 (1979).

200. *See, e.g.*, Gordon v. Committee on Character and Fitness, 48 N.Y. 2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). *See* Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979). *See also* Golden v. State Bd. of Law Examiners, 614 F.2d 943 (4th Cir. 1980)(challenge to Maryland's former residency requirement dismissed as moot).

201. In Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont. 1974), a three judge district court upheld, in a 2-1 decision, Montana's statute permitting graduates of the University of Montana School of Law to be admitted in that state without taking a bar examination.

202. O'Neal v. Thompson, 559 F.2d 485 (9th Cir. 1977), rejected a challenge to a bar

torneys and bar associations involved in the admission process,[203] the requirement of graduation from an American Bar Association accredited law school,[204] the development and grading of the bar examination,[205] individual questions on the application form[206] in the character investigation, the use of the multi-state bar examination, waiver of requirements, disparity in bar examination failure rates between racial or sexual groups,[207] and grounds for automatic disqualifications such as felony convictions. Many of these issues have already been presented to lower federal courts and thus may come before the Supreme Court in the near future.

In considering the outcome of these questions, one must realize that the Supreme Court no longer gives any presumption of validity to a state's actions concerning admission to the practice of law. Rather, admission to the bar will be treated on the same basis as the granting or denying by government of any benefit or privilege[208] —that is, admission qualifications must be rationally related to a person's capacity or fitness to practice law and must not be used to violate constitutional rights.[209]

To insure that the qualifications imposed by a state are rationally related to the practice of law, each state should review all of its requirements, applying the test to each. In so doing, the state should not assume that, because something has traditionally been required, it necessarily bears any substantial relationship to the practice of law. One way to avoid the trap of treating the traditional as necessary is to approach the subject as though there are no requirements, imposing entirely new ones. When a new list of requirements is developed, it can be compared with the existing

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examination requirement for non-resident attorneys moving to Nevada, citing Gormley v. Committee on Admissions, 419 U.S. 810 (1974), which the Supreme Court dismissed for want of a substantial federal question.

203. Justice Black referred to this problem in his dissenting opinion in Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

204. *See, e.g.*, Potter v. New Jersey Supreme Court, 403 F. Supp. 1036 (D. N.J. 1975), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

205. *See, e.g.*, Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974).

206. A prime candidate for challenge is the question asked by North Carolina: "[A]re you married and living with your spouse? If not, why not?" *Is There a Need for Uniformity in Application Forms and Fitness Questions? A Panel Discussion*, 47 BAR EXAMINER 36, 39 (1978).

207. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975).

208. Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971).

209. *See* notes 167-68 and cases cited therein *supra*.

ones to determine if any essential qualification has been overlooked.

Residency qualifications provide an example of the type of analysis which should be made. Residency of various lengths is required in most, but not all states.[210] Is residency really necessary? One argument is that it is essential to enable a state to exercise control of the members of its bar. This argument loses effect, however, because an attorney who is a resident when admitted can leave the state permanently thereafter and still continue to practice in that state. To avoid the problem of admitting persons who have no intention of practicing in the state, a requirement could be drawn that an applicant demonstrate some intent to practice in the state on either a full or part-time basis. Residency, by itself, does not appear to have any rational relationship to bar admission and thus should not be required.[211]

One aspect of the admissions process that appears to be safe from further Supreme Court review is the restriction on out-of-state attorneys. *Martin v. Walton*[212] and *Leis v. Flynt*[213] permit a state to ban completely non-resident attorneys from appearing *pro hac vice* in its courts or to put conditions upon their appearance. Even when permitted in the discretion of a judge, no hearing is required and thus the exercise of the discretion is unreviewable in the federal courts. Why a state would establish such a procedure may be a question that is difficult to answer, but insofar as the Supreme Court is concerned, it is a state and not a federal issue. States also appear to be free to impose whatever conditions they think desirable upon a non-resident attorney who is admitted permanently to its bar.[214] It is unlikely, however, that a state could impose a condition that would violate recognized constitutional rights.

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210. RULES FOR ADMISSION TO THE BAR (West 1979); Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 200.

211. The residency requirement is already under attack in lower courts and it seems only a matter of time before the question reaches the Supreme Court. Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 200.

212. 368 U.S. 25 (1961). *See* notes 69-71 and accompanying text *supra*.

213. 439 U.S. 438 (1979). *See* notes 72-76 and accompanying text *supra*.

214. *See* note 76 and the cases cited therein *supra*.

D. The Practice of Law

Once a person is admitted to the practice of law, state control over his conduct is substantial. This control arises primarily from the code of professional responsibility that is in effect in the state, and requirements set forth in state statutes, court rules, and court opinions. Only a few of these regulations have been reviewed by the Supreme Court.

Lathrop v. Donohue[215] is usually cited as authority for the constitutional requirement that an attorney belong and pay dues to a state bar association. The plurality opinion in that case was more limited, however, dealing only with the issue of paying dues to a state bar organization that may spend funds for legislative activities to which an attorney may object. The attorney in that case did not allege the expenditure of any specific funds on a particular item of legislation to which he was opposed, and thus the merits of the constitutional requirement were not reached. The Supreme Court has given *Lathrop* just that reading in *Abood v. Detroit Board of Education.*[216] There the Court held that public teachers cannot be compelled by the state to support political activity by a union to which they are required to belong. This case could be read as requiring similar protection for attorneys who are compelled to belong to a state bar. There are, however, several differences. In *Abood*, the union supported political candidates, not issues, and legislative activity was not within the statutory responsibilities of the collective bargaining agent. In *Lathrop* the state bar took positions only on legislation, not candidates, and one of the functions of the state bar as authorized by the Wisconsin Supreme Court was to support improvements in the administration of justice, some of which could be accomplished only by legislation. Notwithstanding these differences, the use of the dues of a mandatory state bar for legislative activity appears to violate the basic principle of *Abood. Abood* also holds that it is not incumbent upon the individual to detail the disputed actions taken by the organization nor to prove how much was spent on them. The Supreme Court stated that it favors an internal voluntary plan whereby objectors to legislative activity can obtain a refund of that portion of the dues spent for political purposes, and a reduction of future dues assessments

215. 367 U.S. 820 (1961). *See* notes 91-97 and accompanying text *supra.*
216. 431 U.S. 209, 233 n.29 (1977).

to exclude that portion attributable to political activity. It would appear incumbent upon mandatory state bar organizations to adopt such a procedure.

The conduct of an attorney in connection with court proceedings on behalf of a client is regulated by a state's code of professional responsibility, standards governing courtroom conduct such as the American Bar Association's Standards Relating to the Administration of Criminal Justice,[217] and statutes, rules, or court decisions defining contempt of court. *Holt v. Virginia*[218] prohibits the use of any of these regulations in such a way as to prevent an attorney from adequately representing his client. The opinion does suggest, however, that an attorney is not immune from charges of professional misconduct simply because he has engaged in improper conduct while acting as an attorney. The interest being protected is the client's, not the attorney's, right to due process. The test for determining whether a state can regulate or prohibit a particular activity will, consequently, be whether the regulation or prohibition will deny due process to the person being represented by the attorney.

The recent cases decided by the Supreme Court have been concerned with state efforts to limit or prohibit activity by attorneys or others designed to generate legal business or to attract it to one attorney or another. The prohibition against this type of activity has an ancient and honorable tradition,[219] and the Supreme Court in *Goldfarb* has acknowledged the power of the state to restrict some forms of competition to protect the ethical standards of the legal profession.[220] There are, however, severe limitations upon the states in enforcing these restrictions. Bar association activities which go beyond those of the state may violate federal statutes encouraging competition, such as the Sherman Act.[221] State activity is also subject to federal statutory control[222] and *Sperry* enforced

217. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Compilation (1974).

218. 381 U.S. 131 (1965). *See* notes 101-03 and accompanying text *supra*.

219. *See* McCloskey v. Tobin, 252 U.S. 107, 108 (1920). *See generally* Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. OF CHI. L. REV. 674 (1958).

220. 421 U.S. 773, 792-93 (1975).

221. *Id.*

222. Sperry v. Florida, 373 U.S. 379 (1963). *See* notes 98-100 and accompanying text *supra*.

such a restriction. But even when exempted from the federal statute, the state activity must not interfere with the constitutional rights of individuals, organizations, or attorneys.[223]

The response of the bar has been more positive than some might have been expected. Minimum fee schedules, even of an advisory nature, have disappeared. Restrictions on advertising, other than prohibiting that which is false or misleading, have been eliminated in some states[224] and are likely to be abandoned entirely.[225]

Perhaps the largest unexplored area involves the most basic issue—what constitutes the practice of law. States have made many efforts to prohibit the unauthorized practice of law.[226] To date, the Supreme Court has not been faced with a case involving a definition of the practice of law, but it is only a matter of time before this occurs. Such a case could arise through a challenge to agreements between the legal profession and other professions as duties supposedly unique to a lawyer.[227] It could also arise in the context of the activities of paralegals, representatives of corporations, particularly those of a non-profit character, or publication of books giving legal advice.[228]

Here again, results in specific cases cannot be predicted with certainty. What can be predicted, however, is the approach that will be taken by the Supreme Court. The Court will look at the harm that the state is trying to protect against by prohibiting non-attorneys from engaging in the conduct, weighed against the harm suffered by the non-attorney in not being able to engage in the activity. The harm to the public will have to be greater when a First Amendment right is involved. An important factor is whether the public interest alleged to be the object of the regulation is simply a cover for protection of the economic interests of the legal

223. *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); United Transp. Union v. Michigan State Bar, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

224. *See, e.g.*, Wisconsin's Code of Professional Responsibility, WIS. STAT. ch. 757 (1977).

225. *See, e.g.*, ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT, Rules 9.1-9.3 (Jan. 1980 Draft).

226. *See* L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 364-76 (1971).

227. *Id.* at 366.

228. Morrison, *Revising the Definition of the Practice of Law as a Way of Increasing the Availability of Legal Services*, 66 A.B.A.J. 248 (1980).

profession. An example of this conflict would be an attack on a rule that restricts an attorney from identifying himself as a specialist in a particular area of the law. The precise type of restriction will be important, as will be the evidence presented to demonstrate an actual or probable injury to the public. Defenders of the restriction will have to do more than simply provide a list of potential but unproven dangers to the public. Also relevant will be whether the case arises in the context of an organization attempting to aid its members or simply an attorney who wants to advertise a specialty without any demonstrated competence in the field. State efforts to regulate group legal plans may provide additional opportunities for the Supreme Court to weigh the public interest in access to legal services against traditional limitations upon the provision of those services.

Perhaps the clearest indication of the change in the Court's philosophy toward state regulation of the bar is found in its most recent decision, *Supreme Court of Virginia v. Consumers Union*.[229] The liability of those responsible for regulation of the bar to be sued for injunctive relief or for damages is to be decided upon the same principles applicable to other state officials in any other area of governmental activity. Under these principles enforcement officials are liable to suit and to payment of attorney's fees, but those responsible for rulemaking and adjudication are immune from both. This raises problems for bar regulatory authorities. To the extent that courts have the ability to initiate or direct the initiation of disciplinary proceedings against an attorney to enforce a rule or regulation, they are liable to suit, may have injunctive relief issued against them, and may be required to pay attorney's fees in cases arising under 42 U.S.C. § 1983. For those involved in bar discipline, whether with a bar or court agency, the same liability exists. Persons or agencies which have both prosecutorial and adjudicative functions are liable for the former activity but not the latter.

The applicability of *Consumers Union* to the admission process is more difficult. Are admission authorities acting only in an adjudicative capacity because they merely respond to petitions for admission, or are they enforcement agencies seeking compliance with the rules and regulations governing admission to the bar?

229. 444 U.S. 914 (1980). *See* notes 143-49 and accompanying text *supra*.

There is no simple answer to this question. It will depend upon how the issue arises. The denial of an admission made on the basis of a simple failure to comply with a formal requirement and which does not involve a hearing or adjudication which would render those enforcing the rule subject to suit and liability for attorney's fees. If, however, there is a factual dispute requiring a hearing, those holding the hearing and making the adjudication would be immune from any type of legal action. This would apply to determinations of moral character as well as other more objective issues.

Conclusion

Control over the legal profession for most of the history of the republic was considered to be the exclusive province of the states. The first cases attacking some aspect of this control as violating federal rights did not reach the United States Supreme Court until the latter half of the nineteenth century. Not until 1945 did the Supreme Court acknowledge that the Fourteenth Amendment applied to regulation of the bar. In 1957 the Court for the first time held that a state action in a bar regulatory matter violated a federal constitutional right. Since then, the Court has been presented with challenges to state actions or regulations concerning admission to the bar, discipline of attorneys, procedural due process in admission and discipline matters, solicitation by attorneys and non-attorneys, relationship between attorneys and non-attorneys, bar membership requirements, fee schedules, practice by non-resident attorneys, governance of practice before federal agencies, and the courtroom conduct of attorneys. In all of these areas the deference once granted to state action no longer exists, even though the Court continues to acknowledge the primary interest of the states in regulating the bar. The Court has adopted several general principles in this area. A requirement for admission to the bar must bear a rational relationship to an applicant's fitness or capacity to practice law. The Court will review a restriction on attorneys or other persons based upon the power to regulate the practice of law by weighing the state's interests against the harm suffered by the person upon whom the restriction is imposed. Regulations limiting activities protected by the First Amendment must meet a higher standard than those restricting other types of activities. Notwithstanding the special interest of the states, the Supreme Court no longer gives a presumption of validity to the action of a state in

regulating its legal profession. A state's effort to control the bar will now be judged on the same basis as any other exercise of state authority.

This change in philosophy on the part of the Court has important implications not only for the state courts and related agencies who exercise direct authority over attorneys, but also for bar associations—state and local, mandatory and voluntary—individual attorneys, organizations seeking to assist their members in asserting public or private rights, consumers of legal services, and the public at large. State regulatory bodies and bar associations should examine critically all present rules and regulations which control the practice of law to determine whether each rule or regulation is necessary to protect the public or is based simply on tradition or on the desire to protect the economic interests of present members of the legal profession. This review should be made by representatives not only of the regulatory agencies and the legal profession but also by members of the public. If this is done, the likelihood that the Supreme Court will be forced to intervene in the state's control of the legal profession to protect the public will be substantially reduced. Both the public and the bar will be the beneficiaries.