

THE DEMANDS OF DUE PROCESS IN BAR ADMISSIONS PROCEEDINGS

by Thomas A. Pobjecky

The Supreme Court of the United States has held that “[a] State cannot exclude a person from the practice of law ...in a manner or for reasons that contravene the Due Process...Clause of the Fourteenth Amendment.”¹ To ensure compliance with this mandate from our country’s highest court, bar examiners need not retain the services of a nationally recognized scholar on constitutional law.

On the contrary, it is recommended that bar examiners simply ask themselves the following question: Are our procedures fair? If bar examiners cannot answer such question in the affirmative without any hesitation, then an evaluation of their procedures should be undertaken.

For bar examiners who want to revamp their entire procedures or who only want to fine tune particular procedural aspects, this article will explore considerations of procedural due process during the different stages of the admissions process. If a bar admissions authority wishes to instill the notion of fair play upon bar applicants as they embark upon the practice of law, what better way than to embody such notion in its own procedures?

CONTROLLING LEGAL PRINCIPLE

In its 1955 decision in *Coleman v. Watts*,² the Supreme Court of Florida couched the issue of fairness in the following manner:

The prime question for decision, is whether or not the ruling of the board accorded with the essential requirements of the law and afforded due process to the petitioner when, it appears from the petition, the petitioner was never informed of the nature of the charges or complaints against him, was not confronted with the witnesses or complainants, and, because of the lack of such information, was deprived of the fair opportunity to refute any of the charges or complaints upon which the board apparently based its decision....

In *Coleman*, Florida’s bar examining authority simply notified the bar applicant that “he did not meet the requirements for admission to The Florida Bar.”³ The board’s notice failed to specify any grounds for the unfavorable determination. In remanding the case back to the board for a hearing, the *Coleman* court held that the applicant was not accorded due process.⁴

Along with decisions from Arizona,⁵ Oregon⁶ and Louisiana⁷, the *Coleman* decision was cited favorably by the Supreme Court of the United States in *Willner v. Committee on Character and Fitness*.⁸ In *Willner*, the court held that the applicant “was denied procedural due process when he was denied admission to the bar...without a hearing on the charges filed against him....”⁹ The *Willner* court quoted approvingly from one of its prior decisions holding that “[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but

extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."¹⁰

BEGINNING STEP: NOTICE

The essential function for any bar examining authority is the protection of the public.¹¹ Such function is achieved by the administration of the bar examination and the conducting of an investigation into an applicant's character and fitness to practice law. Such investigation may involve an informal interview,¹² an informal conference¹³ or an investigative hearing¹⁴ between bar examiners and the applicant.

After completing its character and fitness investigation, a bar examining authority notifies an applicant of its initial decision. If the determination is an unfavorable one, there is no set format among the jurisdictions for achieving such notification. In Texas, the notice must contain the following:

1. a detailed analysis of the results of the investigation; and
2. an objective list of actions, if any, which the applicant may take to correct the deficiencies and become qualified for admission to the bar after passing the bar examination.¹⁵

In one state, the applicant is served with specifications.¹⁶ Such document is similar to a criminal indictment. Specifications allege with specificity the concerns regarding an applicant's character or fitness or both which, if proven, could preclude a favorable recommendation by the board.

In evaluating the fairness of a notification of an adverse determination to a bar applicant, substance is paramount to any particular form. The notice can be

transmitted in a variety of written ways including letter, report, complaint or specifications.

Regardless of what particular form is used, it is essential that the notice clearly and fairly apprise applicants of the reasons why they are not being recommended for admission to the bar. As observed by Justice Goldberg:

The constitutional requirements in this context may be simply stated: 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.¹⁷

INTERMEDIATE STEP: HEARING

A formal, adversary hearing before a bar examining authority serves two distinct purposes. First, it provides applicants with a forum by which they can challenge unfavorable evidence. If an applicant does not wish to contest the adverse facts, then a formal hearing affords him or her an opportunity to offer evidence of mitigation¹⁸ or rehabilitation.¹⁹

Secondly, such a hearing provides the record upon which the bar examining authority will base its decision. As held by one state supreme court:

[I]t is incumbent upon the board to sustain its ruling by *record evidence* and not by mere assertions that it is possessed of confidential information which shows the applicant to be unfit; and if the record consists only of evidence supplied by the applicant, then such evidence must demonstrate that the board's dissatisfaction with his application rests on valid grounds and not upon mere suspicion.²⁰

The burden of proof at a formal hearing should be articulated in some manner. In Texas, the following rule provision specifically addresses the burden of proof:

The board or any opponent of approval of the moral character and fitness of the Applicant or Declarant, shall have the burden of proof and be required to present evidence that the Applicant or Declarant does not have the requisite good moral character or fitness. Upon the admission of such evidence, the burden of proof shall shift to the Applicant or Declarant to show that the Applicant possesses good moral character and fitness as defined in these Rules.²¹

Pronouncements regarding the burden of proof in a bar admissions hearing also occur in case law.²²

Related to the burden of proof is a recognition of the differing standards applicable to bar admissions proceedings and bar disciplinary proceedings. Thus, a bar applicant can be held to a higher standard of character and fitness than a practicing attorney.²³

Furthermore, denial of admission to the practice of law is not the same as disbarment. After a period of disqualification, a previously denied applicant may reseek admission upon a showing of rehabilitation.²⁴

Although an unfavorable character determination by a bar examining authority must be supported by record evidence, such determination need not be established beyond a reasonable doubt.²⁵ The standard of proof often stated by one state supreme court is that of "competent and substantial evidence."²⁶ As any other trier of fact, bar examiners may rely upon circumstantial evidence,²⁷ and

may accept or reject the testimony of any witness appearing at the hearing (including the testimony of a bar applicant).²⁸

To ensure the fairness of a formal hearing, a bar applicant should be granted certain procedural rights like any other litigant. Bar applicants appearing for a formal hearing should be granted the following rights: representation by counsel, timely release of witness and exhibit lists, cross examination of witnesses, access to the board's subpoena powers, presentation of evidence and witnesses on the applicant's behalf and disclosure to the applicant of any exculpatory information within the possession of bar examiners.²⁹

Administratively, procedures should be designed to ensure that a bar applicant will appear before an impartial hearing panel. Some jurisdictions specifically prohibit board members from sitting on a formal hearing panel if they had participated in an earlier hearing involving the same applicant³⁰ Although it is legally permissible to combine investigative and adjudicatory functions,³¹ "a better practice would be to separate these functions."³²

LAST STEP: FINDINGS AND RECOMMENDATION

Following a formal hearing, a hearing panel must make and report its determination of the character and fitness of the applicant who appeared before it. Although such determination must rest firmly on the record produced at the hearing, a hearing panel (like any other trier of fact) can rely upon the intuition and experiences of its

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members in arriving at its final decision. As observed by Justice Frankfurter:

No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of "many honest and sensible judgments" in a different context that it expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."³³

If the factual allegations before the hearing panel are in dispute, it is incumbent upon the panel to adjudicate such allegations. A panel cannot relinquish its fact-finding role by a "[m]ere recitation of the testimony" or "by merely summarizing the evidence."³⁴ As stated by the Supreme Court of North Carolina:

When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies.³⁵

A problem arises when a bar examining agency possesses adverse information regarding an applicant which the agency is unwilling or unable to disclose on the record at a hearing with such applicant. The need for bar examiners to maintain the confidentiality of particular information if they so choose is essential. As one state supreme court observed: "[U]nless the board's investigative files are held in confidence, many of those from whom the board seeks information concerning applicants would be unwilling to candidly respond."³⁶

Yet, can undisclosed, confidential information be used against applicants to prevent their admission? The

fairness test clearly precludes the use of such information. As reasoned by the Supreme Court of Arizona:

[W]e cannot allow information of this nature to be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. To do so would be to open the door to the most noxious type of character assassination and guilt by innuendo. If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth. If they insist on hiding behind a cloak of secrecy, then their evidence cannot be used to impeach the character of a man whose only apparent fault has been to acquire a few devious secret enemies.³⁷

In addition to its detailed findings of fact, a hearing panel must articulate its final recommendation. Options which are available to a hearing panel in some jurisdictions include the following: (1) a recommendation that the applicant be admitted; (2) a recommendation that the applicant not be admitted; (3) a recommendation of conditional or probationary admission for the applicant or (4) a recommendation that the applicant's admission be deferred for a specified period of time to conduct further investigation or to allow the applicant to establish rehabilitation.³⁸

CONCLUSIONS

Some bar examiners might argue that certain procedural safeguards are either unnecessary or too burdensome. Yet, jurisdictions have shown that both fairness and protection of the public can be successfully achieved.

For example, Florida held 216 formal, adversary hearings in response to the filing of specifications during the period of 1988 through 1994. Such hearings were in

addition to the hundreds of investigative hearings conducted during the same period.

In recent years, Florida has taken specific action to enable it to accomplish its workload in a timely manner while maintaining procedural due process for applicants. For example, in 1994, Florida adopted an emeritus rule whereby former members are authorized to sit on hearing panels.³⁹ As noted by the Florida Supreme Court when adopting such rule:

Through the use of retired board members, the board should be able to conduct its hearings more expeditiously and thereby shorten the time prospective applicants must wait for determination of whether they may be admitted to the bar.⁴⁰

Additionally, the board in Florida has recently proposed a rule amendment which would authorize its attorneys to enter into consent settlements in cases involving pending specifications.⁴¹ Under the proposed rule, the parties could agree to a disposition (e.g. conditional admission) and, thereby, would waive a formal hearing. The agreed upon disposition must be approved by the full board.

The above discussed provisions in Florida are not exhaustive. Other proposals await development and implementation by bar examiners to address their own particular needs.

In the words of Justice Goldberg: "Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process."⁴² Let the same be said especially of bar examiners.

ENDNOTES

1. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957).
2. 81 So.2d 650, 652 (Fla. 1955).
3. *Id.* at 651.
4. *Id.* at 655.

5. *Application of Burke*, 351 P.2d 169 (Ariz. 1960).
6. *In re Crum*, 204 P. 948 (Or. 1922).
7. *Moity v. Louisiana State Bar Ass'n*, 121 So.2d 87 (La. 1960).
8. 373 U.S. 96, 103-104 (1963).
9. *Id.* at 106.
10. *Id.* at 105.
11. *See Florida Bd. of Bar Examiners re C.W.L.*, 364 So.2d 454, 458 (Fla. 1978).
12. N.J. Regulations Governing the Comm. on Character, Reg. 302:1.
13. Rules Regulation Admiss. to Practice Law in Cal., Rule X, §3.
14. Fla. Sup. Ct. Bar Admiss. Rules, art. III, §3.a.
15. Rules Governing Admiss. to the Board of Tex., Rule X.
16. Fla. Sup. Ct. Bar Admiss. Rules, art. III, 3.b. The term "Specifications" is derived from military law. "According to military usage and practice,....[t]he specification sets forth the acts or omissions of the accused which form the legal constituents of the offense." *Carter v. McClaughry*, 183 U.S. 365 (1902).
17. *Willner*, *supra* note 8 at 107 (Goldberg J., concurring).
18. Evidence of mitigation could include factors such as the applicant's age (e.g. juvenile), the seriousness of the conduct (e.g. a misdemeanor) or the presence of a mental disorder (e.g. bi-polar) which caused or contributed to the underlying conduct.
19. Florida's rule on rehabilitation lists the following elements: (1) strict compliance with the specific conditions of any disciplinary, judicial, administrative or other order, where applicable; (2) unimpeachable character and moral standing in the community; (3) good reputation for professional ability, where applicable; (4) lack of malice and ill feeling toward those who by duty were compelled to bring about the disciplinary, judicial, administrative or other proceeding; (5) personal assurances, supported by corroborating evidence, of a desire and intention to conduct one's self in an exemplary fashion in the future; (6) restitution of funds or property were applicable; and (7) positive action showing rehabilitation by such things as a person's occupation, religion, community or civic service. Merely showing that an individual is now living as and doing those things he or she should have done throughout life, although necessary to prove rehabilitation, does not prove that the individual has

undertaken a useful and constructive place in society. The requirement of a positive action is appropriate for applicants for admission to the bar because service to one's community is an implied obligation of members of the bar. Fla. Sup. Ct. Bar Admiss. Rules, art. III, §4.e.

20. *Coleman*, *supra* note 2 at 655 (emphasis original).
21. Rules Governing Admiss. to the Bar of Tex., Rule XV(d)(1).
22. See e.g., *Florida Bd. of Bar Examiners re H.H.S.*, 373 So.2d 890, 891 (Fla. 1979) ("In the bar admission process the burden is upon the applicant to demonstrate his or her good moral character. Although the burden of coming forward with evidence may shift, the burden of proof never does."). See also *Konigsberg v. State Bar of California*, 366 U.S. 36 (1960): "The burden of demonstrating good moral character is regularly placed upon the bar applicant." *Id.* at 41, fn 4 (citations omitted).
23. For a discussion of the rationale for a higher standard for bar applicants, see *Fraser v. West Virginia Bd. of Law Examiners*, 408 S.E. 2d 675, 680 (W. Va. 1991).
24. See *Florida Bd. of Bar Examiners re C.W.G.*, 617 So.2d 303, 305 (Fla. 1993) ("It should be noted that a rejection of admission to the bar is not the equivalent to disbarment. Upon a showing of rehabilitation, C.W.G. may reapply for admission after two years from the date of the board's adverse recommendation.").
25. See *Florida Bd. of Bar Examiners re L.K.D.*, 397 So.2d 673, 675 (Fla. 1981) ("The board was correct in noting that the standard of proof in a bar admission proceeding does not require the establishment of facts beyond and to the exclusion of every reasonable doubt, as required in the criminal proceedings.").
26. See e.g., *Florida Bd. of Bar Examiners re R.B.R.*, 609 So.2d 1302, 1304 (Fla. 1992); *Florida Board of Bar Examiners re J.A.F.*, 587 So.2d 1309, 1311 (Fla. 1991). On a range of evidential standards of proof, the competent and substantial evidence standard would fall between the preponderance of evidence standard and the clear and convincing evidence standard.
27. See *Florida Bd. of Bar Examiners re C.W.G.*, 617 So.2d 303, 305 (Fla. 1993); *Florida Bd. of Bar Examiners re R.D.L.*, 581 So.2d 27, 29 (Fla. 1991) ("[I]n a bar case, as in a civil case, facts may be proven by circumstantial evidence if the inference of the facts preponderates over other inferences.").
28. See *Florida Bd. of Bar Examiners re J.H.K.*, 581 So.2d 37, 39 (Fla. 1991) ("[T]he board was entitled to reject petitioner's version of the events.").
29. See also Rules Governing Admiss. to the Bar of Tex., Rule XV(d)(2)(3); N.J. Regulations Governing the Comm. on Character, Reg. 303:5; *Moity*, *supra* note 7 at 91. For a discussion of the different considerations of fair play involved in Florida's two-step (investigative and adjudicatory) hearing process, see *Florida Bd. of Bar Examiners re Interpretation of Article I, Section 14d*, 581 So.2d 895, 897 (Fla. 1991).
30. See e.g., N.J. Regulations Governing the Comm. on Character, Reg. 304:2; Fla. Sup. Ct. Bar Admiss. Rules, Art. III, §3.F.
31. For a discussion of the case law upholding the combination of investigative and adjudicatory functions, see *Parker*, "Procedural Due Process in Bar Admission Proceedings," 61 *The Bar Examiner* 15, 18 (1992).
32. *Id.*
33. *Schware*, *supra* note 1 at 248 (Frankfurter, J., concurring).
34. *In the Matter of Rogers*, 253 S.E. 2d 912, 917-918 (N.C. 1979).
35. *Id.* at 918.
36. *Florida Bd. of Bar Examiners re Interpretation of Article I, Section 14d*, 581 So.2d 895, 897 (Fla. 1991).
37. Application of *Burke*, *supra* note 5 at 172.
38. See e.g., Fla. Sup. Ct. Bar Admiss. Rules, art. III, §3.f.; Rules Governing Admiss. to the Bar of Tex., Rule XV(f).
39. Fla. Sup. Ct. Bar Admiss. Rules, art. I, §2.c.
40. *Amendment to the Rules of the Supreme Court*, 630 So.2d 576, 577 (Fla. 1994).
41. *Amendment to the Rules of the Supreme Court*, No. 85,058 (Fla., Petition filed Jan. 25, 1995).
42. *Willner*, *supra* note 8 at 106 (Goldberg, J., concurring).

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