

facts in the Michigan admissions cases, Mr. Ault has failed to rebut the principle, approved by seven of the nine justices of the U.S. Supreme Court, that diversity in higher education remains a compelling governmental interest.

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## Character and Fitness Review— Is the Process Fit?

To the Editor:

In his July 2003 column, the executive director defends the current licensing procedure and says it works well. I disagree. Based on just a few examples from recent litigation, which Mr. Berry fails to mention, it is apparent that the process has significant problems and that administrators, unfortunately, cling to practices that are illegal. We must assure the fitness of the licensing procedure.

No one disputes the goal of assuring the suitability of law school graduates for their future role as lawyers. One key function is serving as a critical buffer between the power of the state and the individual. *Johnson v City of Cincinnati*, 310 F3d 484, 498 (CA 6, 2002). Character fitness should not be a sieve through which administrators filter sharp or questioning personalities or views. Lawyers may be officers of the court, but they are not servant to it.

Administrative decision-making is subject to basic principles of fairness. Written and practical standards must both confine the exercise of administrative discretion and afford reasonable notice to applicants of disqualifying conduct. In addition, governmental decision-making at every level must abide by legal or constitutional limits.

My principal concern is that character-fitness review has been used to scrutinize lawful activities of applicants without any limiting principle (whether by statute, rule or practice) for administrative evaluation of the act itself. As a result, there is no place in the current process where decision-makers (whether State Bar staff, State Bar committee or Board of Law Examiners) ever consider if the scrutinized act is protected by law. Quite frankly, this practice has led to abuses.

And because fitness review is confidential, said to be for the "protection" of the applicant, there is no public record that exposes

the use of improper considerations. What is gleaned from the process arises indirectly, as noted below. The absence of published decisions protects current practice, not the applicants. Transparency should be a universal principle of governmental decision-making.

The tangible deficiencies in the current process have been exposed in a number of recent lawsuits in federal court. One, *Stephen Dean v Thomas Byerley*, U.S. District Court, Western District of Michigan, Case No. 5:01 cv-40, establishes the State Bar's illegal practice of using protected acts against applicants under the guise of "character." In defending comments allegedly made by regulation counsel Thomas Byerley to Stephen Dean, which threatened character rejection because Mr. Dean had picketed the State Bar building, or elsewhere, the State Bar asserted:

*Although an individual may have a constitutional right to engage in a certain activity under certain circumstances, the activity may constitute a basis on which an applicant is denied admission to the Bar. On occasion, Bar applicants have been denied admission for activity that is lawful, but that reflects poorly on the applicant's suitability to practice law.*

*The Bar has had several applicants who exercised free speech in a fashion that contributed to a recommendation of denial.*

Thus, the State Bar asserts that lawful acts may provide a reason for rejection of an applicant on character grounds, notwithstanding constitutional protection for the act.

The State Bar's position is illegitimate. There are well-established rules for administrative decision-making, which the State Bar chooses to ignore. One notable example comes from judicial disciplinary proceedings concerning Judge John Chmura.

Applying established First Amendment principles, the Michigan Supreme Court held that Judge Chmura could not be punished for campaign statements that had been characterized as racist despite the state of Michigan's very considerable interest in having "fit" judicial officers. *In re Chmura*, 461 Mich 517 (2000). Notably, the state was required to prove that the activity in question was unprotected, under a rigorous constitutional measure. *In re Chmura*, 464 Mich 58, 71-72 (2001). This is distinctly unlike the current licensing procedure, where the applicant car-

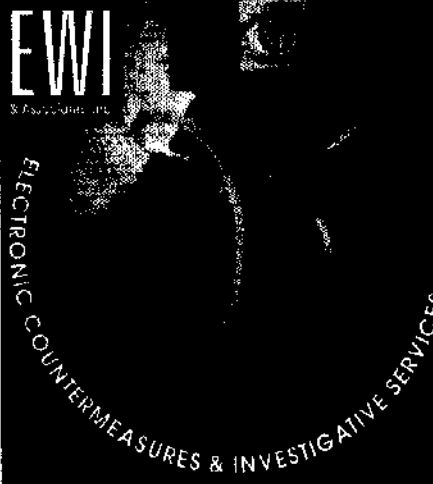
ries the burden whenever the State Bar says there is a problem with "character."

It is eminently clear that the state cannot use protected acts against an individual. In addition, the *Chmura* decisions say there are both substantive and procedural safeguards for any process of governmental decision-making, especially where the First Amendment is implicated. See also *Feiger v Michigan Attorney Grievance Commission*, 74 F3d 740, 747 (CA 6, 1996).

Yet, Mr. Berry's article avoids any statement about controlling legal limits and utterly fails in squaring the current licensing process with known legal parameters. Mr. Berry says that an applicant's "lack of candor" is the most common reason for rejection. But he offers no administrative practice for this determination, other than saying it exists.

The regulations themselves do not mention or define this deficiency or how it is determined. Nowhere is it stated as a standard of decision-making. In view of the State Bar's acknowledgment in the *Dean/Byerley* litigation, it is clear that applicants have been rejected for "candor" when the State Bar disagrees with the expression of an open and honestly held view. This is not fitness review. It is censorship or illegitimate paternalism at best. (There is a troubling Board of Law Examiners' memorandum from a few years ago suggesting that administrators rejected applicants merely because they did not like them.)

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Mr. Berry cannot cure the defects in the current process by referring to "abuse" or other claim of "egregious" behavior attributed to the applicant. Judge Chmura was not subject to discipline although the Judicial Tenure Commission felt it was warranted due to unseemly public behavior. Since the law protected his conduct, that was the end of the matter.

In contrast to Judge Chmura's situation, the Board of Law Examiners withheld character approval (acting on a recommendation from the State Bar) in the case of one applicant (Dennis Dubuc) because of his statements about a sitting judge. The Board of Law Examiners said those remarks were "of primary concern" to the licensing decision. Yet, the Board did not apply controlling First Amendment principles to Dubuc's statements, as set out by the *Chmura* decisions. (Dubuc's battle with the licensing authorities is reported in *Dubuc v Googasian*, \_\_\_ F3d \_\_\_; 2003 WL 22047344 (2003).)

Furthermore, Judge Chmura suffered no disability while litigating those important constitutional issues. That is markedly different from the State Bar's treatment of applicant, Frank Lawrence, Jr. His example shows that the "character" process has been grossly misused.

Lawrence's application was placed in administrative purgatory because he was involved in proceedings arising from his prosecution under a Bloomfield Township ordinance for interfering with a police officer. The State Bar refused to finalize his fitness evaluation even though prior administrative practice showed that such a simple ordinance charge (whatever its outcome) would not lead to "character" rejection. Nonetheless the State Bar refused to recommend certification of Mr. Lawrence, saying it had to await the final outcome of the ordinance violation.

The ordinance under which Lawrence was prosecuted seems overly broad or indefinite akin to disorderly conduct laws that fail basic due process. However, ex-State Bar president Thomas J. Ryan prosecuted the matter. Lawrence defended the charge and also challenged the ordinance in federal court, seeking monetary damages. After the local judge refused to dismiss the charges, Lawrence went to trial and was convicted. He appealed, and his appeal is pending (it has gone through a

number of procedural twists). Lawrence's federal action for damages is stayed pending the final outcome of the state prosecution.

Bloomfield Township said it would accept dismissal of Mr. Lawrence's civil lawsuit (the damages claim) in exchange for dismissal of the ordinance violation. Lawrence refused that quid pro quo, an equation that has the State Bar working with the township on a de facto basis.

Lawrence's application for membership in the State Bar is hostage to his legitimate fight for justice. The State Bar refuses to recognize that litigation *with* government is protected by the First Amendment, under both the Speech and Petition Clauses. Facing continued deferral of his application, Lawrence sued the State Bar (and others) over its refusal to

**“The State Bar’s practice in “character” review has been to take as much latitude as possible, despite known controlling legal limits.”**

process his application. That lawsuit is pending in federal court in the Western District of Michigan. It seeks to adjudicate the State Bar's use of an applicant's lawful acts to assessment of character-fitness.

It is apparent that Lawrence's lawsuit has legitimate grounds substantively, as demonstrated by the State Bar's comments in the *Dean/Byerley* litigation, noted above, and by the procedural history of his own licensing attempt. It is procedurally proper since one may challenge a defect of "process" without exhausting administrative proceedings or receiving a final decision. *Bowers v Flint*, 325 F3d 758, 762 (CA 6, 2003).

These examples illustrate the State Bar's practice in "character" review has been to take as much latitude as possible, despite known and controlling legal limits.

Those responsible for character-review must do one thing first. They must acknowl-

edge that the law applies to their *own* acts during the review process. The State Bar's avowed position—expressed in court papers—is that it is above the law. Such a viewpoint is hardly good public policy.

Of further significance is the fact that the State Bar's litigation statements have not been forthcoming. The State Bar led one federal court (Judge Nancy Edmunds) to believe that it did not consider First Amendment activities. Yet, its expressed position in the *Dean/Byerley* litigation was exactly the contrary, as quoted above.

The State Bar did not tell Judge Edmunds that it rejected applicants because of First Amendment activities. Rather, it shaped its arguments to further its procedural position in order to gain dismissal on non-meritorious grounds, i.e., that plaintiffs lacked standing and the lawsuit was not ripe for judicial review. The Sixth Circuit, unfortunately, affirmed Judge Edmunds in a brief unpublished opinion (*RoelDoe v State Bar of Michigan*, 2003 WL 219491187), repeating her wrongly induced finding that the State Bar does not scrutinize First Amendment activities. ("[P]laintiffs lack standing to challenge the statute because they failed to demonstrate a realistic danger that the statute will be applied so as to compromise their First Amendment rights.") Unfortunately, counsel—the undersigned—did not know of the State Bar's litigation comments in the *Dean/Byerley* lawsuit until afterwards.

The State Bar is entitled to advance its interests zealously. I suggest, however, that the State Bar's foremost responsibility is fidelity to the law, not preservation of administrative latitude. There is much to be gained by self-examination and the State Bar's governors need to examine a great deal. What do commissioners or members of the Representative Assembly know of these lawsuits and the State Bar's positions and administrative practices?

I also suggest that someone outside the present embattled lawsuit circumstances take a look at Frank Lawrence's situation and do the right thing. It is neither fair nor right that lawyers are stopping a person from becoming a lawyer because of a legitimate choice to fight for legal principle. The State Bar should not be used as a lever to extract a lawsuit settlement.

Equal access to justice applies to those who *seek* to become lawyers, as well as to lawyers who are sitting judges or important politicians. (Mr. Ryan, the prosecutor of Frank Lawrence, represents a well-known lawyer and elected official recently charged with dangerous public behavior. The disciplinary authorities have not questioned the fitness of Mr. Ryan's client and he continues to serve in an important governmental role. I do not quarrel with that circumstance, but simply note the disparity with Frank Lawrence's situation.)

What bar-applicants have now is neither equality nor justice. In addition, the public is not served by shrouded decision-making that preserves bureaucratic latitude at the price of constitutional principles.

Deemed public necessity and constitutional rights are frequently at odds. The State Bar of Michigan should be a leading advocate of constitutional principles, even where

its own prerogatives are at issue. Unfortunately, the State Bar has used its considerable state power to injure, rather than honor, basic constitutional guarantees.

The *Dubuc* lawsuit, to which I referred earlier, was remanded by the Sixth Circuit for further proceedings, overruling Mr. Berry's argument that he could not be sued over State Bar licensing practices claimed to be unconstitutional. As counsel for Mr. Dubuc I was pleased in that result, but dismayed that it took a trip to Cincinnati to get recognition of basic legal principles. State officials are not above the law. See *Republican Party of Minnesota v White*, 536 US 765, 122 S Ct 2528, 153 L. Ed. 2d 694 (2002), *Glassroth v Moore*, \_\_\_ F3d \_\_\_; 2003 WL 21499258 (CA 11, 2003), or *Spargo v New York State Com'n on Judicial Conduct*, 244 F Supp 2d 72 (ND NY, 2003).

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## From the Editor:

*Strict confidentiality rules imposed by the Michigan Supreme Court make it impossible to respond to these specific disagreements on how the State Bar is conducting its character and fitness reviews. The Bar takes its responsibility to screen the character and fitness of every applicant to the Bar very seriously. If the Bar is to protect the public from individuals who lack the requisite character and fitness to practice law in this state, it must diligently and professionally investigate all applications received. It is understood that some applicants find this process intrusive or unnecessary. It is noteworthy, however, that no court has found that the State Bar's character and fitness process violates anyone's constitutional rights.*

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