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NOTES

CONSTITUTIONAL LAW—The Right to a Jury Trial in Disbarment Proceedings

Lawyers in the United States have long been considered officers of the court, subject to examination for good moral character and adequate education in law before admission to the bar.[1] They have also been subject to summary proceedings for disbarment whenever they have deviated from accepted standards of conduct[2] embodied in various codes of professional ethics.[3] Although the specific grounds for disbarment vary from state to state and between federal and state courts,[4] one thing is clear: in the absence of a specific statutory provision[5] there traditionally has been no right to a jury trial in disbarment proceedings.[6] Since the requirements of due process are currently undergoing re-examination, and since this particular question has arisen in a number of recent cases,[7] this Note shall examine the traditional policy in light of recent Supreme Court decisions.

Due process of law is essentially a dynamic concept, tailored to the individual type of proceeding to which it is applied.[8] It is not only a limitation on the federal government through the fifth amendment, but also on the various state governments through the fourteenth amendment. The essence of the due process clause in each of these amendments is that it protects the individual from arbitrary action, both substantive and procedural, by the executive, legislative, and judicial branches of government.[9] The other provisions of the Bill of Rights give the individual in federal courts further procedural safeguards in addition to the minimum requirements of the fifth amendment. Those procedural guarantees of the Bill of Rights which the Supreme Court has deemed necessary to attain a level of fundamental fairness have been selectively incor-

1. *See* Green, *The Court's Power over Admission and Disbarment*, 4 TEXAS L. REV. 1 (1925).

2. *See* H. DRINKER, LEGAL ETHICS 21-55 (1953); Potts, *Disbarment Procedure*, 24 TEXAS L. REV. 161 (1946).

3. For an excellent compilation of the state statutes concerning disbarment, see Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039 (1952).

4. For a discussion of federal disbarment procedure, see *In re* Isserman, 345 U.S. 286, 287 (1953).

5. A jury trial is provided in disbarment proceedings by statute in Georgia [GA. CODE ANN. § 9-513 (1935)], North Carolina [N.C. GEN. STAT. ANN. § 84-28(3)(d) (1965)], and Texas [TEX. REV. CIV. STAT. ANN. art. 316 (1959)].

6. Potts, *Trial by Jury in Disbarment Proceedings*, 11 TEXAS L. REV. 28, 38 (1932).

7. *See, e.g., In re* Griffith, 219 S.2d 357 (Ala. 1969).

8. Hannah v. Lerche, 363 U.S. 420 (1960); Ballard v. Hunter, 204 U.S. 241 (1907).

9. *See* Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORNELL L.Q. 467 (1966).

porated into the due process clause of the fourteenth amendment and are protected against abridgment by the states.[10]

To determine what constitutes due process of law in any given case, one must first determine the essential nature of the proceeding involved in light of the sanction which is its end.[11] In examining the question whether trial by jury should be extended to disbarment proceedings, the approach required depends on whether such proceedings are characterized as criminal or as regulatory and hence, noncriminal. If disbarment is criminal, those provisions of the Bill of Rights which pertain to criminal proceedings must be observed in federal courts, and those which have been incorporated into the fourteenth amendment must be observed in state proceedings. In noncriminal cases in which there may be a deprivation of life, liberty, or property, the individual is entitled by the fifth and fourteenth amendments only to notice of the proceedings against him and to a hearing that is basically fair.[12]

However, the determination of the precise nature of disbarment proceedings is not without difficulty. They have traditionally been classified as civil proceedings,[13] but courts are by no means unanimous in adopting this characterization. In fact, in a recent Supreme Court decision, *In re Ruffalo*,[14] the proceeding was characterized as quasi-criminal for purposes of procedural due process.

The Court in *Ruffalo* held that a defendant in disbarment proceedings is entitled to fair notice of the charges against him,[15] and

10. Those rights which have been incorporated are the rights of religion, speech, press, assembly, and petition embodied in the first amendment [Malloy v. Hogan, 378 U.S. 1, 5 n.4 (1964); Fiske v. Kansas, 274 U.S. 380 (1927)]; the fourth amendment rights to be free from unreasonable searches and seizures [Elkins v. United States, 364 U.S. 206 (1960)], and to have excluded from criminal trials any evidence illegally seized [Mapp v. Ohio, 367 U.S. 643 (1961)]; the privilege against self-incrimination [Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609, 615 (1965)]; the sixth amendment rights to counsel [Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932)], to a speedy and public trial [Klopfer v. North Carolina, 386 U.S. 213 (1967); *In re* Oliver, 333 U.S. 257 (1948)], to a jury trial in criminal cases [Duncan v. Louisiana, 391 U.S. 145 (1968)], to an impartial jury if one is required [Irvin v. Dowd, 366 U.S. 717 (1961)], to compulsory process for obtaining witnesses [Washington v. Texas, 388 U.S. 14 (1967)], and to confrontation of witnesses [Pointer v. Texas, 380 U.S. 400 (1965)]; and the eighth amendment right to be free from the imposition of cruel and unusual punishment [Robinson v. California, 370 U.S. 660 (1962)].

11. Due process in criminal cases differs from that in civil cases because some guarantees of the Bill of Rights relate only to criminal cases and some only to civil cases. *See* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1063 (1968).

12. *See* Shaughnessy v. United States, 345 U.S. 206, 228 (1953) (Justice Jackson, dissenting).

13. *See, e.g., Ex parte* Wall, 107 U.S. 265 (1882).

14. 390 U.S. 544 (1968).

15. The *Ruffalo* case involved the disbarment of an attorney in a federal court after he had already been disbarred by a state court proceeding. The Court noted that the eventual grounds relied upon for disbarment were not included in the original charges against Ruffalo, but were added after he had given considerable testimony at his hear-

that holding is undoubtedly sound. But it is Justice Douglas' reasoning in reaching this conclusion that is significant. Douglas viewed disbarment as punishment and consequently classified disbarment proceedings as "adversary proceedings of a quasi-criminal nature."[16] Manifestly, such a characterization is not essential to the holding since fair notice is a threshold requirement of due process even in civil cases. Nevertheless, the dictum may represent a tendency of at least a segment of the Court to emphasize the criminal aspects of disbarment. Such an emphasis departs from the traditional view of disbarment,[17] but it is not without support in reason and precedent.

In *Ruffalo*, Douglas cited *Ex parte Garland*[18] for the proposition that disbarment is punishment. The latter case arose during Reconstruction when Congress passed a law requiring lawyers to take an oath disclaiming disloyal activities before they could be admitted to the federal bar. The Court in that case held that the statute was a bill of attainder and an ex post facto law. Since the proscription of bills of attainder and ex post facto provisions applies only to criminal sanctions,[19] Justice Field, to reach this conclusion, had to recognize the criminal aspect of disbarring a lawyer for reasons unconnected with his fitness to practice. Recognition that disbarment can be a criminal sanction,[20] even though it does not involve a fine or imprisonment, supports the conclusion that disbarment proceedings are basically criminal.[21]

The view that disbarment is in fact a criminal sanction may be supported by noting the similarity between disbarment and criminal contempt. Like disbarment, criminal contempt is a disciplinary tool of the bench which serves the combined object of preserving the dignity of the courts and punishing those who affront the courts. Since the same action can constitute both contempt and grounds

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ing. The Court reasoned that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

16. 390 U.S. at 551.

17. *See* note 13 *supra*.

18. 71 U.S. (4 Wall.) 333 (1867).

19. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 595 (1952).

20. *But see, e.g.*, Dent v. West Virginia, 129 U.S. 114 (1889).

21. Douglas also cited Spevack v. Klein, 385 U.S. 511 (1967), for the proposition that disbarment is punishment. *Spevack* held that a lawyer may invoke the fifth amendment privilege against self-incrimination in disbarment proceedings without being disbarred for so doing. Although that privilege by its terms applies only to criminal cases, it has been extended to civil cases, the evidence from which may be used in a later criminal proceeding. *Spevack*, however, seems to proceed from the assumption that disbarment as a sanction is too serious to impose on a lawyer for invoking the privilege. Hence, it is not clear whether the Court views disbarment as a quasi-criminal sanction and disbarment proceedings as criminal in nature, or whether it is merely delving into a "liberal construction" of the privilege against self-incrimination beyond its terms. 385 U.S. at 516.

for disbarment, it might be argued that they are really alternative sanctions of the same basic nature, that is, criminal.[22] It may also be observed that disbarment fulfills the retribution and deterrence[23] goals of the criminal law, although its rehabilitative effectiveness is as suspect as that of a prison term. Also worth noting in this regard is the fact that even some of those courts which view disbarment as essentially civil have characterized it as criminal to control the quantum of evidence needed for disbarment[24] or to construe the disbarment statutes.[25]

The ramifications of emphasizing the criminal aspects of disbarment proceedings are apparent. Once a proceeding is denominated criminal, it is not only governed by the threshold considerations of due process, but also by the other procedural safeguards of the Bill of Rights which relate to criminal proceedings. Among those safeguards is the right to trial by jury. However, whether that right applies to disbarment proceedings is dependent not only upon whether the Supreme Court chooses to define disbarment proceedings as criminal or quasi-criminal, but also upon the application of certain other traditional tests.

Although the language of the sixth amendment is inclusive, extending to "all criminal prosecutions," it has never been applied literally.[26] Since the adoption of the Constitution, the language has always been read with reference to colonial and common-law experience.[27] Those cases which required a jury trial, and those which did not, came to be loosely defined as "serious" and "petty" offenses respectively.[28] The basic test for determining whether a case is "serious" so as to require a jury trial was developed in *District of Columbia v. Clawans.*[29] Three factors are considered under the *Clawans* test; and if any one is found to exist, trial by jury is required. First, the moral nature of the offense in light of contemporary societal norms is examined to determine whether the community views the act as serious. Second, if a jury trial was required at common law, it is also required under the sixth amendment. Finally, even if the offense is found not to warrant a jury trial

22. The Supreme Court of the United States has stated that criminal contempt is a crime in every essential respect. Bloom v. Illinois, 391 U.S. 194, 201 (1968). The Court held that, due to the severity of the penalty imposed in that case (twenty-four months imprisonment), a jury trial was constitutionally required. 391 U.S. at 211.

23. *See* Lantz v. State Bar of California, 212 Cal. 213, 220 (1931).

24. *In re* Thatcher, 190 F. 969, 976 (N.D. Ohio 1911).

25. *In re* Donegan, 282 N.Y. 285, 26 N.E.2d 260 (1940).

26. *See* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

27. *Id.* at 921-22.

28. *Id.* at 969.

29. 300 U.S. 617 (1937).

under the first two tests, trial by jury may be required if the penalty is severe.

In recent years, however, several cases appear to indicate that the Court is emphasizing the third phase of the *Clawans* test to the exclusion of the other two phases.[30] This tendency has been especially marked in criminal contempt cases. But although those cases seem to focus on the allowable or actually imposed penalty as a mechanical line between serious and petty offenses, the Court has continued at least to acknowledge the validity of the other phases of the *Clawans* test.[31] The Court's approach has been to treat criminal contempt as a monolithic genre of offenses classified as petty under the community standards phase of the *Clawans* test.[32] Thus the determination of whether a jury trial is required depends upon the severity of the penalty. Since there are no statutory penalties for contempt, this crucial determination cannot be made until a penalty is actually prescribed by the judge. A more fruitful approach would be to recognize that the range of conduct which may constitute criminal contempt extends from that which is morally innocuous to that which shocks the moral sense.[33] Then the Court could make a prospective determination by applying the community standards phase of the *Clawans* test to the particular conduct which constitutes the contempt.[34]

In attempting to apply the community standards test to disbarment cases, a problem arises which is similar to that of the criminal contempt cases: a variety of different types of conduct can constitute grounds for disbarment.[35] While it is not fruitful to generalize about the scope of the various state provisions for disciplining attorneys, it is possible to discern the general philosophy behind the statutes and court rules governing the conduct of lawyers. As one commentator has stated, "attorneys are rightfully expected to maintain a standard of ethics and moral integrity somewhat higher than that demanded of other groups in the society. It is a concomitant of their status as officers of the court and the fact that to them are entrusted people's lives and fortunes."[36] Thus, lawyers are disciplined for breaching the high level of trust commensurate with their

30. *See* Frank v. United States, 395 U.S. 147 (1969); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

31. *See* Frank v. United States, 395 U.S. 147 (1969); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

32. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966).

33. Conduct constituting contempt runs the gamut from filing a baseless complaint [Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955)] to assaulting a judge [Turquette v. State, 174 Ark. 875, 298 S.W. 15 (1927)].

34. *Cf.* District of Columbia v. Colts, 282 U.S. 63 (1930).

35. *See* Note, *supra* note 3.

36. Note, *supra* note 3, at 1048.

position. Yet it is only the most serious cases of departure from statutory norms which will result in disbarment. Normally a lawyer will be disbarred only for aggravated or oft-repeated misconduct which shows an incapacity to live up to his position of trust.[37] For lesser offenses merely a reprimand or suspension is the usual penalty. Furthermore, it is significant that those purely criminal acts which warrant disbarment are generally the type of crimes for which a jury trial is required. Most state statutes imposing disbarment for the commission of a crime not related to an attorney's professional status differentiate between felonies and misdemeanors such that a lawyer will be disbarred only for commission of a felony or a misdemeanor involving moral turpitude. Petty offenses which do not require a jury trial are not normally grounds for disbarment.[38]

Thus, since it is clear that disbarment is imposed only for extremely serious misconduct,[39] acts constituting disbarment seem to satisfy the first phase of the *Clawans* test as acts of a serious moral nature requiring a jury trial under the sixth amendment. It does not appear that disbarment proceedings fall within the other two phases of the test as the Court now applies them. Clearly, disbarment did not require a jury trial at common law.[40] Also, since disbarment does not involve a term of imprisonment as the sanction, the approach of the Court in recent cases, which classifies crimes as serious solely on the basis of the term of imprisonment allowable or actually imposed,[41] would not include disbarment as a serious penalty warranting a jury trial.

Under the foregoing analysis, the conclusion that the attorney-defendant should be assured the right to a jury trial in disbarment proceedings depends upon a characterization of the proceedings as basically criminal in nature. This view, while supportable, has some obvious shortcomings. Disbarment proceedings may also be described as having a regulatory rather than a punitive goal. Yet to determine on that basis alone that a jury trial is not required in disbarment proceedings would be to ignore the threshold requirements of due process which must be met in any case in which an individual may be deprived of life, liberty, or property.

Punishment can take several distinct forms—primarily those of compensation, regulation, criminal sanction, or treatment.[42] Disbarment as a punishment can be classified according to these forms. Clearly it is not a compensatory sanction like the normal civil suit

37. H. DRINKER, *supra* note 2, at 47.

38. *See* Note, *supra* note 3, at 1049.

39. *See In re* Cahill, 66 N.J. Law 527 (1901).

40. *Ex parte* Thompson, 228 Ala. 113, 152 S. 229 (1933); Potts, *supra* note 6, at 36.

41. *See* Frank v. United States, 395 U.S. 147 (1969); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

42. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION chs. 1-2, at 9-34 (1968).

for damages, nor is it treatment like civil commitment. Disbarment as punishment, then, must be criminal or regulatory. Manifestly, like most forms of punishment, it has elements of both types of sanction. But by focusing on the purpose of the sanction, rather than on its effect, disbarment may be seen as essentially regulatory.[43] Like the revocation of any other license, disbarment serves to maintain professional standards. Of course, unlike the revocation of other professional licenses, which is a function of the police power of the legislature, disbarment is intrinsically a judicial function because lawyers are officers of the courts. While this distinction may be important in other senses,[44] it does not appear to affect the basic regulatory nature of disbarment proceedings. Nor does the severity of the sanction change the essential purpose of the proceeding. In determining the nature of a proceeding, it is the nature of the sanction, not its severity, which controls.[45]

If disbarment proceedings are viewed as primarily for the purpose of regulating the standards of the legal profession for the protection of the public, the procedural due process requirements for disbarment cannot be determined by reference to criminal procedure. Rather, threshold considerations of procedural due process must govern the analysis: the lawyer must have fair notice of the proceedings against him, he must be given a hearing and opportunity for explanation and defense, and the proceeding must be basically fair and just to the accused.[46] Apart from these requirements, any specific formal procedures may be adapted to the particular needs of the case.[47]

It is difficult to generalize about disbarment procedure since it varies from state to state.[48] It is universally recognized that disbarment can be effected by judicial action only.[49] This means that a court with jurisdiction must enter the order of disbarment.[50] But many states have procedures whereby grievance committees for local bar associations make preliminary findings and submit them to the court which then rules on the evidence so obtained.[51] In other states the disbarment is handled in a regular court proceeding.[52] Whatever the precise procedure in any given state may be, the basic

43. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 182 (1963).

44. *See* text accompanying note 58 *infra*.

45. *See, e.g.*, H. PACKER, *supra* note 42, at 251-56.

46. *See* text accompanying note 11 *supra*.

47. *See, e.g.*, *In re* Griffith, 219 S.2d 357 (Ala. 1969).

48. *See* Potts, *supra* note 2, at 179.

49. *See, e.g.*, People *ex rel.* Illinois State Bar Assn. v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931). *See also* Potts, *supra* note 6, at 44.

50. *See* H. DRINKER, *supra* note 2, at 11-51; Potts, *supra* note 2.

51. H. DRINKER, *supra* note 2, at 35.

52. *Id.*

outline of the disbarment proceeding—from the initial commission of the alleged offense to the actual striking from the roles—is the same. An attorney commits an offense against the legal-judicial system directly, or he commits an offense not related to his practice of law, but which if proved would tend to cast disgrace upon the profession and the courts. Charges of the offense are then brought to the court or to the local bar association. Notice of the charges is forwarded to the accused. He is then afforded a hearing either in court or before a bar association grievance committee which submits findings to the court. A court then rules on the evidence and, if it is necessary, orders the disbarment. Appeal is universally allowed to the highest court of the state.

One thing is at once apparent about the pattern of the disbarment procedure from beginning to end: the adjudication of the case is always in the hands of parties who may be interested. It is not unreasonable to presume that judges and lawyers are interested parties in disbarment proceedings, for they have an interest in preserving the good reputation of the legal system. This interest may cause them to be unduly harsh toward attorneys accused of misconduct. On the other hand, in some cases, attorneys may be unduly lenient to their delinquent brethren. Clearly, political factors may exert an influence on bench and bar in disciplining its own members. Probably the most forceful current danger of bias lies in having lawyers or judges of one philosophical view have an unrestrained hand in disciplining lawyers of another view. The possibilities for abuse are obvious and have long been recognized by the courts.[53] It is questionable whether "discretion" is a sufficient safeguard to balance against the manifest possibilities for abuse.

At no time in the disbarment procedure are the facts ascertained by a clearly impartial tribunal. Rather, lawyers and judges control the entire fact-finding, adjudicatory, and reviewing process. In a practical sense, this system allows the injured parties—namely, the bench and bar—to sit in judgment of an accused attorney at all stages of the proceeding. This fact raises doubts as to the fundamental fairness of the procedure, since impartiality of the adjudicating tribunal is an essential element of fairness to the accused.[54]

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53. It has long been recognized that both contempt proceedings and disbarment proceedings by their summary character can be convenient vehicles for the bar and bench to deal with lawyers who champion unpopular causes. Frequently judges warn that the most careful discretion must be used because this summary power of punishment is so great. *See* Cohen v. Hurley, 366 U.S. 117, 148 (1961) (Justice Black, dissenting); Sacher v. United States, 343 U.S. 1, 22-23 (1952) (Justice Black, dissenting); *Ex parte* Wall, 107 U.S. 265, 317 (1882) (Justice Field, dissenting). *See also* Wall St. J., April 28, 1969, at 1, col. 1.

54. The Supreme Court has recognized that there are some elements to an essentially "fair trial" which are not enumerated in the Bill of Rights. *See* Ratner, *supra* note 11, at 1064.

Although in most cases involving revocation of licenses mere resort to the courts will afford a fair procedure, disbarment proceedings require another finder of fact, the jury, in order to guarantee the accused an impartial hearing.[55]

The suggestion of injecting the institution of the jury into disbarment proceedings to insure the accused some modicum of fundamental fairness is no doubt a novel one. Disbarment proceedings have traditionally been summary in nature.[56] But an unfair practice should not be sanctified by custom and usage.[57]

An obvious objection to the proposal of extending a jury trial to disbarment cases arises from the recognition that the revocation of other professional licenses is normally handled by administrative boards composed of members of the accused's profession. These board members may also be presumed to be interested parties. But there is universally in these cases the right of review in the courts, and it appears that this right is probably of constitutional dimensions.[58] When a doctor or an accountant appeals the loss of his license to the courts, he invokes an impartial tribunal to determine his rights. On the other hand, when a lawyer appeals his disbarment, the appellate tribunal can still not be presumed to be completely impartial. Consequently, in disbarment cases a jury trial should be required in order to assure some objectivity in the proceedings.[59] This distinction between disbarment and the revocation of other professional licenses is consistent with the theory that due process requirements may be adapted to the nature of the particular proceeding involved. That distinction would also seem to permit the use of the jury as fact finder in disbarment cases and not in other license cases without violating the requirements of the equal protection clause. Thus it is possible to avoid the practical problem of extending the requirement of trial by jury to all administrative proceedings involving revocation of licenses.

The right to jury trial could be extended to disbarment proceedings by either of two approaches. Disbarment might be treated as essentially criminal in nature and therefore covered by the sixth amendment. Such a characterization is supportable, but it might be argued that to treat disbarment as criminal mistakes the basic nature of the proceedings, which is regulatory rather than criminal. How-

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55. *But see* McVicar v. State Bd. of Law Examiners, 6 F.2d 33 (W.D. Wash. 1925).

56. *See* H. DRINKER, *supra* note 2, at 11-51; Potts, *supra* note 2.

57. *See* note 22 *supra*.

58. *See* Jaffe, *The Right to Judicial Review* (pt. I), 71 HARV. L. REV. 401 (1958); Jaffe, *The Right to Judicial Review* (pt. II), 71 HARV. L. REV. 769, 795 (1958).

59. *See, e.g.*, St. Joseph Stock Yards v. United States, 298 U.S. 38, 73 (1936) (Justice Brandeis, concurring).

ever, in the event that disbarment were treated as regulatory, the right to jury trial might still be extended by a fundamental-fairness approach. Whether either approach is accepted in reconsidering the traditional absence of jury trials in disbarment proceedings, it is at least clear that some reconsideration of the problems of ensuring justice for an attorney accused of misconduct is in order.