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Constitutional Law--Due Process of Law in State Disbarment Proceedings

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CONSTITUTIONAL LAW — DUE PROCESS OF LAW IN STATE DISBARMENT PROCEEDINGS

Introduction

Throughout the history of our legal system, the courts have possessed inherent and summary jurisdiction over members of the bar.[1] Included in this jurisdiction is the power to summarily discipline an attorney by disbarment. Two recent cases serve to emphasize the problems of due process involved in these proceedings.

In *Cohen v. Hurley*[2] the accused attorney, relying on his state privilege against self-incrimination, refused to answer material questions relating to his alleged professional misconduct. The issue arose in the context of an "ambulance chasing" inquiry by the court. Affirming the New York Court's order of disbarment, the Supreme Court held that the fourteenth amendment did not prevent the state from disbarring an attorney for his refusal to answer questions as to the propriety of his professional conduct. This result was reached even though the attorney's refusal rested upon a valid claim of a privilege against self-incrimination. In the opinion, the majority implicitly approved of the summary procedures used in the disbarment area. However, the language of the dissenting opinion makes it apparent that the fairness of these procedures is an extremely difficult and close legal question.[3]

The Supreme Court of Pennsylvania in *In re Schlesinger*[4] took a dimmer view of summary disbarment procedures. Schlesinger, the accused, was charged with violating his oath as an attorney by being a member of the Communist Party. According to statute, the Committee on Offenses of the Court of Common Pleas appointed a Subcommittee of three of its own members to hear argument on the motion to dismiss the complaint and to make a report to the Committee. After a hearing that spanned several years the Subcommittee recommended that Schlesinger be disbarred. The court adopted the recommendation and entered an order disbarring Schlesinger. On appeal to the Supreme Court of the state the order of disbarment was reversed and the case remanded with directions to dismiss the complaint. The court held that the proceeding violated the requirements of "due process in that the respondent was not afforded the full, fair and impartial hearing to which he was entitled."[5] The hearing was deemed defective because "The functions of prosecutor, judge and jury were combined in one body, namely, the Committee on Offenses. . . . "[6] That Committee filed the complaint, prosecuted the defendant, and through its Subcommittee, adjudicated the charge of unprofessional conduct. The Court of Common Pleas, without any hearing of witnesses, entered the final order of disbarment. Because this procedure provided no protection against biased conduct, the Pennsylvania Supreme Court considered it a violation of a basic due process requirement — namely, a fair trial in a fair tribunal.

The language of the majority in *Schlesinger* is parallel to the dissent in *Cohen,* in that both opinions cast a disapproving eye on the utilization of summary disbarment procedures. An example of this disapproval is seen in *Schlesinger* where the court, contrary to the traditional view that disbarment actions are not criminal and are not for the purpose of punishment,[7] stated that, "A disbarment proceeding is every bit as serious as a criminal trial and often far more so. . . . "[8]

1 *Ex parte* Wall, 107 U.S. 265, 274 (1882).
2 Cohen v. Hurley, 366 U.S. 117 (1961).
3 *Id.*, Black, Douglas, Brennan and Warren dissenting.
4 *In re* Schlesinger, 172 A.2d 835, 840 (Pa. 1961).
5 *Id.* at 840.
6 *Ibid.*
7 *Ex parte* Wall, 107 U.S. 265, 274 (1882).
8 *In re* Schlesinger, 172 A.2d 835, 848 (Pa. 1961).

The objective of this note is to ascertain, as far as possible, the constitutional limitations imposed by due process of law upon the procedures used in disbarment actions.

Historical Analysis of Disbarment Proceedings

It is commonplace for present-day courts to justify their powers of discipline over attorneys by referring back to the practices of the early English courts. For centuries, English and American courts have exerted disciplinary powers over members of the bar. This power has been deemed an incident of the courts' "broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied."[9]

An early Massachusetts tribunal made the following observation concerning the history of disbarment cases:

> [A]t common law an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment or information was ever necessary as the foundation of such proceedings.[10]

As we have seen in *Cohen* and *Schlesinger,* an argument can be made that some aspects of the summary procedures used in this area are contrary to the due process clause of the fourteenth amendment. It seems of utmost importance to note that a similar provision for due process of law existed in English jurisprudence from at least the year 1215, and that despite this principle, summary disbarment procedures flourished.[11] In 1215, King John, in the face of baronial resistance and demands, agreed to and executed Magna Carta.[12] The document provided in part that:

> No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.[13]

Commenting on these exact words of the Great Charter, an eminent English historian wrote that,

> This did not guarantee trial by jury, as is so often asserted, because trial by jury did not become the common procedure in criminal cases until the reign of Henry III; but it did provide that a freeman should not be deprived of life, liberty, or property without judgment by his social equals, obtained by the mode of trial customarily employed to determine innocence or guilt in the kind of case in question. *The clause has almost the same value as the clause in the fifth amendment to the Constitution of the United States which forbids that any person "be deprived of life, liberty, or property, without due process of law."*[14]

Two interesting and contrary interpretations of the relevant historical material presented themselves in *Cohen.* The interpretation given by the majority of the Court, *i.e.,* that historical precedent prevails in this area, appears to be the view taken by most American courts. The *Cohen* majority stated that,

> Of course it is not alone the early beginning of the practice of judicial inquiry into attorney practices which is significant . . . rather it is the long life of that mode of procedure which bears upon that issue, in much the same way that a strong consensus of views in the States is relevant to a finding of fundamental unfairness. What is significant is that the *practice* we are now concerned with has survived the centuries which have seen the fall of all those iniquitous *standards* of which we are reminded, and which, incidentally, would be equally unconstitutional today if applied after a full criminal-type investigation and trial.[15]

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9 Cohen v. Hurley, 366 U.S. 117, 123-24 (1961).
10 Samuel H. Randall, 93 Mass. (11 Allen) 473, 479 (1865).
11 People v. Culkin, 248 N.Y. 465, 162 N.E. 487, 490 (1928).
12 DOWLING, CASES ON CONSTITUTIONAL LAW 26 (5th ed. 1954).
13 *Id.* at 27.
14 LUNT, HISTORY OF ENGLAND 138 (4th ed. 1928) (Emphasis added).
15 Cohen v. Hurley, 366 U.S. 117 (1961).

The long life of the precedents involved failed to impress the dissenters in *Cohen* who argued that such precedents were unreasonable and therefore should be overturned. In his dissenting opinion, Mr. Justice Black made the following observation,

> When the Founders of this Nation drew up our Constitution, they were uneasily aware of this English practice. . . .
>
> Unlike the majority today, however, the Founders were singularly unimpressed by the long history of such English practices. They drew up a Constitution with provisions that were intended to preclude for all time in this country the practice of making "short shrift" of anyone — whether he be lawyer, doctor, plumber or thief.[16]

Modern Disbarment Procedures

In the case of *In re Isserman*[17] the Supreme Court reaffirmed the historical competence of the courts in this field. In *Isserman* it was noted that "there is a right in the Court to protect itself, and hence society, as an instrument of justice."[18] This disciplinary power of the courts is well established in our legal system.[19]

The rationale of this power seems to be primarily based upon the unique relationship existing between the court and the advocate. The attorney is considered to be a servant of the court. The courts, working through their servants, strive to further the cause of justice. When the court's servant manifests a want of fidelity to this cause, the court has a duty to protect society by disciplining him.[20]

The goal sought in the exercise of this power is the protection of the courts of justice from undesirable persons.[21] This goal or purpose has its roots firmly imbedded in our Anglo-American legal history. In addressing the question of the purpose of these proceedings, the Court in *Ex parte Wall* quoted Lord Mansfield as saying,

> The question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the courts in such cases exercise their discretion, whether a man who they have formerly admitted is a proper person to be continued on the roll or not.[22]

A somewhat different contention is that disbarment is punishment, notwithstanding the fact that one of its objectives is the preservation of the courts and the protection of society. "It would be idle to say that it was not punishment to take from a man his means of livelihood, and at the same time discredit and disgrace him."[23]

As we have seen, a court authorized to admit an attorney to practice has the inherent jurisdiction[24] to disbar him. Such power has been held to be independent of constitutional or statutory provisions.[25] In jurisdictions where this power is regulated by statute, it is stated that the power would exist even in the absence of such a statute.[26]

Courts are the only authorities considered to possess the power to disbar an

16 *Id.* at 140-41.
17 345 U.S. 286 (1953).
18 *Id.* at 289.
19 *In re* Isserman, 345 U.S. 286 (1953); *Ex parte* Wall, 107 U.S. 265 (1882); People v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).
20 *Ex parte* Wall, 107 U.S. 265, 274 (1882). "We are to see that the officers of the court are proper persons to be trusted by the court with regard to the interests of suitors. . . ." *Id.* at 280.
21 *Id.* at 288.
22 *Id.* at 273.
23 Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948, 955 (1915).
24 Hertz v. United States, 18 F.2d 52 (8th Cir. 1927).
25 Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871).
26 *In re* Gorsuch, 113 Kan. 380, 214 Pac. 794, 796 (1923).

attorney. Bar associations do not possess and cannot be granted the power to disbar, although they are generally given the power to investigate the charges against accused attorneys.[27] In *In re Bruen*[28] a state statute giving the board of law examiners the power to hear and determine disbarment actions was held unconstitutional. The court noted that such power was inherently judicial and that the statute created a judicial tribunal in violation of the Constitution of the state of Washington. Federal agencies have certain disciplinary powers, however, these are limited to the particular agency involved and do not affect an attorney's standing in court. The Commissioner of Patents, for example, is held to have the power to suspend or disbar an attorney from practicing before that department.[29]

There has been considerable discussion in court opinions concerned with the nature of these proceedings. The proceeding has been held to be "in its nature civil, and collateral to any criminal prosecution by indictment."[30] It has also been said that such proceedings, although generally classed as civil, "are nevertheless of a quasi-criminal nature."[31] Courts have argued that the proceeding is "neither a civil action nor a criminal proceeding, but is a proceeding *sui generis*. . . . "[32] As is evident from the decisions noted, there is no generally accepted categorization.

The classification of disbarment proceedings is of practical importance because the court's determination of that question will influence its treatment of the weight of evidence required to impose the penalty. Where, for example, the proceeding has been held to be civil in nature, it has been said that "cause for disbarment may be established by a fair preponderance of the evidence . . . and that proof beyond a reasonable doubt as in criminal cases is not required."[33] Only one jurisdiction has been found to require a higher degree of proof than a mere preponderance,[34] and proof beyond a reasonable doubt, as in criminal cases, does not appear to have ever been required.[35]

It has generally been held that a statute of limitations is no defense to an action for disbarment.[36] The benefit of a change of venue is usually allowed in these proceedings,[37] and the granting of a continuance has been held to be in the discretion of the trial court.[38] In most jurisdictions the attorney is allowed the right to have his cause reviewed. Such a review is governed by the general rules of appellate practice.[39] Generally the disbarred attorney may, in the discretion of the court, be reinstated and allowed to resume his practice.[40] As to the attorney's right to practice in another jurisdiction after his disbarment, it is generally accepted that the courts of one state will not admit an attorney to practice if he is under the ban of a sister state.[41]

27 *In re* Royall, 33 N.M. 386, 286 Pac. 570 (1928).
28 102 Wash. 472, 172 Pac. 1152 (1918).
29 Robertson v. United States, 285 Fed. 911, 914 (D.C. Cir. 1922).
30 *Ex parte* Wall, 107 U.S. 265, 288 (1882).
31 Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948, 954 (1954).
32 *In re* Bowman, 7 Mo. App. 567 (1879).
33 *In re* May Berry, 295 Mass. 155, 3 N.E.2d 248, 253 (1936).
34 Copren v. State Bar, 64 Nev. 364, 183 P.2d 833 (1947).
35 State Bar Comm'n v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1913).
36 Wilhelm's Case, 269 Pa. 416, 112 Atl. 560 (1921). See generally 45 A.L.R. 1111 (1926).
37 Peters v. State Bar of California, 219 Cal. 218, 26 P.2d 19 (1933).
38 Wilhelm's Case, 269 Pa. 416, 112 Atl. 560 (1921).
39 Houtchens v. Mercer, 29 S.W.2d 1031 (Tex. 1930); Lincoln v. Superior Court, 95 Cal. App. 35, 271 Pac. 1107 (1928).
40 *In re* Smith, 220 Minn. 197, 19 N.W.2d 324 (1945); *In re* Keenan, 310 Mass. 166, 37 N.E.2d 516 (1941); *In re* Andreani, 14 Cal.2d 736, 97 P.2d 456 (1939). See generally 70 A.L.R.2d 268 (1960).
41 *In re* Van Bever, 55 Ariz. 368, 101 P.2d 790 (1940); State Law Examiners v. Brown, 53 Wyo. 42, 77 P.2d 626 (1938).

Analysis of State Legislation

It seems appropriate at this point, in an effort to show the specific workings of modern disbarment proceedings, to make a brief analysis of a selected group of state procedures.

A number of jurisdictions follow what can be termed an agency type procedure.[42] In such a jurisdiction the court appoints a referee, commissioner, or other separate agent to conduct the actual disbarment inquiry. Such an "agent" then recommends action, if deemed necessary, to the court, which alone has the power to disbar. Pennsylvania, the state in which the *Schlesinger* case arose, is such a jurisdiction. The Pennsylvania Supreme Court has approved of this agency procedure,[43] but as we observed in *Schlesinger,* this same court considered the proceedings in violation of due process of law when the functions of prosecuting and adjudicating were merged into one body. The statute in Pennsylvania provides for an agency type hearing;[44] however, the legislature has made no provision regulating the structure of the body conducting the hearing.[45] *Schlesinger* obviously limits the bar's power in this regard, in that it requires the separation of the prosecuting and judicial functions of the investigating committees.[46] The Pennsylvania statute dealing with disbarment proceedings is not very detailed. It provides for the removal of misbehaving attorneys[47] and goes on to vest the convicted attorney with the right to have his case reviewed *de novo* by the state Supreme Court.[48] It also provides that any committee approved by the court may apply to the court to subpoena witnesses for its investigation.[49] There its regulation ends. All other procedural safeguards are left to the discretion of the investigating committees, under the general supervision of the courts.

The Illinois statute, like that of Pennsylvania, may also be deemed unspecific.[50] It is so, at least to the extent that it makes no provision to avoid the faulty composition of the hearing body that arose in *Schlesinger.* The commissioners of the bar association are empowered to make all of the necessary rules concerning the "conduct" of disbarment inquiries.[51]

California's legislation differs from that of Pennsylvania and Illinois, in that it deals with the procedural element in some detail. Two alternative methods are provided.[52] One gives disciplinary authority to the Board of Governors of the State Bar,[53] and the other allows for disciplinary action in the Supreme Court of the state.[54] The Board of Governors may recommend disbarment; only the court may disbar. The procedural defect in *Schlesinger* appears to be remedied by the California legislation. The state bar has been authorized by the legislature to provide

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42 See, New York, N.Y. JUDICIARY LAWS § 90; Illinois, ILL. ANN. STAT. ch. 110, § 101.59, Rule 59 (Smith-Hurd 1941); Ohio, OHIO REV. CODE ANN., tit. 47, § 4705.02 (Page 1954). In both Ohio and New York, without specific statutory grants, the courts normally designate fact-finding "agents" to investigate the charges.

43 Montgomery County Bar Ass'n v. Rinalducci, 329 Pa. 296, 197 Atl. 924 (1938).

44 PA. STAT. ANN. tit. 17, § 1665 (Supp. 1960).

45 *In re* Schlesinger, 172 A.2d 835 (Pa. 1961).

46 *Id.* at 840.

47 PA. STAT. ANN. tit. 17, § 1661 (1953).

48 PA. STAT. ANN. tit. 17, § 1663 (1953).

49 PA. STAT. ANN. tit. 17, § 1665 (Supp. 1960).

50 ILL. ANN. STAT. ch. 110, § 101.59, Rule 59 (Smith-Hurd 1941). This rule provides in part as follows:

> The board of governors and its existing committee on grievances, and their successors as such, of the Illinois State Bar Association, and the board of managers and its existing committee on grievances, and their successors as such, of the Chicago Bar Association, are hereby appointed as commissioners of this court and are empowered and charged to make investigations. . . .

51 ILL. ANN. STAT. ch. 110, § 101.59, Rule 59 (Smith-Hurd 1941).

52 CAL. BUS. & PROF. CODE § 6075.

53 CAL. BUS. & PROF. CODE §§ 6075-87.

54 CAL. BUS. & PROF. CODE §§ 6100-18.

rules of procedure in these cases,[55] and has enacted several of the common law's traditional procedural safeguards.[56] Rule 26 of the state bar's rules provides in part that,

> When a notice to show cause is issued the committee issuing such notice or the committee before which the respondent is directed to appear shall appoint one or more examiners from the active members of the State Bar not members of the Committee . . . it is the duty of the examiner to prepare the evidence and present the same to the trial committee.[57]

It seems that the examiner is to act as prosecutor. As this rule explicitly separates him from the body which is to hear the charges, it would seem that the *Schlesinger* fact situation would not arise under the California bar association's rules.

A minority of the states do not conduct disbarment actions in the above mentioned agency manner. Rather the attorney's hearing is conducted as in civil cases, and a jury is provided to determine any disputed facts.

Arkansas, by statute, provides for a trial by jury. The statute reads as follows, "When the matter charged is not indictable, the trial of the facts alleged shall be had . . . by jury, or if the accused fails to appear, or, appearing, does not require a jury, by the court."[58] However, it has been stated that where the facts are uncontroverted, the court may direct a verdict on the issues of fact as well as on the issues of law.[59]

Texas provides that, "A jury of twelve men shall be impaneled, unless waived by the defendant."[60] The procedural safeguard of notice is also provided for by statute.[61]

Due Process in the Proceedings

The importance of procedural due process was aptly expressed by Mr. Justice Jackson dissenting in *Shaughnessy v. United States.*

> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Governement, as they should on matters of policy which comprise substantive law. . . .
>
> Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.[62]

At the outset of this section, a consideration of the validity of the general rationale used by the courts in determining procedural due process in the disbarment area is relevant. The courts are quite willing to base their determination of what constitutes due process on the pertinent historical precedents. It is a mistake to regard this tendency as a venture in sophistry. Rather, it seems more correct to view this inclination as a manifestation of constitutional scholarship. Cardozo, directing

55 CAL. BUS. & PROF. CODE § 6086.
56 CAL. BUS. & PROF. CODE § 6085.
57 CAL. BUS. & PROF. CODE ch. 4, art. 5, rule 26.
58 ARK. STAT. ANN., § 25-411 (1947).
59 Wernimont v. State, 101 Ark. 210, 142 S.W. 194 (1911).
60 TEX. REV. CIV. STAT. art. 316 (1959).
61 TEX. REV. CIV. STAT. art. 315 (1959).
62 Shaughnessy v. Mezei, 345 U.S. 206, 224 (1953).

his attention to an established aspect of criminal procedure, noted that, "Not lightly vacated is the verdict of quiescent years."[63] Mr. Justice Holmes conveyed the same thought when he said that,

> The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.[64]

As summary power over members of the bar has been the standard for well over two hundred years, it is advanced that resort to historical data forms one valid rationale upon which to resolve issues of due process.

In considering the question of due process, two main points present themselves for discussion. First, does the guaranty of due process of law, contained in the fourteenth amendment, apply to proceedings aimed at the revocation of an attorney's right to practice his profession? Second, if the due process clause applies, what is necessary to afford the accused attorney such due process?

The answer to question number one is clear; the guaranty of due process embodied in the fourteenth amendment does apply to disbarment proceedings. In *Schlesinger* it was stated that, "The right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law. . . . "[65] The Supreme Court long ago classified the practice of law as a property right. In *Ex parte Wall* the Court said that, "[A]n attorney's calling or profession is his property, within the true sense and meaning of the Constitution. . . ."[66] The more difficult question concerns what is necessary to afford the accused attorney such due process. In an effort to ascertain what procedural safeguards are required to satisfy the fourteenth amendment, an examination will be made of what various courts have concluded on this point.

It has been held, first of all, that an attorney sought to be disbarred is entitled to fair notice of the charges against him and a reasonable opportunity to be heard in his defense.[67] There are however, two exceptions to the requirements of notice and hearing. One exception exists where the matter in question occurs in open court in the presence of the judge or judges.[68] A second exception presents itself in the case of an attorney who has been convicted of a crime.[69] In both of these cases the court may order the disbarment without affording the accused the procedural safeguards of notice and hearing. In these situations the courts reason that the evidence before them is sufficient and that further investigation is thus unnecessary.

In *Bradley v. Fisher*[70] the Court noted that the power to remove an attorney from the bar should never be exercised without notice to the attorney of the grounds of the complaint and ample opportunity for the attorney to be heard. They reasoned that, "This is a *rule of natural justice* and is applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession. . . ."[71]

Mr. Justice Frankfurter noted that fairness of procedure is "ingrained in our national traditions and is designed to maintain them."[72] It is necessary that the

63 Coler v. Corn Exchange Bank, 250 N.Y. 136, 164 N.E. 882, 884 (1928), *aff'd*, 280 U.S. 218 (1930).
64 Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).
65 *In re* Schlesinger, 172 A.2d 835, 840 (Pa. 1961).
66 *Ex parte* Wall, 107 U.S. 265, 289 (1882).
67 Phipps v. Wilson, 186 F.2d 748 (7th Cir. 1951).
68 Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).
69 *In re* Collins, 188 Cal. 701, 206 Pac. 990 (1922).
70 80 U.S. (13 Wall.) 335 (1871).
71 *Id.* at 354 (Emphasis added).
72 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (concurring opinion).

notice and hearing, generally required in disciplinary actions, must be fair and reasonable, to satisfy the due process requirement. In *Schlesinger* the court found that the hearing violated due process in that the attorney was denied his right to a fair and impartial hearing.[73] In an attempt to convey the requirements of a reasonable hearing the court noted the statement of the Supreme Court in *In re Murchinson* that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.[74]

As previously mentioned, in *Schlesinger* the duties of prosecutor, judge, and jury were placed in one body. It was precisely that situation which the court found to be disagreeable.

The above-noted exception to the due process requirement of notice and an opportunity to be heard, *i.e.*, that such safeguards are not required where the attorney has been convicted of a crime, requires further elucidation. In the case of *In re Collins*[75] the California Supreme Court, upon receiving a certified copy of Collins' conviction of a felony involving moral turpitude, entered an order disbarring him. This action was taken without notice to Collins, and he sought to have the order set aside contending that the court did not acquire jurisdiction to make said order and that by making it without notice to him it had deprived him of his liberty and property without due process of law. The court held that an attorney, upon his conviction of a crime involving moral turpitude, is not denied his constitutional rights when he is disbarred without a hearing, the reason being that said attorney had his day in court when put on trial for the crime.[76]

As we have seen, a majority of the states provide for a referee, commissioner, or other separate agent to conduct the actual disbarment hearing. There is some question as to whether due process inheres in such a proceeding. The issue arises where the attorney is heard before an agency responsible for making determinations of fact, but is not afforded a hearing before the body making the ultimate ruling on his right to continue practicing law.

In *McVicar v. State Board of Law Examiners*[77] the accused attorney sought to enjoin the state board of law examiners from hearing disbarment charges preferred against him. Plaintiff contended that the relevant statute conferring upon the board the power to hear issues of fact and certify the same to the Supreme Court of the state was unconstitutional. The point pressed by the plaintiff was that he was given notice to appear before the board, whereas the final judgment was to be rendered by the court. Because he was not given notice to appear before the tribunal having the power to render judgment, plaintiff claimed he had been denied due process. The court dismissed plaintiff's bill and disposed of the above contention saying that such a procedure, "amounts to little else than constituting the board of law examiners . . . masters of the court to take proof and submit findings thereon, of the taking of which proof complainant in this case had due and adequate notice."[78]

An apparently contrary conclusion was reached in *In re Noell.*[79] In this case an effort was made to disbar Noell, who had previously been disbarred in a state

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73 *In re* Schlesinger, 172 A.2d 835, 840 (Pa. 1961).
74 349 U.S. 133, 136 (1955).
75 *In re* Collins, 188 Cal. 701, 206 Pac. 990 (1922).
76 For a discussion as to whether conviction is a necessary condition of disbarment proceedings based on charges amounting to a crime, see 90 A.L.R. 1111 (1934), wherein it is stated that, "In the absence of statutes which are deemed conclusive on the question the authorities are all agreed that, where the conduct charged as the ground for disbarring an attorney falls within the sphere of his official duty, the court may proceed summarily against him without awaiting the result of a criminal prosecution." *Id.* at 1111.
77 6 F.2d 33 (W.D. Wash. 1925).
78 *Id.* at 35.
79 93 F.2d 5 (8th Cir. 1937).

court, from practice in a federal court. The disbarment was sought under a rule of the federal court by which any member of the bar of that court who was disbarred in any court of record should have his name stricken from the roll of the federal court. Noell asserted that the order of the state court was entered without notice and without giving him an opportunity to be heard and was therefore lacking in due process of law. The procedure used in the state court was similar to that used in *McVicar*. The court appointed a commissioner to hear the cause and report finding of fact. The commissioer, in his report to the court, recommended suspension to which Noell took exception. Without affording the accused notice or hearing, the state court denied his exceptions and entered the disbarment order. The federal court concluded that the hearings before the commissioner were not hearings before the court. Hence, the court did not have the merits of the cause before it until the report of the commissioner and the exceptions of the respondent were filed with it. The court at no time afforded Noell an opportunity to be heard before it upon the merits, and by this inaction it was held that respondent had been deprived of due process of law.

One further point deserves mention concerning agency-conducted disciplinary proceedings, namely, the composition of the agency conducting the hearing. As we have seen in *Schlesinger,* the agency conducting the hearing must be completely impartial. Therefore, where the functions of prosecutor, judge, and jury are given to one body, the hearing may be deemed partial and thus, unfair. Because of the agency's composition, the court in *Schlesinger* held that the attorney had been denied due process of law. The court in *McVicar* seems to have overlooked the implications of the agency's composition. *McVicar* held that a state statute was not invalid because it authorized a member of the Board of Law Examiners, which heard the evidence, to prefer charges against an attorney and then to sit as a member of the board for consideration of these charges. The court noted that such a procedure "raises no presumption of unfairness in the proceedings, and in no wise invalidates the statute. . . ."[80]

The accused in a disbarment proceeding has no constitutional right to a trial by jury.[81] However, as we have seen, a minority of jurisdictions provide him with such a hearing. The Supreme Court addressed itself to this point in *Ex parte Wall.*[82] Wall was accused of engaging in a riot in which a prisoner was taken and lynched before the court house door. Wall's summary disbarment was upheld by the Court. As to Wall's plea for a jury trial the Court said, "It is a mistaken idea that due process of law requires . . . a trial by jury, in all cases where property or personal rights are involved."[83] Continuing, the Court noted that "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts."[84] The Court seemingly based its denial of a jury trial to Wall on that ground. Historically, disbarment proceedings have been summary and "established customs and usages of the courts" bring summary procedure and the denial of trial by jury within the confines of due process.

An unusual issue concerning trial by jury arose in the case of *State Board of Law Examiners v. Phelan.*[85] The constitutionality of a statute allowing for trial by jury in disbarment actions was questioned. It was contended by the State Examiners that a statute providing for trial by jury in disbarment cases was an unconstitutional interference with the inherent power of the courts over its officers.

80 McVicar v. State Board of Law Examiners, 6 F.2d 33, 35-36 (W.D. Wash. 1925).
81 Montgomery County Bar Ass'n v. Rinalducci, 329 Pa. 296, 197 Atl. 924 (1938).
82 107 U.S. 265, 289 (1882).
83 *Ibid.*
84 *Id.* at 280.
85 43 Wyo. 481, 5 P.2d 263 (1931).

The court held that since the statute was not an unreasonable regulation of the court's power, it was not unconsitutional.

After noting that an attorney cannot be deprived of his profession without due process of law, which, as we have seen, includes notice and an opportunity to be heard, the court in *Montgomery County Bar Ass'n v. Rinalducci*[86] said the following concerning trial by jury: "[T]he Federal Constitution [does] not guarantee to an attorney the right of trial by jury in disbarment or disciplinary cases. The power to discipline its officers inheres in the court itself."[87] This conclusion of the court, as is the case with similar conclusions that we have noted in this section, seems to be based on the historical competence of the courts in this field.

Generally, in disbarment actions, the ordinary rules of evidence apply. In *People v. Amos*[88] it was said, "that the recognized rules of evidence should be observed in this class of cases as well as in all others."[89] However, a recent decision hints that due process may not be offended by a refusal to allow the attorney the right to take depositions.[90]

There is conflict on the question of whether an attorney in a disbarment proceeding has the right to confront the witnesses testifying against him. It has been held that an attorney in such a proceeding has no right of confrontation.[91] Decisions to the contrary indicate that the accused attorney is entitled to confront the accusing witnesses and subject them to cross-examination.[92] In *Schlesinger* it was stated that:

> The appellant has a constitutional right to the production of the reports of the witnesses against him, touching the events and activities to which they testified, and to inspect so much of such reports as is relevant to the issue.[93]

To further emphasize the procedural exceptions allowed in these proceedings, it is valuable to refer back to *Cohen v. Hurley*[94] wherein the Court held that an attorney in a disbarment hearing cannot complain that the proceedings were unconstitutional as a result of his being denied the use of his privilege against self-incrimination.

In our brief examination we have seen that state courts have varied opinions in regard to the procedures required to satisfy due process of law in this area. Procedural safeguards as traditional as trial by jury, and confrontation and cross-examination of witnesses, are allowed by some courts and denied by others. It seems fair to conclude that the only universal procedural requirements set down by the courts are those of notice and the opportunity to be heard. However, we have noted exceptions to even these basic elements of procedural due process of law.

Conclusion

Two opposing policy positions seem to present themselves from the foregoing analysis. The prevailing side contends that the summary procedures applied in this area satisfy the conditions of due process of law. As we have seen, they base this contention on historical precedent. The other group argues that these summary procedures violate due process of law. They seem to reject historical precedent. Mr. Justice Black, a spokesman for this minority position, stated the following in his dissent in *Cohen:*

> The majority is holding, however, that lawyers are not entitled to the full sweep of due process protections because they had no such protection

86 329 Pa. 296, 197 Atl. 924 (1938).
87 *Id.* at 926.
88 246 Ill. 299, 92 N.E. 857 (1910).
89 *Id.* at 859.
90 *In re* Crow, 181 F. Supp. 718 (N.D. Ohio 1959).
91 Bar Ass'n of San Diego v. Superior Court of San Diego County, 64 Cal. App. 590, 222 Pac. 185 (1923).
92 Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948 (1915).
93 *In re* Schlesinger, 172 A.2d 835, 848 (Pa. 1961).
94 366 U.S. 117 (1961).

> against judges or their fellow lawyers in England. But I see no reason why this generation of Americans should be deprived of a part of its Bill of Rights on the basis of medieval English practices that our Forefathers left England, fought a revolution and wrote a Constitution to get rid of.[95]

While not intending to compare *Schlesinger* and *Cohen* on their facts, it is submitted here that the policy position, as expressed by the majority in *Cohen,* is the better one. The present procedures, albeit summary in nature, appear to afford an adequate degree of fairness to the accused attorney. Until stronger arguments can be offered against the current mode of procedure, the verdict of the "quiescent years" should stand. In addressing the issue of the courts' power in this area, Justice Cardozo compellingly concluded as follows:

> In the long run the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.[96]

Frank P. Maggio

95 Cohen v. Hurley, 366 U.S. 117, 142 (1961).
96 People v. Culkin, 248 N.Y. 465, 162 N.E. 487, 493 (1928).