North Carolina Central Law Review

Volume 7
Number 2 *Volume 7, Number 2*

Article 3

4-1-1976

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TIGHTENING LEGAL CONSTRAINTS ON PROFESSIONALS

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Exclusivity is a prominent and paradoxical feature of human behavior. Although man is a social creature vulnerable to isolation, he strives to establish a variety of systems designed to shut out other men who are unwanted. In early days his exclusionary instinct focused on geographical territories. In modern times, with the proliferation of occupations, he has found new outlets for the expression of this impulse.

Exclusivity in occupations is achieved in a number of ways. To follow a trade, hold a position, engage in a business, or practice a profession, membership may be required in an association, such as a union, a guild, or a professional society; educational attainment may be required, such as high school diploma, a college degree, or a postgraduate degree; a license may be required from the state. Whatever the requirement, it is a barrier to entry which prevents those on the outside from competing with those on the inside.

Exclusivity in occupations usually permits those on the inside to exercise some control over both the nature of the barrier and trade practices within the barrier. There is thus a dual effect on competition—the number of competitors is restricted and competitive behavior *inter se* is restrained.

Public policies in opposition to exclusivity in occupations have developed. Constitutional protections accorded the individual—freedom of belief, speech and association, due process and equal protection—as well as the antitrust laws place limits on barriers and constrain behavior within barriers. This paper examines some of the doctrinal developments in constitutional and antitrust law, and the applications thereof, relative to the barriers to admission that professions may erect and the controls they may exert over the competitive behavior of their members.

CONSTITUTIONAL CONSTRAINTS ON BARRIERS

To qualify as a professional, one may need not only special knowledge but also a good moral character. Reputation is what people say about you; character is what you are, and a part of what you are is your set of beliefs. In determining your character, how far may a licensing board go in probing your beliefs?

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In *Konigsberg v. State Bar of California*,[1] an applicant for a license to practice law had been refused. In addition to passing a bar examination, California law required that an applicant must be of "good moral character" and no person certified "who advocates the overthrow of the Government of the United States or of this state by force, violence, or other unconstitutional means . . . ." The applicant, to satisfy the burden of proof placed on him, offered substantial evidence in the form of testimonials from forty-two individuals, including a Catholic priest, a Jewish rabbi, lawyers, doctors, professors, businessmen and social workers, that he had met these two criteria. While no evidence of bad character or advocacy of forceful overthrow was adduced, the applicant persistently declined to answer questions concerning his political opinions or associations; including the question of his membership in the Communist Party. The Supreme Court, in reversing the California court, held that the denial of admission to the bar was based on the applicant's failure to satisfy the two criteria rather than his refusal to answer questions, and that a denial of admission based on these grounds violated the applicant's due process and equal protection rights because there was no evidence in the record which rationally justified such a conclusion.

If Konigsberg felt he had won, his sense of victory was short lived, for on remand, instead of admitting him to practice, the California court ordered new hearings.

In the second *Konigsberg* case,[2] the Supreme Court was presented squarely and unavoidably with the issue of whether a bar applicant has a constitutionally protected right to refuse to answer questions about his present and past membership in the Communist Party; because the second denial of admission by the California court had been based on the ground that the applicant's refusal to answer had obstructed a full investigation into his qualifications. Mr. Justice Harlan, who had dissented in the first *Konigsberg* case, answered the issue adversely to the applicant in his opinion for the Court's majority of five.

"At the outset," Mr. Justice Harlan wrote, "we reject the view that freedom of speech and association . . ., as protected by the First and Fourteenth Amendments, are 'absolutes,' . . . ."[3] Rather, when these freedoms are asserted against the exercise of valid governmental powers, a reconciliation by weighing the respective interests must be undertaken. In the resulting weighing process, the Court found the balance in favor of the state's interest "in determining the fitness of applicants for

1. 353 U.S. 252 (1957).
2. 366 U.S. 36 (1961).
3. 366 U.S. 36, 49 (1961).

membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

Konigsberg passed the bar examination in 1953; his first Supreme Court case and seeming victory was decided in 1957; the final defeat of his effort to surmount the barrier was recorded in 1961.

Sara Baird graduated from Stanford Law School in 1967. She took and passed the Arizona bar examination. Her moral character was flawless. In response to a question on her application for admission to practice, she listed all organizations with which she had been associated since she was sixteen years of age. None of these organizations was objectionable. To Question No. 27, which asked if she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence" she replied, "Not Applicable." This reply was taken by all the parties to be a refusal to answer, thus presenting the constitutional question. Her denial of admission to practice was affirmed by the Arizona court. In *Baird v. State Bar of Arizona*,[4] the Supreme Court reversed the Arizona court and held that the applicant's first amendment rights had been violated. In a close decision, Mr. Justice Black speaking for the Court, in an opinion concurred in by four of the justices, said ". . .it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law."

Does *Baird* overrule *Konigsberg*? Not expressly, but since *Baird*, in 1971, the Supreme Court has not been presented with the issue of states refusing to admit applicants to practice because they declined to answer questions relating to their beliefs about government and their affiliations with organizations suspected of advocating the overthrow of government by force.[5] Thus the rule of *Baird*, as formulated by Mr. Justice Black, becomes a first amendment constraint on the barrier which may be erected to bar individuals from the practice of a profession:

> The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.
>
> When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is

4. 401 U.S. 1 (1971).
5. In re Stolar, 401 U.S. 23 (1971), was decided the same day as Baird.

> necessary to protect a legitimate state interest. . . . And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes. (Citations omitted).[6]

Another constitutional constraint is found in the fourteenth amendment. In *Schware v. Board of Bar Examiners of the State of New Mexico*,[7] an applicant was denied permission to take the bar examination, a prerequisite to admission to practice, on the ground that he had failed to demonstrate he had "good moral character." Far from refusing to answer questions, the applicant had supplied detailed information about himself, including: two arrests in 1934 on "suspicion of criminal syndicalism," an arrest in 1940 for violating the Neutrality Act of 1917, membership in the Communist Party from 1932 to 1940, and the use of aliases from 1934 to 1937. He had entered the University of New Mexico law school in 1950 and sought to take the bar examination scheduled for February, 1954.

The Court was unimpressed by his arrest record. It said "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct." His use of the alias Rudolph Di Caprio to foreclose anti-Semitism and enable him to secure a job during the depression of the 1930's was not indicative of a bad character some twenty years later. His membership in the Communist Party as a young man in the midst of the country's greatest depression was no bar when contrasted with the exemplary life he had led since abandoning his affiliation. A unanimous Court held that there was no evidence in the record which rationally justified a finding that the applicant was morally unfit to practice law.

The constitutional constraint was formulated by Mr. Justice Black in the following terms:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their findings that he fails to meet

6. 401 U.S. 1, 6-7 (1971).
7. 353 U.S. 232 (1957).

these standards, or when their action is invidiously discriminatory. (Citations omitted).[8]

The Equal Protection Clause prohibits a state from making invidious discriminations in the treatment of persons subject to its jurisdiction. When a state grants some and denies others a license to engage in an occupation, it is discriminating. In order for the discrimination to be legal, the licensure law must be fair on its face *and* it must be fairly applied. For example, in *Yick Wo v. Hopkins*,[9] a statute prohibiting laundries in wooden buildings without a license was held to be invalidly applied when non-Chinese applicants were consistently granted licenses while Chinese applicants were consistently denied.

The Supreme Court has sometimes found gross discrimination falling short of invidiousness. For example, in *Kotch v. Board of River Port Pilot Commissioners*,[10] Louisiana law required that seagoing vessels sailing between New Orleans and foreign ports be navigated through the Mississippi approaches by pilots who were state officers, appointed by the Governor only upon certification of a State Board of River Pilot Commissioners, themselves pilots. The complainants, with fifteen years or more experience piloting vessels whose pilotage was not governed by the law in question over the same waterways, were denied appointment as state pilots. Qualified in every way, except for a six months apprenticeship under an incumbent, they alleged that the incumbents, having unfettered discretion, selected only relatives and friends as apprentices. In a five to four decision, the Supreme Court held that considering the entirely unique institution of pilotage in the light of its history in Louisiana and elsewhere, the pilotage law and its application did not violate the Equal Protection Clause.

While in *Kotch* the Equal Protection Clause lacked the vigor to limit a barrier based on nepotism, it showed remarkable new strength in *In re Griffiths*[11] to strike down a rule of the Connecticut Bar Examining Committee which excluded resident aliens from the practice of law. Fre Le Poole Griffiths, a citizen of the Netherlands, came to the United States in 1965, married a citizen in 1967, and became a resident of Connecticut. After her graduation from law school, she applied for permission to take the bar examination. She was found qualified in all respects except that she was not a citizen of the United States, and for that reason permission was refused. Noting that classifications based on alienage are inherently suspect and subject to close judicial scrutiny, the Court held that the State had not carried its burden of justifying the

8. 353 U.S. 232, 238-39 (1957).
9. 118 U.S. 356 (1886).
10. 330 U.S. 552 (1947).
11. 413 U.S. 717 (1973).

necessity of the classification to accomplish its substantial interest in assuring that attorneys-at-law are qualified by character and general fitness. The classification was invidious and, thus, unconstitutional.

ANTITRUST CONSTRAINTS ON PROFESSIONAL BEHAVIOR

When the subject shifts from barriers to practices within barriers, we find that the antitrust laws are the favored instruments of public policy in the attempt to control anticompetitive behavior by professionals.[12] Even though eighty-five years were to elapse between the enactment of the Sherman Act[13] and a definitive decision that the practice of a profession is a "trade" within its meaning, this statute had begun to prove effective against some forms of professional restraints. Professional restraints invariably originate with the professional association; thus the requirement of Section 1 of the Sherman Act, that there be concerted action, is easily met. The more difficult question is whether the restraint is unreasonable, for the restraint often takes the form of a rule of ethics. The task of the Court is to separate unreasonable trade restraints from reasonable rules of ethics, and the process of defining criteria through developing case law has only recently begun. The long held doubts that the antitrust laws did not apply at all to the professions likely retarded the development. In the earlier cases the courts dealt with gross examples of trade restraints, and, in general, were simply willing to apply the label of unlawful trade restraint without any extended analysis of the difference between a trade restraint and a rule of ethics.

A rule of medical ethics was judicially examined in *United States v. American Medical Ass'n.*[14] There, a group of government employees in the District of Columbia had organized to obtain medical care for themselves and their familes by paying dues to a corporation which employed a staff of doctors who were compensated by salary. The American Medical Association and its constituent society in the District of Columbia regarded with disfavor the "salary-for-service" instead of the traditional "fee-for-service" arrangement adopted by the group plan. In order to destroy the plan's effectiveness, the medical society sought to apply a rule of ethics to expel participating doctors from membership in the society and thereby exclude them from practicing in the area hospitals. The hospitals' accreditation depended on their admitting only physicians in good standing with the medical society. Thus hospitals

12. For an example of a constitutional constraint of anticompetitive behavior, *see* Firestone v. First Dist. Dental Soc'y, 59 Misc.2d 362, 299 N.Y.S.2d 511 (Sup. Ct. 1969), *noted in* 48 Geo. L.J. 646 (1970).

13. Act of July 2, 1890, ch. 647, §§ 1-7, 26 Stat. 209, *as amended*, 15 U.S.C. §§ 1-7 (1970).

14. 130 F.2d 233 (D.C. Cir. 1942), *aff'd* 317 U.S. 519 (1943).

would not admit salaried doctors to their staffs if their accreditation were thereby threatened, and doctors would not accept salaried employment if they could not practice in hospitals.

The rule of ethics made it unprofessional (and hence grounds for expulsion) for a physician to dispose of his services under conditions "which interfere with reasonable competition among the physicians of a community." Clearly, to the society, underbidding or accepting "inadequate" compensation interfered with "reasonable competition." But absent from its case was any proof that the salaries received by the group plan physicians were inadequate to assure good medical services. The evidence indicated that the effect of the use of salaried practitioners might determine who provides the medical service, but it did not indicate any reduction in the quality of that service. While recognizing that professional organizations may establish standards for "*self-discipline and control*," the court thought there was a real difference in legal consequences when the use of the standards was directed towards the destruction of competing professional or business organizations.

In the Supreme Court, while the conviction of the American Medical Association and the Medical Society of the District of Columbia was upheld, the resolution of the issue of whether the practice of a profession is a "trade" within the meaning of the statute was deferred, for the Court found that the group health plan was a sufficient commercial venture in itself to make it a "trade," and the activities of the Association and Society were therefore illegal when they sought to restrain it.

The Federal Trade Commission had occasion to deal with the question of the practice of a profession as a "trade," and the validity of professional behavior which restricted competition, in *Community Blood Bank of the Kansas City Area, Inc.*[15] Prior to 1955, the blood needs of the Kansas City area were supplied primarily by hospital blood banks, under the supervision of the staff pathologists. The patient who received blood was given the option of replacing the blood or paying a "responsibility" fee. A need for a community blood bank had been voiced.

In 1955, a commercial blood bank was established in the community. The pathologists in the area were opposed to commercial blood banks and set about to destroy the new entrant by organizing a nonprofit

15. 70 F.T.C. 728 (1966), *rev'd on other grounds* 405 F.2d 1011 (8th Cir. 1969). Although the Federal Trade Commission's complaint failed because the Commission lacked jurisdiction over the nonprofit corporations involved in the conspiracy, the Department of Justice was more successful in its Sherman Act action against The College of American Pathologists in which the association consented to the entry of a decree which in effect enjoined it from conspiring to monopolize laboratory services involving human tissue and materials. U.S. v. College of American Pathologists, 1969 Trade Cas. 87,022 (N.D. Ill. 1969).

community blood bank and prevailing on the local hospitals to boycott the commercial bank. The justification for the opposition to commercial banks was based on two grounds: (1) that it was immoral to traffic in human blood, and (2) that the blood of commercial banks, often obtained from a segment of society that is motivated by poverty to sell its blood, was not as safe as blood from noncommercial sources. With respect to the first ground, the Commission was of the opinion that moral belief generally is not a valid basis for concerted action aimed at the destruction of a trade or business. The particular method of attack was the group boycott, a method usually treated as a per se violation of the anti-trust laws. Condemnation of this method in these circumstances does not necessarily foreclose all group action; for example, the doctors might have assembled to petition the government for a law which would have effectuated their goal,[16] provided their zeal was kept within reaonable bounds.[17] With respect to the second ground, a very delicate issue was presented. When physicians have said that something is medically unsafe, who is to contradict them? Lay analysis may show that the medically approved regimen is the one most likely to enhance the market power of physicians' services, but it cannot show that another, more economically efficient, regimen is as medically safe or safer. Thus, the Commission was unwilling to interfere with an individual doctor's choice of treatment; but, because the National Institutes of Health had prescribed standards and licensed this particular commercial blood bank, and because the doctors themselves had approved the use of commercial blood in emergencies, the Commission felt it proper to order a termination of the group boycott.

The Commission, like the Supreme Court in *American Medical Ass'n*, thought it unnecessary to decide whether the practice of a profession is a "trade" for purposes of Section 1 of the Sherman Act or for its own purposes in enforcing the Federal Trade Commission Act, for it was of the opinion that the process of acquiring, processing and supplying blood to hospitals, when performed by a properly licensed blood bank, did not constitute the practice of medicine.

The issue of a profession as a "trade" was finally resolved in 1975 in *Goldfarb v. Virginia State Bar*.[18] There, a lawyer had sought legal services in connection with the purchase of a home. He approached numerous lawyers in Fairfax County, Virginia, only to find none who would quote him a fee less than 1% of the value of the property involved. This minimum fee was incorporated in a schedule adopted by the

16. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

17. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

18. — U.S. —, 95 S. Ct. 2004 (1975).

Fairfax County Bar Association. Adherence to minimum fees was secured through two cannons of ethics, one which forbade solicitation and another which forbade encroachment on other lawyers' employment; for the Committee on Legal Ethics had ruled that intentionally and regularly undercutting the fee schedule was a violation of these cannons which could lead to disciplinary action.

Ruling unanimously that the practice of a profession is a "trade" within the meaning of the Sherman Act, the Court said:

> The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public service aspect of professional practice controlling in determining whether § 1 includes professions. Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose. (Citations omitted).[19]

Nor did the Court spend much time analysing the ethical claim. The associations had seen price cutting as a form of solicitation and encroachment on other lawyers' established clientel, and the minimum fee schedule was the countermeasure. The Court saw the minimum fee schedule as price-fixing, aggravated by the monopoly of legal services granted lawyers by licensure, and consequently did not address the distinction between a proper rule of ethics and an unreasonable trade restraint.

CONCLUSION

Legal constraints on the anticompetitive aspects of professionalism are tightening. While constitutional doctrines are directed primarily towards the elimination of arbitrariness in the admission process and have had little effect on the supply and price levels of professional services, the first amendment has the potential of making a material impact on professional economics by limiting or invalidating restrictions on advertising.[20] But the development in the law that has the most economic significance is the bringing of professional trade practices under the strictures of the Sherman Act. Under the authority of *Goldfarb,* judicial inquiry can now be made into the reasonableness of professional restrictions on advertising, solicitation, encroachment and other practices normally unrestricted in a competitive market. Out of this inquiry, in the manner of the common law, will come a new accommodation between the roles of ethics in professional regulation and the public policy of competitive markets embodied in the antitrust laws.

19. — U.S. —, 95 S. Ct. 2004, 2013 (1975).

20. *See* Terry v. California State Board of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975); *cf.* Bigelow v. Virginia, — U.S. —, 95 S. Ct. 2222 (1975) (holding unconstitutional a Virginia statute prohibiting the advertising of abortion services).