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## Judicial Immunity in Bar Admissions

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## CONCLUSION

The issue of professional liability to nonclients will continue to arise in the judicial setting. As additional exceptions are carved, the courts will be forced to address the privity requirements as it relates to attorneys. The majority of states, including New York, still require privity in order to recover in negligence from an attorney while acting in his professional capacity. Those states that do not require strict privity have articulated various tests to determine whether or not an attorney owed a duty of care to a non-client. It is submitted that the strict privity requirement is in jeopardy in New York and courts may expose attorneys to liability for professional negligence to plaintiffs with whom they are not in privity.

*Melinda R. Katz*

## JUDICIAL IMMUNITY IN BAR ADMISSIONS

Each state establishes its own bar admission procedures which require the applicant to meet certain character and fitness criteria.<sup>1</sup> Generally, the qualifications for admission require a prospective attorney to possess a bachelor's degree, a law degree from an approved school,<sup>2</sup> to pass a written examination,<sup>3</sup> and to establish

<sup>1</sup> Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. *See, e.g.*, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (state can require bar applicants to possess certain qualifications to be eligible for admission).

<sup>2</sup> Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. Graduation from an ABA-approved law school is to "provide uniform and measurable standards by which to assess the qualifications of applicants." *LaBossiere v. Florida Bd. of Bar Examiners*, 279 So. 2d 288, 289 (Fla. 1973). There is reliance on the ABA due to the fact that state supreme courts are "unequipped to make such a determination . . . because of financial limitations and the press of judicial business." *Id.*

California has a "Baby Bar" requirement that students attending law schools not approved by California's Committee of Bar Examiners must take and pass an exam at the end of their first year so as to receive credit from the Committee for further study. *See Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir.) (upheld constitutionality of Baby Bar), *cert. denied*, and *appeal dismissed*, 474 U.S. 916 (1985).

<sup>3</sup> Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. *See Richardson v. McFadden*, 540 F.2d 744, 748 (4th Cir. 1976) (purpose of bar examination is to distinguish between those

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his good moral character.<sup>4</sup> The judiciary is charged with regulating who may practice law.<sup>5</sup> In a majority of states the highest court is the ultimate arbiter of who shall be admitted to practice.<sup>6</sup> Courts are permitted to delegate their authority to a board of bar examiners or a fitness committee.<sup>7</sup>

Evaluating a person's fitness to practice law is a subjective determination.<sup>8</sup> Therefore, it is not surprising that bar admission engenders much litigation.<sup>9</sup> The doctrine of judicial immunity insulates a judge's judicial acts from vexatious lawsuits, thereby insuring their independence and the proper administration of jus-

"demonstrating minimal competence" and those who do not), *modified*, 563 F.2d 1130 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978); *Tyler v. Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975) (bar exam tests minimal present competence), *cert. denied*, 426 U.S. 940 (1976).

<sup>4</sup> Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. *See Schware*, 353 U.S. at 239 (state can require qualification of good moral character); *In re Cassidy*, 268 App. Div. 282, 284, 51 N.Y.S.2d 202, 204 (1944) (moral character and fitness a condition precedent to bar admission), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947). *See generally* Rhode, *Moral Character as Professional Credential*, 94 YALE L.J. 491 (1985) (comprehensive survey of history, structure and objectives of character as criteria for attorneys).

<sup>5</sup> *See, e.g., Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856) ("[W]ell settled . . . that it rests exclusively with the court to determine who is qualified to become one of its officers"); *Feldman v. State Board of Law Examiners*, 438 F.2d 699, 702 (8th Cir. 1971) (judicial branch has exclusive jurisdiction to admit and disbar attorneys, though legislature may pass general rules). *See generally* Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFFALO L. REV. 525 (1983) (discussion of how courts successfully took control over bar). Twelve states give responsibility for admission to the judiciary through their constitution. *See* ARK. CONST. art. XXVIII, amend. 28; FLA. CONST. art. V, § 15; IND. CONST. art. VII, § 4; KY. CONST. § 116; LA. CONST. art V, § 5(B); MONT. CONST. art. VII, § 2; N.J. CONST. art. VI, § 2, cl. 3; N.D. CONST. art IV, § 87; OHIO CONST. art. IV, § 2(B); PA. CONST. art. V, § 10(e); S.C. CONST. art V, § 4; VT. CONST. § 30.

<sup>6</sup> *See* Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 662 (1981) ("Typically, state supreme court acts as the general overseer . . ."). In New York, it is the Appellate Division of the Supreme Court which is responsible for determining whether the applicant possesses moral character and fitness. N.Y. JUD. LAW § 90(1)(a) (McKinney 1983).

<sup>7</sup> *See In re Brennan*, 230 App. Div. 218, 219, 243 N.Y.S. 705, 706 (1930) (character and fitness committee appointed by Appellate Division to certify applicants for admission to bar); Hill, *Appellate Review of Moral Character and Fitness Determinations*, B. EXAM., Aug. 1982, at 22, 23 (because appellate courts are not equipped to hear and record evidence, board is usually created to make initial fitness determination). *See* N.Y. JUD. LAW § 90(1)(c).

<sup>8</sup> *See* Rhode, *supra* note 4, at 529 (inherent subjectivity of moral fitness). Because of the ambiguity surrounding the good moral character requirement, the Supreme Court held that any qualifications must have "a rational connection to the applicant's fitness . . . to practice law." *Schware*, 353 U.S. at 239. *See* Comment, *The Investigation of Good Moral Character for Admission to the Virginia Bar - Time for a Change*, 19 U. RICH. L. REV. 601, 605 (1985) ("rational relation" test, without guidelines, is of little value).

<sup>9</sup> *See* Special Project, *supra* note 6, at 658.

tice.<sup>10</sup> Whether the doctrine of judicial immunity applies to bar admission decisions was the issue in the recent case of *Sparks v. Character and Fitness Committee of Kentucky*.<sup>11</sup> The United States Court of Appeals for the Sixth Circuit held in *Sparks* that the actions taken by the state supreme court and the character and fitness committee in connection with the admission of an applicant to the state bar were judicial acts for which absolute immunity attached.<sup>12</sup> Sparks had sued the Chief Justice of the Kentucky Supreme Court and the Kentucky Character and Fitness Committee for damages pursuant to the Civil Rights Act, alleging violations of his procedural and substantive due process rights in the court's refusal to admit him into the bar.<sup>13</sup> The district court dismissed the complaint on the ground that the defendants enjoyed absolute immunity.<sup>14</sup> Although the court of appeals affirmed, the Supreme Court vacated the judgment and directed it to reconsider in light

<sup>10</sup> See generally *Stump v. Sparkman*, 435 U.S. 349, 363 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872)); *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

In *Stump*, the Court held that a circuit judge was immune from a Section 1983 damages suit for his approval of a mother's petition for permission to have her "somewhat retarded" fifteen year old daughter sterilized. 435 U.S. at 349. The case reaffirmed the doctrine that judicial acts, even if malicious and unconstitutional, are absolutely immune unless performed in the clear absence of jurisdiction. *Id.* at 356-57. In *Pierson*, a municipal police justice was given immunity from a Section 1983 damage suit for his judicial acts in convicting a group of white and black clergymen for breach of the peace while they were attempting to use a segregated bus terminal. 386 U.S. at 547. *But see, e.g., Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) (judicial immunity does not bar prospective injunctive relief against a judicial officer under 42 U.S.C. § 1983); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) (judges not immune from criminal prosecution for civil rights violations).

A major reason for granting judicial immunity has been the need for decisions to be rendered free of any personal considerations, including personal liability. See *Stump*, 435 U.S. at 363 (quoting *Bradley* for the proposition that judicial officers must be "free to act upon [their] own convictions without apprehension of personal consequences"). See generally Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879 (comprehensive history of the development of judicial immunity).

<sup>11</sup> 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989).

<sup>12</sup> *Id.* at 428-29.

<sup>13</sup> *Id.* at 429. To assert a cause of action under the Civil Rights Act, 42 U.S.C. § 1983, a plaintiff must show that the defendant acted under color of state law or authority to deprive the plaintiff of a right, privilege, or immunity secured by the Constitution and laws of the United States. See *Sykes v. California*, 497 F.2d 197, 199-200 (9th Cir. 1974).

An associate member of the Kentucky Bar Committee determined, based on an interview with the applicant, that Sparks lacked the requisite moral and character fitness to practice law. *Sparks*, 859 F.2d at 429. The record does not indicate the basis of the decision. *Sparks*, 818 F.2d 541, 542 (6th Cir. 1987).

<sup>14</sup> *Sparks*, 818 F.2d at 542.

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of the Court's ruling in *Forrester v. White*.<sup>15</sup> The court of appeals distinguished *Forrester* and again affirmed.<sup>16</sup>

The Supreme Court in *Forrester* announced the analytical key for determining what a judicial act is for purposes of granting judicial immunity. The analysis focused on the function performed and not the identity of the actor who performed it.<sup>17</sup> The *Sparks* Court held that there were three reasons suggested in the *Forrester* decision which would indicate that the chief justice and the committee members were performing judicial acts.<sup>18</sup> The first was the availability of appellate review which *Forrester* cited as a central reason for granting judicial immunity.<sup>19</sup> Second, *Forrester* quoted with approval *Bradley v. Fisher*,<sup>20</sup> in which judicial immunity was given to a court for disbarring an attorney.<sup>21</sup> The inference was that if disbarment proceedings are judicial acts, then it follows that the power to determine admissions to the bar are also judicial acts.<sup>22</sup> Finally, the determination of bar membership is in-

<sup>15</sup> 484 U.S. 219 (1988). In *Forrester*, an Illinois state court judge who discharged a probation officer pursuant to a state statute was not shielded by judicial immunity. *Id.*

<sup>16</sup> *Sparks*, 859 F.2d 428, 429 (6th Cir. 1988).

<sup>17</sup> *Forrester*, 484 U.S. at 229. The Court had previously defined a judicial act in *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). The *Stump* Court held that the proper inquiry for purposes of granting immunity would be (1) whether the judge performed a function normally performed by a judge and (2) whether the parties dealt with the judge in his judicial capacity. *Id.*

<sup>18</sup> *Sparks*, 859 F.2d at 433.

<sup>19</sup> *Id.* See also *Atcherson v. Siebenmann*, 458 F. Supp. 526, 535 (S.D. Iowa 1978) (availability of appellate review is factor in determining whether act is judicial), *vacated in part*, 605 F.2d 1058 (8th Cir. 1979). An applicant who is not recommended for admission by a committee can appeal the decision to the state supreme court. See *Hill*, *supra* note 7, at 23. If the state supreme court denies admission, the decision is subject to discretionary review by the United States Supreme Court, if federal issues are raised. See *In re Summers*, 325 U.S. 561, 568-69 (1944) (freedom of religion); *Brown v. Board of Bar Examiners*, 623 F.2d 605, 609-10 (9th Cir. 1980) (due process); *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976) (equal protection and due process), *cert. denied*, 431 U.S. 916 (1977).

<sup>20</sup> 80 U.S. (13 Wall.) 335 (1872).

<sup>21</sup> *Sparks*, 859 F.2d at 433. In *Bradley v. Fisher*, the attorney for an alleged conspirator in Lincoln's assassination sued the judge who disbarred him after a hung jury verdict. 80 U.S. (13 Wall.) at 344. In denying relief due to judicial immunity, the Court wrote that even though the plaintiff's due process rights were violated, this "did not make the act any less a judicial act." *Id.* at 356-57.

<sup>22</sup> *Sparks*, 859 F.2d at 433. There has been little dispute that disciplinary and disbarment proceedings are judicial acts. See, e.g., *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1869) (judge disbarring attorney acts judicially and is thus immune from damage suit); *Ex parte Secombe*, 60 U.S. (19 How.) 9, 15 (1856) (disbarment decision is "in its nature a judicial act"); *Erdmann v. Stevens*, 458 F.2d 1205, 1208 (2d Cir. 1972) (state court's disciplinary proceedings are judicial inquiry).

herently the function of the judiciary.<sup>23</sup>

## THE ADMINISTRATIVE/JUDICIAL DICHOTOMY OF BAR ADMISSIONS

### A. *The Immunity of Judges*

A positive aspect of the *Forrester* decision is its recognition that there is a need to distinguish judicial acts from administrative or legislative acts.<sup>24</sup> While judicial acts enjoy immunity, the administrative, ministerial and executive aspects of a judge's duties do not.<sup>25</sup> The procedures for admitting an applicant to the bar have been characterized as part legislative and part adjudicative.<sup>26</sup> Generally, the adjudicative function involves the individualized determination of whether the applicant is fit to practice law in that state, whereas the legislative function is the establishment of rules which apply to every candidate.<sup>27</sup> A judicial act requires the utilization of discretion and judgment which is closely akin to the ad-

<sup>23</sup> *Sparks*, 859 F.2d at 434. Employment decisions made by judges have been held to be administrative tasks in which judicial immunity does not attach. *Id.* See *Forrester v. White*, 484 U.S. 219, 229 (1988) (dismissal of probation officer not judicial act); *Guercio v. Brody*, 814 F.2d 1115, 1119 (6th Cir. 1987) (dismissal of confidential secretary is administrative act), *vacated in part, reh'g granted*, 823 F.2d 166 (1987) (en banc), *vacated*, 840 F.2d 358, *re-reported in full*, 859 F.2d 1232 (6th Cir. 1988); *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir.) (firing of court reporter is administrative act), *cert. denied*, 479 U.S. 985 (1986).

However, the admission of attorneys is inherently a judicial function. See *Sparks*, 859 F.2d at 434; *cf.* *Simons v. Bellinger*, 643 F.2d 774, 805 (D.C. Cir. 1980) (bar committee members absolutely immune while exercising inherent judicial power).

<sup>24</sup> See *Forrester*, 484 U.S. at 229. The definition of a judicial act announced in *Stump v. Sparkman*, 435 U.S. 349, 363 (1978), garnered much criticism from commentators. See Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?* 53 *FORDHAM L. REV.* 1503, 1508 n.41 (1985) (*Stump* definition inherently vague). See also *supra* note 17.

<sup>25</sup> See *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) (when promulgating code of rules for attorneys, judges have legislative immunity, not judicial immunity). See also J. CLERK & W. LINDSELL, *TORTS* § 1108 (14th ed. 1975):

Officers of courts of justice act either judicially or ministerially. A judicial act is one which involves the exercise of a discretion, in which something has to be heard and decided. A ministerial act is one which the law points out as necessary to be done under the circumstances, without leaving any choice of alternative courses.

*Id.* quoted in *Block*, *supra* note 10, at 887; *supra* note 23 and accompanying text.

Judges can obtain professional liability insurance if sued for their administrative decisions or if found liable under Section 1983 for plaintiff's attorneys' fees. See *And Now, Malpractice Insurance For Judges*, 123 *N.J.L.J.*, June 8, 1989, at 1, index page 1401.

<sup>26</sup> See Special Project, *supra* note 6, at 662.

<sup>27</sup> *Id.* See *Consumers Union*, 446 U.S. at 731 (promulgating a code of rules for attorneys is "not an act of adjudication but one of rulemaking"). See generally Note, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 *STAN. L. REV.* 500, 515 n.76 (1963) (difference between adjudication and rule making).

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judication of controversies.<sup>28</sup> The Supreme Court in *In re Summers*<sup>29</sup> held that “[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy” within the meaning of Article III of the Constitution.<sup>30</sup> However, when the validity of a rule is not challenged but a petition is made to waive one of its bar admission rules, some courts have found the ensuing state court action is ministerial, not judicial and that the decision rendered is one by a court acting in its administrative capacity.<sup>31</sup> Nevertheless, the majority of the pre-*Forrester* decisions have concluded that the consideration of an application for admission to the bar is judicial rather than administrative in nature.<sup>32</sup>

### B. *The Extension of Immunity to Quasi-Judicial Officials*

The absolute immunity given to the members of the character and fitness committee in *Sparks* is not the first instance where a court has given absolute immunity to officials acting in a quasi-judicial capacity.<sup>33</sup> The Supreme Court in *Butz v. Economou*<sup>34</sup> an-

<sup>28</sup> See *Consumers Union*, 446 U.S. at 731 (judicial functions arise out of adjudication of controversies); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1335-36 (E.D. Mich. 1983) (judicial act requires discretion and normal elements of judicial proceeding); cf. *Butz v. Economou*, 438 U.S. 478, 510-11 (1978) (discretionary functions of prosecutor deserve absolute immunity because of same policy reasons supporting judicial immunity).

<sup>29</sup> 325 U.S. 561 (1945).

<sup>30</sup> *Id.* at 568.

<sup>31</sup> See *Ktsanes v. Underwood*, 552 F.2d 740, 743 (7th Cir. 1977) (denial of bar applicant's waiver petition administrative), *cert. denied*, 435 U.S. 933 (1978); *Brooks v. Laws*, 208 F.2d 18, 29-30 (D.C. Cir. 1953) (evaluation of application for admission is not decision or judgment). *But see* *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-82 (1983) (court's denial of applicant's waiver petition was judicial inquiry in which court adjudicated claims of present right to admission to bar); *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1204 (D. Colo. 1983) (“Even in exercising its judgment on an individual petition, a court performs a judicial act.”)

<sup>32</sup> See, e.g., *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1182 (D. Nev. 1980) (“[A]cts of supreme court justices in deciding matters pertaining to admission to the bar are judicial acts.”); *Moity v. Louisiana State Bar Ass'n*, 414 F. Supp. 180, 183-84 n.17 (E.D. La.) (judicial immunity applies to denial of petitioner's admission to bar), *aff'd*, 537 F.2d 1141 (5th Cir. 1976); cf. *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605, 610 n.10 (9th Cir. 1980) (in bar admission petition “soundness of the district court's interpretation that absence of judicial trappings negates the existence of a judicial act is questionable.”)

<sup>33</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutor absolutely immune for actions taken in initiating and prosecuting case). As with judges, prosecutor's absolute immunity does not extend to those responsibilities that are administrative or investigative. See *Marrero v. City of Hialeah*, 625 F.2d 499, 507 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). Court clerks have been given absolute immunity for their discretionary duties. See

nounced three considerations which a court must weigh in determining whether to extend immunity: (1) the "functional comparability" of the official's judgments to those of a judge;<sup>35</sup> (2) whether the nature of the proceeding is such that there is a realistic prospect of harassment by disappointed litigants;<sup>36</sup> and (3) the availability of safeguards adequate to reduce the need for private damage actions as a means of controlling unconstitutional conduct.<sup>37</sup>

Bar associations involved in investigating and presenting cases for attorney disciplinary or disbarment proceedings have been granted absolute immunity from damages.<sup>38</sup> Other courts before *Sparks* have similarly extended absolute immunity to bar committees involved with the admission of attorneys.<sup>39</sup> The common

Note, *supra* note 24, at 1513 n.73 for cases cited therein. Court clerks are given absolute immunity for actions taken under command of court decrees or under instructions of a judge. See *Foster v. Walsh*, 864 F.2d 416, 417-18 (6th Cir. 1988) (issuance of arrest warrant by clerk at direction of judge is a judicial act); *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988) (clerk absolutely immune for issuance of arrest warrant at direction of judge).

The doctrine of absolute legislative immunity protects individuals while acting within the bounds of their legislative duties. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state legislators absolutely immune from suits for damages under § 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952 (7th Cir. 1983) (legislative immunity applies to local legislators); *Herbst v. Daukas*, 701 F. Supp. 964, 970 (D. Conn. 1988) (town council members have legislative immunity in their individual capacities for eliminating one lieutenant in police department).

<sup>34</sup> 438 U.S. 478 (1978).

<sup>35</sup> *Id.* at 512.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* See *supra* note 19 and accompanying text. Bar candidates have due process rights. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 106 (1963) (cannot reject applicant without first giving notice and hearing either before committee or court having authority over bar admissions); *Mattox v. Disciplinary Panel of U.S. Dist. Court*, 758 F.2d 1362, 1367-68 (10th Cir. 1985) (due process requirements of notice and hearing should apply equally to federal and state court admission decisions). The burden of proof is on the individual to prove his or her fitness. See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36, 40-41 (1961). In a disciplinary proceeding the state has the burden of proving the lawyer's unfitness. See, e.g., *In re Simpson*, 47 Ill. 2d 562, 566, 268 N.E.2d 20, 22 (1971).

<sup>38</sup> See *Simons v. Bellinger*, 643 F.2d 774, 777-78 (D.C. Cir. 1980); *Kissell v. Breskow*, 579 F.2d 425, 430 (7th Cir. 1978); *Clark v. State of Washington*, 366 F.2d 678, 681 (9th Cir. 1966).

<sup>39</sup> See *Rosenfeld v. Clark*, 586 F. Supp. 1332 (D. Vt. 1984) (board of bar examiners immune from damages for failure to review applicant's examination within statutorily prescribed time period), *aff'd*, 760 F.2d 253 (2d Cir. 1985); *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1180-81 (D. Nev. 1980) (Board of Bar Examiners and state bar immune from suit as they are under direct control and supervision of state supreme court); *Greene v. Zank*, 158 Cal. App. 3d 497, 506, 204 Cal. Rptr. 770, 781 (1984) (state bar and committee members have absolute quasi-judicial immunity for acts while performing plaintiff's pre-admission investigation). Bar examiners have been found exempt from antitrust



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thread running through the cases is the belief that as arms of the court, these committee actions are actually actions of the state court.<sup>40</sup> Therefore, if the official is acting in a quasi-judicial capacity he should be granted absolute immunity; if his actions are ministerial and executive, he should not.<sup>41</sup>

### CONCLUSION

The most immediate effect of *Forrester v. White* is that courts reviewing whether an act is judicial, administrative, or legislative will focus more on the form and substance of the proceedings.<sup>42</sup> The decision by the Sixth Circuit in *Sparks* to immunize judges and bar committee members from damage suits for their bar admission decisions should not adversely affect the rights of applicants. The possibility that a court or its committee may arbitrarily determine an applicant is unfit to practice will not leave the applicant without recourse. Despite the defense of judicial immunity for admission decisions, applicants clearly have due process rights and an appellate remedy. *Sparks* should not be interpreted as either altering or diminishing those rights.

*Katherine Ann Wopat*

scrutiny in the grading of bar examinations. *Hoover v. Ronwin*, 466 U.S. 558 (1984). *But see* *Richardson v. McFadden*, 540 F.2d 744, 746 n.2 (4th Cir. 1976) ("[I]t is crystal clear that in giving and grading examinations and certifying passing scores the Board of Bar Examiners neither renders judicial decisions nor exercises judicial functions."), *modified*, 563 F.2d 1130 (1977) (en banc), *cert. denied*, 435 U.S. 968 (1978).

<sup>40</sup> *See Hoover*, 466 U.S. at 573 (actions of committee were in reality those of state supreme court); *Simons*, 643 F.2d at 781 (committee members "must almost by definition make decisions comparable to those of a judge.").

<sup>41</sup> *Rosenfeld*, 586 F. Supp. at 1339. For example, bar examiners' judicial duties would include determining which applicants are qualified for admission and ministerial duties would include providing an applicant with review of his/her examination results. *Id.*

<sup>42</sup> *See Ohse v. Hughes*, 863 F.2d 22 (7th Cir. 1988). On remand from the Supreme Court after its decision in *Forrester*, the Seventh Circuit indicated that absolute immunity may attach to the actions of a panel of judges in terminating a probation officer if the procedures used at the termination hearing were those normally employed in an adjudication proceeding, i.e., right to counsel, cross-examination of adverse witnesses, discovery, verbatim transcript and a discernible burden of proof. *Id.* at 24.

