Michigan Law Review

Volume 34 | Issue 2

1935

MAY THE BAR SET ITS OWN HOUSE IN ORDER?

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A Study of an Attempt at Self-Discipline Made by The State Bar of California and of the Fate of that Attempt at the Hands of the California Supreme Court

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> "Through this process [interpretation] the original act [the State Bar Act of California] has been emasculated to such an extent that it now bears slight semblance to the law as conceived by its framers. Certain powers claimed by its governing board under the act are no longer recognized; and what was conceived to be an act vesting full power and control over the admission and discipline of members of the bar has been practically nullified, in those respects at least, by decisions of this court." [1]

THE quoted statement is a somewhat extraordinary example of judicial candor, inasmuch as it comes from three justices of the California Supreme Court who had concurred with the rest of the court in the process of "emasculating" the State Bar Act. Indeed, in the very case in which the statement appears, these justices were dissenting from the refusal of a majority of the court to emasculate it still further. The statement has been the incentive for the present paper, the purpose of which is to determine the extent and implications of this avowed process of emasculation, so far as it affects the disciplinary work of the State Bar of California, and the legal justification or lack of justification therefor. Part I will treat of the general problem, statistics showing the results of the court's review of disciplinary cases, two illustrative cases, and two principles of review applied by the California Supreme Court in such cases. Part II, in a later issue of this *Review*, will treat of the constitutional question whether disciplinary authority may be given to an organized bar, as was attempted in California.

California is a particularly appropriate jurisdiction to be used as the basis for a study such as the present. Its State Bar Act of 1927 was one

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[1] Curtis, Richards, and Langdon, Justices, dissenting, in Y v. State Bar, 212 Cal. 196 at 211, 298 P. 474 at 480 (1931). (In all citations of this case, the letter "Y" has been substituted for the name of the accused attorney.)

of the early, detailed, legislative attempts to confer self-governing powers upon the bar, its decisions have become leading cases on the questions of constitutionality and construction thus presented, and its reported disciplinary cases far outnumber those of any other state-bar-act jurisdiction. Consideration of the relative merits of different methods of bar integration is outside the scope of this paper. But no inference should be drawn from anything herein that a statutory bar of the California type is intrinsically disadvantageous.

PART I

THE GENERAL PROBLEM

The "house-cleaning" program which in part motivated the formation of The State Bar of California eight years ago has encountered two major obstacles, neither of which apparently was anticipated by the able and public-spirited lawyers who fathered the movement.[2]

The first of these obstacles was the restrictive interpretation given to the disciplinary provisions of the State Bar Act in the *Shattuck* case,[3] in order, so the Supreme Court of California says, to avoid declaring these provisions to be an unconstitutional vesting of judiciary authority in the Board of Governors of the State Bar. The second is the frequent willingness of the Supreme Court to override the determinations of the Board of Governors and to show greater leniency than the Board to the offending lawyer.

The *Shattuck* case amounted to no less than a major operation upon the new organic act, an excision of the power to suspend or disbar, expressly conferred upon the Board of Governors of the State Bar (subject, of course, to judicial review), and a construction of the act as merely conferring upon the Board the power to investigate facts and

[2] The State Bar Act of California is Cal. Stat. (1927), c. 34, p. 38, in effect July 29, 1927. Amended, Stat. (1929), c. 708, p. 1256; Stat. (1929), c. 884, p. 1965; Stat. (1931), c. 328, p. 852; Stat. (1931), c. 861, p. 1761; Stat. (1931), c. 897, p. 1909; Stat. (1933), c. 430, p. 1087. It will be found in a compilation called "State Bar Acts Annotated," published in the Revised Edition of 1934 by the Conference of Bar Association Delegates. It will be referred to hereinafter simply by the title of the act and section number.

The State Bar Act was based on a model published in 2 J. AM. JUD. SOC. 111 (1918), which was inspired in part by the bar organization in certain Canadian provinces. For history of the California Act and its purposes, see Webb, "Bar Organization, Its Growth and Purpose," 1 CAL. S. B. J. 68 (1926); 1 CAL. S. B. J. 179 (1927).

[3] In re Shattuck, 208 Cal. 6, 279 P. 998 (1929).

make recommendations to the Supreme Court. Seemingly the court [4] knew that by this decision it was destroying a power of self-government fundamental to the philosophy of the act and was thereby "emasculating" it.[5] Nevertheless, the important constitutional question presented by the literal terms of the act is passed upon in a single sentence without the giving of reasons or the citation of authority. The question of the power of the legislature to create a self-governing bar requires for its consideration a study of the rôle of the courts and of the legislature in England and the United States, in the government of the profession. Part II of this paper will attempt such a study and will take the position that the view of the California Supreme Court is unjustified.

Proceeding on the theory that the Board of Governors can only make recommendations to the Supreme Court, that court has established two important principles in respect to review of the decisions of the Board: first, that the court will re-examine the entire record in the case,[6] will always reconsider and weigh conflicting evidence,[7] and will in no sense be bound by the fact-findings of the Board.[8] This is explicit in the decisions. Second, that the court will freely substitute its own judgment as to what the discipline in any particular case should be, regardless of the recommendation of the Board. This second proposition is implicit in the decisions and to some extent explicit.[9]

These principles of review were adopted without discussion of their desirability or citation of outside authority. Relying upon these principles, the court has come to the rescue of some fourteen members of the State Bar whom the Board would have expelled from the ranks, and in some thirteen other cases the court has reduced the period of suspension recommended by the Board, or substituted a reprimand or dismissed the case. We shall consider first the statistical record of the outcome of disciplinary cases; then two of the decided cases; and finally the propriety of the principles of review adopted by the court.

[4] See supra, note 1. Richards, J., who subscribed the statement quoted at the beginning of this paper, was the author of the per curiam opinion in the Shattuck case. See Brydonjack v. State Bar, 208 Cal. 439 at 445, 281 P. 1018 at 1021 (1929).

[5] See the quotation at the beginning of this paper from Y v. State Bar, 212 Cal. 196 at 211, 298 P. 474 at 480 (1931).

[6] In re Shattuck, 208 Cal. 6 at 9, 279 P. 998 at 999 (1929).

[7] Fish v. State Bar, 214 Cal. 215 at 225, 4 P. (2d) 937 at 941 (1931).

[8] Bentson v. State Bar, 216 Cal. 58 at 60, 13 P. (2d) 512 (1932).

[9] Supra, notes 7 and 8. And see the cases of substituted penalty cited infra, notes 13, 14, 53, 94, 95, and Mauer v. State Bar, 219 Cal. 271, 26 P. (2d) 14 (1933); Remington v. State Bar, 218 Cal. 446, 23 P. (2d) 510 (1933); Smith v. State Bar, 211 Cal. 249, 294 P. 1057 (1930); Sawyer v. State Bar, 220 Cal. 702, 32 P. (2d)

STATISTICAL SURVEY OF THE RESULTS OF REVIEW OF DISCIPLINARY CASES [10]

In the eight-year period from the organization of the State Bar of California down to September 20, 1935, the Board of Governors had filed in the Supreme Court recommendations for suspension or disbarment in 191 cases. In 100 of these no petition for review was filed by the accused and therefore the recommendation of the Board became, as of course, the order of the court. In 84 cases petitions for review were filed. The remaining 7 cases are still pending.

Taking up now the 84 cases where review was sought:

In 46 cases the court followed the recommendation of the Board of Governors.

In 27 cases the court imposed a lesser penalty than that recommended, or dismissed the case.

In 9 cases the matter is still pending in the court, one case has been returned by the court to the Board for further proceedings, and in one case the attorney was disbarred summarily after conviction of a felony, during pendency of the review.

It thus appears that in the reviewed cases the court has departed from the recommendation of the Board in 37 per cent or somewhat more than one-third of those cases.

In the group of 27 cases in which the court imposed a lesser penalty than that recommended or dismissed the case, there are 14 cases where the Board had recommended disbarment. In 12 of them the court reduced the disbarment to suspension; in one to reprimand; one case was dismissed without prejudice.

In the remaining 13 of the 27 cases just referred to, the Board had recommended suspension. In 6 of these the court ordered shorter suspensions; in 3 the court ordered reprimands; in 4 the court dismissed the case.

It is interesting to note, by contrast with the record in California, that in the neighboring state of Nevada the Supreme Court has not yet failed to follow the recommendations of the Board of Governors of the State Bar.[11] However, in certain state-bar jurisdictions, such as

369 (1934); Dudney v. State Bar, 214 Cal. 238, 4 P. (2d) 770 (1931); Hill v. State Bar, 2 Cal. (2d) 622, 42 P. (2d) 629 (1935).

[10] For these data thanks are due to Mr. Dean R. Dickey, who until recently was Secretary of The State Bar of California, and to Mrs. E. R. Hoffman, Assistant Secretary.

[11] As of September 18, 1935, the State Bar of Nevada had recommended suspension or disbarment in 13 cases. In 7 of these, the accused attorney sought review by the

Oklahoma and Alabama, it is obvious from the reports that the courts have frequently departed from the recommendations of the bar.[12]

TWO EXAMPLES OF JUDICIAL CLEMENCY

The facts of the following two cases will be summarized from the statements in the opinions of the Supreme Court of California, plus, in the second case, certain evidence which is taken from the record on file in the Supreme Court. The cases are stated here solely for the purpose of comment upon the decision of the court. The attorneys involved will be referred to by the letters *X* and *Y* respectively.

A client of attorney *X* had been sued, and in order to escape the levy of an attachment by the plaintiff the client had transferred certain valuable securities into the name of a fictitious person. The plaintiff moved to set aside the transfer and to subject the securities to the lien of the attachment. Knowing the facts as to the fraudulent transfer, attorney *X*, in opposition to the motion, took the stand as a witness and swore falsely that the transferee was another client of his, thus deliberately misleading the court. *X* then permitted his client, the transferor, in his presence, to testify falsely as *X* knew, "thereby working a fraud upon the court." These facts appearing, the Board of Governors recommended the disbarment of *X*. The Supreme Court, though accepting the facts as found by the Board, imposed a one-year suspension instead of disbarment.[13] No hint of any mitigating circumstances appears in the opinion, nor is any reason stated for not adopting the recommendation of the Board.

The case against attorney *Y* embraced four charges of misconduct.[14] In one instance he was approached by one *L* and his wife, who desired advice as to whether they should invest a sum of $500 in the stock of a certain company. Attorney *Y*, after investigation, advised against this and suggested instead the purchase of stock in a company which, so *Y* asserted, he and certain other persons were about to form under the laws of Nevada. Thereupon the clients handed *Y* a check for $500 to *Y's* order. No such company as *Y* mentioned was ever formed; no stock was

Supreme Court of Nevada. In every case, that court followed the recommendation of the State Bar. Thanks for these data are due to Mr. Chas. M. Merrill, Secretary of the State Bar of Nevada.

[12] See cases infra, note 44.

[13] X v. State Bar, 213 Cal. 403, 2 P. (2d) 340 (1931).
(In all citations of this case, the letter X has been substituted for the name of the accused attorney.)

[14] Y v. State Bar, 212 Cal. 196, 298 P. 474 (1931).

ever delivered to these clients; nor was any part of their money refunded though repeatedly demanded by them. *Y* attempted to answer the charge by the claim that he was entitled to at least a part, if not all, of the $500 as his fee. This defense was opposed by evidence that "prior to undertaking any investigation for the [*L's*], the accused had demanded and received, in three equal installments, the sum of $150 in payment of his fee." [15]

In another matter, *Y*, having brought suit on a note for $300 for a client, Mrs. *J*, settled the action without the knowledge of the client for $200 and converted the money to his own use,[16] thereafter, according to her testimony, denying to his client that he had settled the case.

The court undoubtedly adopted a charitable view of the evidence against the accused in respect to this matter. There is in the opinion no hint of the testimony of the client to the effect that, at a time after *Y* had in fact settled her claim, *Y* directed her to appear at a certain apartment on the representation that he and the opposing party and the latter's counsel would be there and would settle the case; that when she appeared at the apartment *Y* alone was present; that *Y* told her that "if I would go to bed with him, he would see that I got my money right away";[17] that after she had refused and had left the apartment, he kept calling her up and telling her to come to his office; that when on one such occasion she went to his office (quoting her testimony): "He told me I would never get it, that he wouldn't give me a cent until I did sleep with him, that I would never get the money";[18] that when she threatened to employ another attorney, he told her to go ahead, that he had everything in his wife's name.

No impeachment of this testimony, apart from an inferential denial by *Y*,[19] was discovered by the writer in a study of the record. Counsel for the State Bar made reference to this testimony in two "answers"

[15] Id. at 204, 298 P. at 477.

[16] Id. at 203, 298 P. at 477.

[17] See "Reporter's Transcript Before Committee No. 4, Wed. April 17, 1929," p. 7, part of the record in the case.

[18] Id.

[19] Y did not testify before the trial committee. He filed an "Affidavit In Opposition to the Reports of the Local Administrative Committee," dated June 26, 1929, with the Board of Governors. This affidavit does not refer to the testimony of Mrs. J with respect to indecent advances. Doubtless it inferentially denies them by claiming that the reason he failed to pay her the $200 was because he could not locate her after he had settled the case — a reason which the Supreme Court's opinion does not accept, and which apparently had not occurred to Y at the time he wrote to the Local Administrative Committee nearly two months earlier.

filed in the Supreme Court but did not stress it.[20] Counsel for the State Bar did, however, stress a further point, namely, that *Y* wrote a letter May 1 or 2, 1929, to the Local Administrative Committee, which was then investigating this charge, and stated in the letter that he held a cancelled check for $200 bearing the indorsement of Mrs. *J*. This, if true, would of course have shown that he had in fact paid her the money. The untruth of the statement appeared from *Y's* own later affidavit of June 26, 1929, presented to the Board of Governors, in which affidavit *Y* states that he paid the $200 to Mrs. *J* after a warrant had been issued for his arrest on the complaint of Mrs. *J* and a hearing held before a police judge, this hearing being about a month and a half after *Y's* letter to the Committee.[21]

In a third matter charged against attorney *Y*, a compromise had been made to settle for $111 an action brought against a certain client of *Y*, and the client had handed to *Y* $111 for the express purpose of its being applied to the settlement. *Y* transmitted $75 of the money to the opposing counsel and "wrongfully appropriated to his own use the remaining $36." [22]

The misappropriations in these three matters therefore amounted to $736.

The fourth charge proven against *Y* was that he unreasonably retained and failed to pay back upon demand a sum of $500 belonging to a certain client, which sum had been delivered to *Y* for use in settling an alimony claim against the client. As a result, *Y's* indebtedness to this client was eventually garnisheed by other claimants. Attorney *Y* furthermore was "derelict in his duty to his client" in failing to attempt to interplead the claimants or otherwise compose the claims.[23]

On the whole case the Board of Governors recommended disbarment. Without stating any disagreement with the Board on the facts, the Supreme Court rejected the Board's recommendation and ordered *Y* suspended for one year.

It should be noted that the court was not here dealing with a repentant sinner willing to make a clean breast of his misdeeds and promis-

[20] See "Answer of the Board of Governors of The State Bar of California to Petition to Review and Reverse Its Decision," filed Oct. 14, 1929, p. 9; and "Answer of The State Bar of California to the Amended Petition, and Reply to Petitioner's Points and Authorities," filed Jan. 8, 1930, p. 28. Both are part of the record in the case.

[21] This point, in substance, is noted by the court in its opinion, 212 Cal. 196 at 204, 298 P. 474 at 477.

[22] Id. at 203, 298 P. 476.

[23] Id. at 205, 298 P. 477.

ing reform. *Y* refused to appear before the Local Administrative Committee of the State Bar which was charged with the duty of trying the facts.[24] When the case had been transmitted from that committee to the Board of Governors, *Y* filed an affidavit which, as the Supreme Court points out, was discredited in an important respect by the evidence in the case.[25] In the third stage of the proceeding, namely, when it was before the Supreme Court, *Y* attempted to justify himself by excuses which the court does not accept, by charging witnesses and the Local Administrative Committee with ill will, and by reliance upon a "presumption of innocence." [26]

When we look for reasons why the court, in spite of the four charges which it finds to be established, refuses to disbar *Y*, we find in the last part of the opinion filed by the court, under date of April 1, 1931, this sentence: "Nevertheless it is well known to the members of the court that he [*Y*] possesses outstanding ability, a kindly nature and other qualities which should have made him a useful citizen." [26a] By a modification filed April 29, 1931, the court rescinded the sentence just quoted. It does not appear why the court was less willing to take judicial notice of *Y's* personal excellencies on April 29 than on April 1. By this modification the opinion is left with no suggestion of a reason for not adopting the Board's recommendation of disbarment. Indeed, the opinion declares, "our examination of the record shows little justification for petitioner's [*Y's*] actions. . . ." [27]

Out of a total of about $1236 misappropriated or "unreasonably retained" from four clients, *Y*, so far as the court's opinion shows, had made restitution of only $200, namely to Mrs. *J*, and this, as stated above, only after a warrant had been issued for *Y's* arrest. The court does not even require, as a condition precedent to the resumption of good standing at the end of the year's suspension, that *Y* should restore to his other clients their property, or that he make a showing of good conduct during the year.[28] The failure to impose such a condition as the one last mentioned assumes special significance in the light of *Y's* subsequent record.

[24] Id. at 203, 298 P. 477.

[25] Id. at 204, 298 P. 477. Courts should pay heed to the truth or falsity of defenses presented in disciplinary cases. See, In re A Solicitor, [1912] 1 K. B. 302 at 314; Moyerman's Case, 312 Pa. 555 at 562, 167 A. 579 at 582 (1933).

[26] 212 Cal. 196 at 203, 298 P. 474 at 476.

[26a] In the Matter of Y, Attorney at Law, 81 Cal. Dec. 549 at 555 (1931).

[27] Id. at 205, 298 P. 477.

[28] For varying practice as to automatic or conditional reinstatement after suspension, see 18 MINN. L. REV. 348 (1934).

Only three months elapsed after the foregoing decision before *Y* was again in the toils of the law. In July 1931 he was convicted of petty theft in the Municipal Court of San Francisco on a charge not connected with the disciplinary matters above mentioned. After he had made restitution of the amount involved in this charge, he was able, through an exculpatory provision of the California Penal Code, to avoid summary disbarment or discipline.[29]

One cannot read cases such as those of *X* and of *Y* without wishing for a Mansfield to say as he did in answer to a plea for mercy for an attorney who, five years before his lordship spoke, had stolen a guinea: "But 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." [30] Or for a Lord Coleridge, who answered a similar plea (the attorney had induced his client to raise £250 by mortgaging his house, on the representation that an inheritance tax of this amount was payable by the client, and then had pocketed part of the £250) by saying: "The question, therefore, is whether the matters now before us are sufficiently grave to justify us in proceeding to the length to which we are now disposed to proceed, and I think that they are. It is of importance that the disciplinary power which the court has over its officers, whom the public are bound to employ, should be exercised with stringency and determination. The order therefore will be to strike the respondent off the rolls." [31]

[29] In re Y, 217 Cal. 400, 19 P. (2d) 4 (1933). Y's sentence had been suspended, thus in effect placing him on probation. After he had made good the money involved in the charge, the trial court made an ex parte order, setting aside the conviction and dismissing the action, pursuant to provisions of the Cal. Penal Code, (Deering, 1931), § 1203(4). This section permits a defendant who, after conviction and probation, has fulfilled the terms of the probation, to apply to have the verdict against him set aside and the action dismissed. It further declares that such a defendant thereafter shall be "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." On an order to show cause why Y should not be disbarred, the Supreme Court held that the foregoing statute removed what would otherwise have been the necessary result of the conviction, namely, disability to further practice law.

Where a statute purports to remove disabilities already incurred, in the event that a convicted person is pardoned by the Governor, the Supreme Court refuses to give effect to the statute so far as it would require the court to reinstate an attorney disbarred for felony. In re Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935), modified, 42 P. (2d) 311 (1935). The mere fact that sentence was suspended, after conviction of crime, would not prevent automatic disbarment. In re Liliopoulos, 175 Wash. 338, 27 P. (2d) 691 (1933).

[30] Ex parte Brounsall, 2 Cowp. 829, 98 Eng. Rep. 1385 (1778).

[31] Re H. (an Attorney), 31 L. T. 730 at 731 (1875).

In appraising the action of the Supreme Court in the cases of *X* and *Y*, three points should be borne in mind.

In the first place, on the facts stated by the court, the conclusion seems inescapable that in each case the accused attorney was guilty of a felony or felonies — *X* of perjury,[32] and *Y* of embezzlement.[33] Had either *X* or *Y* been prosecuted and convicted, his disbarment would have been mandatory and summary under California law.[34]

Secondly, disbarment has been the usual discipline imposed by Anglo-American courts for offenses of the gravity of those involved in the cases of *X* and *Y*.[35] This has already been pointed out with respect to perjury in caustic comments by a writer in this *Review* on the *X* case.[36] Some courts have said that such offenses imperatively call for disbarment.[37] With the exception of one decision by the Appellate Di-

[32] Perjury, Cal. Pen. Code (Deering, 1931), §§ 118, 126. X was also guilty of a misdemeanor under Cal. Pen. Code (Deering, 1931), § 160. It has been held immaterial, in a disbarment proceeding, whether the false testimony was technically perjury. In re Popper, 193 App. Div. 505, 184 N. Y. S. 406 (1920). Nor should the court be deterred by the fact that no criminal prosecution was in fact conducted. In the Matter of Mills, 1 Mich. 392 at 399 (1850). Although X's perjury went to the heart of the case, the court's attitude should not be different if the perjury were on an immaterial issue. In re Ulmer, (D. C. N. D. Ohio, 1913) 208 F. 461 at 468.

[33] Embezzlement by attorney, Cal. Pen. Code (Deering, 1931), §§ 506, 487-490.

[34] Cal. Code Civ. Proc. (Deering, 1931), §§ 287(1), 299. See, in re Y, 217 Cal. 400 at 402, 19 P. (2d) 4 at 5 (1933).

[35] Disbarment for deceiving court by perjury or subornation of perjury, presentation of false affidavits, knowingly permitting perjured evidence to be introduced, etc.: People ex rel. v. Johnson, 344 Ill. 132, 176 N. E. 278 (1931); Ex parte Walls, 64 Ind. 461 (1878); Rice v. Commonwealth, 18 B. Mon. (57 Ky.) 472 (1857); In re Abrams, 36 Ohio App. 384, 173 N. E. 312 (1930); Matter of Wool, 36 Mich. 299 (1877); In re Hardenbrook, 135 App. Div. 634, 121 N. Y. S. 250 (1909) [for a series of New York cases, imposing disbarment for false testimony and false affidavits, see In re Popper, 193 App. Div. 505 at 512, 184 N. Y. S. 406 at 410-411 (1920)]; In re O'Brien, 95 Vt. 167, 113 A. 527 (1921). Disbarment for dishonest misuse and misappropriation of clients' funds: In re Lohrke, 38 Ariz. 520, 2 P. (2d) 1039 (1931); In re Langworthy, 39 Ariz. 523, 8 P. (2d) 245 (1932); Jones v. McCullough, 138 Ga. 16, 74 S. E. 694 (1912); In re Henry, 46 Idaho 578, 269 P. 416 (1928); People ex rel. Chicago Bar Assn. v. Hachtman, 350 Ill. 326, 183 N. E. 222 (1932); In re Wilson, 79 Kan. 674, 100 P. 635 (1909); In re Comfort, 180 Minn. 148, 230 N. W. 582 (1930); In re Manahan, 186 Minn. 98, 242 N. W. 548 (1932); In re Stevens, 92 Mont. 549, 16 P. (2d) 410 (1932); In re Garrity, 60 N. D. 454, 235 N. W. 343 (1931); Re Hill, L. R. 3 Q. B. 543 (1868); Ex parte Macauley, 30 S. R. New South Wales 193 at 194 (1930); Re H. (an Attorney), 31 L. T. 730 (1875). See 17 Ann. Cas. 692 (1910) for many other cases; and see 18 MINN. L. REV. 217 (1934).

[36] Comment 30 MICH. L. REV. 270 at 273, note 4 (1931); 30 MICH. L. REV. 452 (1932).

[37] In re Hosford, 60 S. D. 625 at 627, 245 N. W. 822 at 823 (1932): "That deliberate subornation of perjury . . . is ample to justify disbarment must be admitted.

vision of the New York Supreme Court on misappropriation,[38] no genuinely comparable case has yet been found by the writer where perjury or subornation of perjury, or dishonest misappropriation of clients' funds was held to warrant a lesser penalty than disbarment.[39] And in the New York case, just refered to, the period of suspension was two years instead of one year as in the California cases under discussion, and reinstatement was to occur only upon compliance with certain conditions and not automatically as in the California cases. The view of the California court that deliberate perjury and repeated misappropriation of clients' funds, without mitigating circumstances, warrant merely short suspension is in striking contrast to the attitude of that court as to the same offenses before the State Bar was formed.[40] Has the court for-

It might almost be said to require disbarment." In re Barclay, 82 Utah. 288 at 297, 24 P. (2d) 302 at 305 (1933): "If the accused was guilty of the crime of embezzlement by reason of appropriating the $453 to his own use, it would seem that nothing short of disbarment would serve to protect the public from his further participation in the administration of the law." People ex rel. Healy v. Barrios, 237 Ill. 527 at 540, 86 N. E. 1075 at 1079 (1908), disbarment for falsely representing that alimony payments were for the wife and children when in fact the attorney was claiming them as fees, under an unconscionable agreement: "They (attorneys) are a part of the machinery of the law for the administration of justice, and it is indispensable that courts shall in a large measure be able to rely upon their good faith and fair dealing. It is no hardship to make this requirement, and it cannot be relaxed without great detriment to the profession and to the proper administration of justice." In re Royall, 34 N. M. 554 at 556, 286 P. 156 at 157 (1930): "The fact remains, however, that this court cannot countenance misappropriation of a client's money by a lawyer. Absolute honesty and fidelity to trust are indispensable elements in his character; when he shows himself unable to resist the urge to misuse his client's money, he must be deprived of the office and privileges of a member of the bar." In re Popper, 193 App. Div. 505 at 512, 184 N. Y. S. 406 at 411 (1920): "The giving of false testimony strikes at the very heart of the judicial system. That an officer of the court should countenance it in another is intolerable. That he should himself be guilty of such an offense against good morals and the public weal is not to be condoned. By such conduct he has forfeited the confidence of the court and his right to its continued certificate of good character and integrity. . . . he no longer possesses that good character which is essential to his continuance in an honorable profession. He is, therefore, disbarred." In re Hertz, 169 Minn. 431 at 433, 211 N. W. 678 at 679 (1927): "An attorney of this court cannot falsify before a Federal tribunal and continue his practice in the courts of this state." See also In the Matter of Mills, 1 Mich. 397 at 400 (1850); Penobscot Bar v. Kimball, 64 Me. 140 at 154 (1875).

[38] In re Campbell, 236 App. Div. 429, 260 N. Y. S. 80 (1932). Cf. In re Treadwell, 236 App. Div. 562, 260 N. Y. S. 264 (1932).

[39] In the following cases, attorneys were merely suspended for misappropriation of funds, but features distinguishing the cases from that of Y are to be found. In re Weed, 26 Mont. 507, 68 P. 1115 (1902); Matter of Z——, 89 Mo. App. 426 (1901); In re O——, 73 Wis. 602, 42 N. W. 221 (1889).

[40] In re Wharton, 114 Cal. 367, 46 P. 172 (1896) (false affidavit of service of summons, disbarment); In re Burris, 101 Cal. 624, 36 P. 101 (1894) (misappropria-

gotten that in earlier days it cordially endorsed the words of Chief Justice Doe of New Hampshire:

> "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not." [41]

To these sentences, the California court, in disbarring an attorney who misappropriated the proceeds of a client's note, added a remark reminiscent of the words of Lord Mansfield already quoted:

> "If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts, by taking away the license under which they have been committed. This it will do not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion." [42]

Thirdly, the *X* and *Y* decisions have come in a period when the profession and the courts are being repeatedly challenged to eliminate the unscrupulous lawyer. The earnest attempt of the State Bar to meet that challenge is thwarted by these and similar decisions, and thwarted in a forum where one would have expected enthusiastic support.[43]

Unfortunately, California does not stand alone among state-bar jurisdictions in the respect just noted. Attempts at housecleaning by the profession in Oklahoma and Alabama have encountered an attitude of complacent leniency in the supreme courts of those states.[44]

tion, disbarment); In re Danford, 157 Cal. 425, 108 P. 322 (1910) (misappropriation, disbarment); In re Treadwell, 67 Cal. 353, 7 P. 724 (1885) (misappropriation, disbarment).

[41] In re Treadwell, 67 Cal. 353 at 358, 7 P. 724 (1885), quoting Delano's Case, 58 N. H. 5, 6 (1876).

[42] In re Treadwell, 67 Cal. 353 at 358, 7 P. 724 (1885).

[43] Obviously, the proven charges against Y did not convince the Supreme Court that he was a "grossly improper person" to participate in the administration of the laws, for the court's opinion quotes with approval the familiar language of the United States Supreme Court in Ex parte Wall, 107 U. S. 265 at 288, 2 S. Ct. 569 (1882), that "courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws." See 212 Cal. 196 at 202, 298 P. 474 at 476 (1931). See also the splendid statement of the Pennsylvania Supreme Court two years ago regarding the duty of the court to the public in striking off unworthy attorneys. Moyerman's Case, 312 Pa. 555 at 563-564, 167 A. 579 at 583 (1933).

[44] In re Hills, 170 Okla. 427, 40 P. (2d) 1031 (1935); In re Pruiett, (Okla., 1935) 46 P. (2d) 919. Cf. In re Dick, 166 Okla. 114, 26 P. (2d) 412 (1933).

In re Fite, 228 Ala. 4, 152 So. 246 (1933); Ex parte Messer, 228 Ala. 16,

PRINCIPLES GOVERNING REVIEW OF DISCIPLINARY PROCEEDINGS IN THE SUPREME COURT OF CALIFORNIA

1. *Re-Examination of the Evidence*

This principle of review, already stated in more detail, seems to have originated in a brief statement of the *Shattuck* opinion, as follows:

> "The review of the evidence, findings and conclusions of the Board of Bar Governors . . . should consist in a reexamination by this Court of the entire record." [45]

The rule was repeated in much the same brief form in the *Stafford* case,[46] again without any consideration of authorities or of the results of such a rule, and was set out more fully in the *Fish* case in 1931 as follows:

> "Its findings [that is, the findings of the Board of Governors], although based on conflicting evidence, are not binding on this court. This court can, and in this particular case, has refused to sustain findings of the Board of Governors based on conflicting evidence. In other words, in such cases this court can and always does pass upon the weight of the evidence." [47]

The rule has been frequently reiterated.[48] Its importance in practice may be judged by reference to cases where it has been applied. Certain of these will now be briefly noted.

In *K's* case,[49] grave charges, involving the payment of money to a hostile witness to induce the witness to secrete himself, were dismissed by the Supreme Court on review, because the court refused to accept testimony deemed credible by the triers of fact.

In the case of attorney *G*,[50] a charge of embezzling some $50,000 of

152 So. 244 (1933); In re Countryman, 228 Ala. 21, 152 So. 257 (1933). Cf. Ex parte Walker, 228 Ala. 130, 152 So. 246 (1933).

[45] 208 Cal. 6 at 9, 279 P. 998 at 999 (1930).

[46] 208 Cal. 738 at 739, 284 P. 670 at 671 (1930).

[47] Fish v. State Bar, 214 Cal. 215 at 225, 4 P. (2d) 937 at 941 (1931).

[48] Clark v. State Bar, 214 Cal. 281 at 286, 4 P. (2d) 944 at 946 (1931); Bentson v. State Bar, 216 Cal. 58 at 60, 13 P. (2d) 512 (1932); In re Richardson, 209 Cal. 492 at 499, 288 P. 669 at 671 (1930). In some cases, the Court has moderated the sweeping effect of the rule for re-examination by insisting that the burden is on the accused attorney to show wherein the decision of the Board of Governors is erroneous or unlawful. Aydelotte v. State Bar, 209 Cal. 737 at 740, 290 P. 41 at 42 (1930); Ring v. State Bar, 218 Cal. 747 at 751, 24 P. (2d) 821 at 822 (1933).

[49] K v. State Bar, 220 Cal. 689, 32 P. (2d) 348 (1934). (Letters are substituted by the writer, in this and following cases, for the actual names of attorneys.)

[50] G v. State Bar, 213 Cal. 237, 2 P. (2d) 325 (1931).

trust funds belonging to a mentally incompetent woman of seventy-two was held by the court not sustained, because the court refused to discredit the story of the attorney that he had paid the money to the woman in cash — a narrative which the Local Administrative Committee and the Board of Governors evidently thought too preposterous, under the circumstances.

Where the Committee and the Board found from all the circumstances that an attorney must have had guilty knowledge of fraudulent or unethical transactions carried on by agents for his benefit, the court has denied the triers of fact the right to draw such inferences and has insisted upon indubitable proof.[51]

An attorney, *C*, who had been employed for five months in the office of a concern, the business of which was ambulance-chasing, testified that he had no knowledge that cases were obtained by solicitation, but thought that the purpose of the concern was "more altruistic than mercenary." The principal stockholder and officer in charge, *M*, testified that from the beginning *C* was fully aware of the nature of the business. The Committee and the Board believed *M*. The Supreme Court on the record believed *C* and dismissed the charges.[52]

In the recent case of *E*, the Local Administrative Committee accompanied its report with the following statement:

> "The committee also feels that an attorney as well acquainted and as influential with the criminal element as respondent has shown himself to be and who has been and is capable and willing to use such acquaintance and influence to his own advantage in obtaining perjured testimony and in intimidating witnesses adverse to him, is not only a discredit to the profession but a menace to society in general." [53]

The original charge which *E* had been called to answer, solicitation of professional business, permitted as a maximum only a year's suspension. The Board of Governors had limited its recommendation to this maximum. The Supreme Court by a majority vote (the Chief Justice and Shenk, J., dissenting) reduced the penalty to a three months' suspension. In the course of a lengthy opinion which is mostly an apologia for *E*, the court dismisses the devastating comment of the Committee, quoted above, on the ground that it is insufficiently proved. This ob-

[51] R v. State Bar, 218 Cal. 446, 23 P. (2d) 510 (1933); B v. State Bar, 218 Cal. 143, 21 P. (2d) 577 (1933).

[52] C v. State Bar, 214 Cal. 281, 4 P. (2d) 944 (1931).

[53] E v. State Bar, 2 Cal. (2d) 209, 40 P. (2d) 264 at 267 (1934).

viously depended upon the credibility of witnesses before the Committee.

Several objections to the principle of complete re-examination of the evidence come at once to mind. In the first place, in view of the procedure while the case is in the hands of the State Bar, complete re-examination is unnecessary as a safeguard to the rights of the accused attorney. The Local Administrative Committees are composed of a number of practicing attorneys selected for their known ability and integrity by the Board of Governors.[54] An attorney designated as the "examiner" presents the case against the accused. The accused is entitled to be present, to be represented by counsel, to subpœna witnesses and to examine and cross-examine witnesses. Testimony is given under oath and is taken down stenographically. The usual rules of evidence apply.[55] The testimony, with the findings of fact and recommendations of the Committee, goes to the Board of Governors. The case is assigned to one member of the Board for detailed study and report to the full Board.[56] The accused attorney may, if he chooses, be heard orally by the Board. If good reason therefor is shown, either the examiner or the accused attorney may present additional evidence or the Board may entirely re-try the case. The Board may adopt the findings and conclusions of the local administrative committee or may make its own findings of fact and recommendations. A majority vote of the entire Board is required for a recommendation of suspension or disbarment. If such a recommendation is made, the complete record goes to the Supreme Court. The Board, a body of fifteen men elected by the bar of the state for terms of three years, five members going out of office each year, is a body of leading lawyers. Here it is dealing with a subject-matter as to which it has special interest and competence. Surely, on review, its findings ought to be given as much weight as attaches to the findings of a judge sitting without a jury. The generally accepted rule as to court review of the fact determinations of administrative bodies is that such determinations are final if supported by substantial evidence.[57] In view

[54] These committees vary in number of members from three to nine, or thereabouts.

For procedure in discplinary cases, see State Bar Act of California, §§ 26, 30, 32, 34, 35, 38; Rules of Procedure of The State Bar, 213 Cal. cxix (1932), as revised down to Jan. 18, 1935, and published by The State Bar; and PROCEEDINGS OF THE STATE BAR OF CALIFORNIA (7th Annual Meeting), 3-4 (1934).

[55] In re Richardson, 209 Cal. 492, 288 P. 669 (1930).

[56] See Shaeffer v. State Bar, 220 Cal. 681 at 688, 32 P. (2d) 140 at 143 (1934).

[57] For citation of authorities, see 27 MICH. L. REV. 943 (1929); 13 TEX. L. REV. 524 (1935).

of the dignity of the Board of Governors, its expertness in the matters involved, its judicial methods of procedure, and because it is answerable in a political sense to the profession for the quality of its work,[58] its determinations of fact ought *a fortiori* to be given the benefit of the rule usually applied to administrative bodies.

Furthermore, the legislative intent as expressed in Section 26 of the State Bar Act is against a *de novo* examination of the evidence by the Supreme Court. Provision is made in the act for the taking and preservation of the evidence in the case in a quasi-judicial manner, the making of fact findings and decisions as to reprimand, suspension or disbarment, by the Board and the transmittal of the entire record to the Supreme Court. The accused attorney is allowed to petition the court within sixty days for a review of the decision of the Board. The section is silent as to any right in the attorney to a reconsideration of the evidence. It provides: ". . . upon such review the burden shall be upon the petitioner to show wherein such decision is erroneous or unlawful." These terms by no means suggest a reconsideration of conflicting evidence or of the credibility of witnesses. They indicate that review was intended to be limited to errors of law, such as the making of a finding of fact without substantial supporting evidence, the application of some erroneous principle of law, or an abuse of discretion.

The only reason ever advanced by the Supreme Court for its rule for a complete reconsideration of the evidence is that stated in the *Shattuck* case, namely, that the Board of Governors can have no judicial power and therefore must act only in an advisory capacity as "an administrative arm of the court." [59] Granted for argument that the court has, as it claims, "inherent" authority to reconsider the evidence regardless of any implication in the State Bar Act to the contrary, it is submitted that the court ought not to exercise such a power. To do so is not only inconvenient for the court and inadvisable as a matter of policy, but unnecessary for the protection of the accused. No one familiar with the Supreme Court's routine imagines that the entire bench reads the record in cases of this type. What happens is that the justice to whom the case is assigned reads the record and prepares his opinion. If his opinion makes a sufficiently plausible case to receive the approval of a majority of the court, it becomes the decision. In practice, then, we have the views of a single justice on a disputed question of fact — views formulated

[58] Cf. Local Government Board v. Arlidge, [1915] A. C. 120 at 133.

[59] For the quoted phrase see Fish v. State Bar, 214 Cal. 215 at 225, 4. P. (2d) 937 at 941 (1931).

without contact with the witnesses in the case — overriding the conclusion of the lawyers who tried the case as members of the Local Administrative Committee, and the conclusion of the lawyers who reviewed it as members of the Board of Governors.

The better authority, and probably the weight of authority, including jurisdictions where the reviewing court has plenary power to reconsider the evidence, is against such actual reconsideration. We shall note first the English and then the American cases.

In 1924 Lord Chief Justice Hewart laid down what the writer submits is the sound principle.[60] The disciplinary committee of the Law Society had found that a certain solicitor for several months had been making payments to a public office-holder as an inducement for the referring of business to the solicitor. The committee had determined that this was professional misconduct for which the solicitor should be suspended for two years and had entered such an order. On the appeal of the solicitor to the King's Bench Division, taken under the provisions of the Solicitors' Act of 1919, the two justices of that court who rendered opinions took occasion to state explicitly the attitude of that court in respect to the findings and decision of the committee of the Law Society. The first opinion by the Lord Chief Justice declared that under the act, it was for the Law Society in the first instance, at any rate, to control the setting of its house in order, and that the Law Society is a very well-qualified body to pass upon questions of professional misconduct. He went on to say that under the terms of the act the appeal to the Divisional Court was in the nature of a rehearing: "nevertheless, as it seems to me, it is right that this Court should pay the greatest attention not only to the findings of the committee under this Act, but also, and not least, to the mode in which that experienced body has exercised its discretion." [61] Roche, J., seconds these remarks of the Lord Chief Justice, declaring that although his own inclination would have been to impose a shorter period of suspension, "none the less I entirely agree that it is not for this Court, with the powers of appeal that are given to it, to interfere lightly with the discretion of the committee, or at all, unless it sees that the committee has gone wrong in some matter of high degree, or some matter of principle. It is not for this Court to say a little more or a little less is the measure we should have given and meted out, therefore we will interfere with the proceedings of the committee." [62] The procedure involved in the foregoing case is analogous to

[60] In re A Solicitor (No. 2), 93 L. J. (K. B.) 761 (1924).
[61] Id. at 763.
[62] Id. at 763.

that prevailing under the State Bar Act of California as construed by its Supreme Court. Yet, there is a marked contrast between the respectful and constructive attitude toward the work of the Law Society taken by the King's Bench Division and the disregard for the judgment of the Board of Governors evinced by the Supreme Court of California in cases such as those of *X* and *Y*, and others already cited.

In Canada, where self-governing powers are generally conferred upon the bar, the only case found, bearing on the question of the weight to be given to the findings of the benchers of the bar, is a decision by the Supreme Court of Ontario stating in forceful terms the same "hands-off" policy regarding review, enunciated by Lord Chief Justice Hewart in the case above.[63]

In considering United States authorities we must distinguish between the state-bar-act jurisdictions where cases are first tried by the bar, and on the other hand the majority of states where the older procedure still obtains, namely, the trial of disciplinary cases in a lower court, generally without a jury,[64] and an appeal to a higher court. This older procedure will be considered first.

In a few states, under the older procedure, appeals are restricted by statute so that only questions of law may be raised.[65] Re-weighing of the evidence would of course be out of the question in such states. However, in most states under the older procedure there is no such statutory limitation upon appeal; but a similar result is reached by a rule of self-limitation, the appellate court declaring that even if it has power to inquire fully into the facts it will not undertake to do so unless some clear showing of error is made.[66]

[63] Hall v. Ball, 54 Ont. L. R. 147 (1923).

[64] For an enumeration of states which do, and do not, permit jury trials in disciplinary cases, see Ex parte Thompson, 228 Ala. 113 at 117-124, 152 So. 229 at 232-237 (1933).

[65] Boston Bar Assn. v. Greenhood, 168 Mass. 169, 46 N. E. 568 (1897); In re Goodman, 199 N. Y. 143, 92 N. E. 211 (1910); Attorney-General v. Nelson, 263 Mich. 686, 249 N. W. 439 (1933); 2 THORNTON, ATTORNEYS AT LAW 1325 (1914).

[66] In re Durant, 80 Conn. 140 at 149, 154, 67 A. 497 at 501 (1907); Re Adriaans, 28 App. D. C. 515 at 524 (1907); Zachary v. State of Florida, 53 Fla. 94 at 97, 43 So. 925 (1907); Jones v. McCullough, 138 Ga. 16, 74 S. E. 694 (1912); In re Wilson, 79 Kan. 674 at 676, 679, 100 P. 635 at 637 (1909); Rice v. Commonwealth, 18 B. Mon. (57 Ky.) 472 at 483 (1857); In re Hopkins, 54 Wash. 569 at 573, 103 P. 805 at 807 (1909), stating the rule against review of the evidence except to ascertain abuse of discretion, which prevailed prior to the adoption of a state bar act. Wash. Laws (1933), c. 94, p. 397, Rem. Supp. (1933) § 138-1. See 2 THORNTON, ATTORNEYS AT LAW 1326 (1914). See, contra, Davis v. State, 92 Tenn. 632 at 645,

California followed the same rule of abiding by conclusions of the trial judge upon contradictory evidence, in the days when disciplinary proceedings were brought originally in the superior courts, subject to an appeal to the Supreme Court.[67]

Before considering the rules of review of fact findings prevailing under the newer procedure, it may be remarked that the rule of self-limitation in the foregoing cases ought to be applied by analogy under the newer procedure, both by reason of the judicial safeguards thrown about the accused in the trial before the bar, and also by reason of the fundamental difficulty which confronts the reviewing court under either procedure, namely, that it cannot observe the demeanor of witnesses or sense other significant imponderables of a trial which escape a stenographic record.[68]

Under the newer procedure, the authorities are divided. One group of states, now to be mentioned individually, gives the fact-findings of the disciplinary body of the bar the same weight as attaches to the findings of a trial court.

In Colorado, where complaints against attorneys are tried by a grievance committee of the Colorado Bar Association, the Supreme Court in examining the committee's findings and recommendation has recently said:

> "The committee saw and heard him and all the witnesses. Every presumption indulged in favor of the action of trial court or jury should be, and is, indulged in support of its findings and conclusions." [69]

23 S. W. 59 (1893). By statute in Iowa, appeals of disciplinary cases are heard *de novo* on the record. State v. Mosher, 128 Iowa 82 at 90, 103 N. W. 105 at 108 (1905).

[67] See In re Wharton, 114 Cal. 367 at 369, 46 P. 172 at 173 (1896).

[68] The California Supreme Court has on at least one occasion recognized its relative incapacity to pass upon conflicting testimony, declaring that the Local Administrative Committee "was in a better position to judge the certainty of the offense than we are. . . ." Mauer v. State Bar, 219 Cal. 271 at 276, 26 P. (2d) 14 at 16 (1933).

Pursuant to Section 38 of the State Bar Act, the Supreme Court has promulgated a rule of review, which provides that if the petition for review is based upon want of evidence sufficient to warrant the determination of the Board of Governors, the petition must fairly state all the material evidence on the issue. See 213 Cal. lxxix. The Supreme Court has never yet dismissed a petition for review for failure to comply with this rule, although the Court has been urged to do so. See "Answer of The State Bar of California to Petition For Writ of Review," part of the record in Bordner v. State Bar, 218 Cal. 580, 24 P. (2d) 459 (1933).

[69] People ex rel. Colorado Bar Assn. v. ———, 90 Colo. 440 at 443, 9 P. (2d) 611 at 612 (1932).

In Pennsylvania, where the complaints are tried by a committee of "hearing masters" and reviewed by the Board of Governance of the Pennsylvania Bar before proceedings in the Supreme Court, the Supreme Court has said:

"Their findings come to us carrying weighty presumptions of justice and propriety." [70]

In a subsequent case the Pennsylvania Supreme Court quoted this language and declared that the weight and reliability of testimony adduced before the hearing masters was for the hearing masters.[71]

In Oklahoma, which in 1929 enacted a state bar act very similar to that of California, the Supreme Court in one of the first cases arising under that act, discussed at some length the principles which should govern review of findings of the Board of Governors. After declaring that the Board was the trier of the facts and that the same rule should apply to its findings as to the findings of a judge in an equity action, the court continued:

"These are matters for the Board of Governors to pass upon. They are attorneys of wide experience, eminently competent to pass upon said matters, and the findings made by the Board of Governors will be conclusive upon this court where there is competent evidence reasonably tending to support the same." [72]

There are then three states, Colorado, Pennsylvania and Oklahoma, plus the very positive authority of England and Ontario, all holding contrary to the California rule for re-examination of the evidence in disciplinary cases.[73]

On the other hand, there are two state-bar-act jurisdictions, namely, Nevada [74] and New Mexico,[75] which are expressly in accord with the

[70] Rosenbaum's Case, 300 Pa. 465 at 466, 150 A. 748 at 748-749 (1930). See also infra, note 85.

[71] Klensin v. Board of Governance, 312 Pa. 564 at 574, 168 A. 474 at 478 (1933).

[72] In re Tillman, 157 Okla. 166 at 167, 11 P. (2d) 511 at 512 (1932).

[73] Since the accused has already in effect had two trials of the facts, before his case gets to the Supreme Court, one might invoke against further fact review the analogy of the rule of the United States Supreme Court that in the absence of clear error it will not reconsider fact findings, if the Circuit Court of Appeals has concurred with the District Court in such findings. See Dun v. Lumbermen's Credit Assn., 209 U. S. 20 at 23, 28 S. Ct. 335 (1907); and 4 FOSTER, FEDERAL PRACTICE, 6th ed., 3885 (1922).

[74] State Bar of Nevada v. Miller, 55 Nev. 38 at 39, 24 P. (2d) 317 (1933).

[75] In re Gibson, 35 N. M. 550 at 567, 4 P. (2d) 643 at 651 (1931).

California rule. Three other state-bar-act jurisdictions — Alabama,[76] Idaho,[77] and Washington [78]— are perhaps also following the California rule in reviewing fact findings, but their decisions are not so clear on the point. These five states, however, do not add considerably to the authority of the California cases. Their decisions are based directly or indirectly upon the *Shattuck* case in California and upon an earlier case in Washington.[79] They give no hint of being aware of contrary authorities. Nor do they adduce any reasoning outside of that in the *Shattuck* case.

Finally, there are a number of state-bar-act jurisdictions in which the question of reviewing fact findings seems as yet to be entirely open, namely, Arizona, Kentucky, Mississippi, North Carolina, North and South Dakota, Oregon, Michigan and Utah.[80] In the last mentioned state the cordial attitude of the Supreme Court toward the State Bar, as indicated in the first reported case,[81] should provide an excellent opportunity for inducing the court to adopt the rule of self-limitation rather than that of California.

2. *Substitution of the Court's Discretion as to the Proper Penalty*

The final matter for discussion is the second principle of review, already stated, namely the free substitution of the view of the Supreme Court of California as to the proper discipline in a particular case for the view of the Board of Governors. Two other state-bar-act jurisdictions, Oklahoma and Alabama, seem to be applying the same principle.[82]

It must be emphasized that this process of substitution, in which disbarments become suspensions and suspensions become shorter suspensions or reprimands, is not predicated on any finding that the Board has

[76] See, Ex parte Thompson, 228 Ala. 113 at 125, 152 So. 229 at 239 (1933). But the Alabama court has wider powers on review than the California court, by the terms of the Alabama statute. See id. at 125, 152 So. at 238.

[77] See In re Henry, 46 Idaho 578 at 582, 269 P. 416 at 417 (1928).

[78] See In re Gwynn, 179 Wash. 389, 37 P. (2d) 1114 (1934).

[79] In re Bruen, 102 Wash. 472, 172 P. 1152 (1918). This case does not decide or state whether the court will re-examine the evidence and re-weigh conflicting evidence. It does, however, deny the right of the legislature to vest disciplinary authority in the bar.

[80] For a summary of jurisdictions adopting one type or another of bar integration, see 19 J. AM. JUD. SOC. 77 (1935).

[81] See In re Barclay, 82 Utah 288 at 298, 24 P. (2d) 302 at 306 (1933).

[82] See cases cited supra, note 44.

exceeded the allowable limits of discretion, has acted arbitrarily, or has applied fallacious reasoning. The process is exactly that condemned by Lord Chief Justice Hewart and Roche, J., in language already quoted — a process by which the California court declares that "a little more or a little less is the measure we should have given or meted out, therefore we will interfere with the proceedings of the committee." Such substitution might be viewed with less suspicion if it ever operated to increase the recommended penalty (in many cases [83] the Board's recommendation is obviously lenient), but it has never so operated.

We shall inquire briefly as to how the principle of substitution stands in reason and on the authorities.

Beyond a doubt, the legislature intended to confide discretion as to the proper penalty in the Board of Governors, subject to review only in the case of abuse or arbitrariness.[84] The reason given by the court for refusing to give effect to the legislative intent is the same reason advanced in respect to re-examination of the evidence, namely, the theory of the *Shattuck* case that disciplinary authority is judicial and therefore the Board can act only in an advisory capacity as an administrative arm of the court. Without entering upon the constitutional question, it is sufficient here to point out that in the states of Pennsylvania [85]

[83] In re Jones, 208 Cal. 240, 280 P. 964 (1929); Jacobs v. State Bar, 219 Cal. 59, 25 P. (2d) 401 (1933); Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513 (1931); Galbraith v. State Bar, 218 Cal. 329, 23 P. (2d) 291 (1933); Barbee v. State Bar, 213 Cal. 296, 2 P. (2d) 353 (1931); Dudney v. State Bar, 214 Cal. 238, 4 P. (2d) 770 (1931); Hill v. State Bar, 2 Cal. (2d) 622, 42 P. (2d) 629 (1935); and see especially Recht v. State Bar, 218 Cal. 352 at 355, 23 P. (2d) 273 at 274 (1933), and Waste, C. J., dissenting in Fish v. State Bar, 214 Cal. 215 at 226, 4 P. (2d) 937 at 942 (1931).

[84] See the preceding discussion of Section 26 of the State Bar Act, under the first principle of review, supra, p. 215.

[85] Rosenbaum's Case, 300 Pa. 465 at 466, 150 A. 748 at 748-749 (1930). The opinion states: "Their [i.e. the Board of Governance's] findings come to us carrying weighty presumptions of justice and propriety." The term "findings" should be understood as including both the findings of fact and the recommended penalty. The use of the terms "justice and propriety" points to this broad construction of the term "findings." It also appears that the brief of counsel for Rosenbaum referred to the recommendation of suspension as "the second finding" of the Board of Governance. For this information, the writer is indebted to Mr. Geo. G. Chandler of the Philadelphia bar. Mr. C. Brewster Rhoads, of the Philadelphia bar, Chairman of the Board of Censors of the Philadelphia Bar Association and Reporter for the Supreme Court of Pennsylvania, has volunteered the following opinion, for which the writer acknowledges indebtedness: The Supreme Court [of Pennsylvania] on appeal treats the findings and recommendations of the Bar Committee as the equivalent of a jury verdict, and not to be upset except for a clear abuse of discretion.

and Colorado,[86] and in England [87] and Canada,[88] where disciplinary authority seemingly is no less judicial than in California, the courts have refused to adopt the California principle of substitution, and have elected to leave undisturbed the discretion of the bar as to penalties where that discretion is reasonably exercised. In these jurisdictions this limitation upon review is recognized as self-imposed.

Oddly enough, the California Supreme Court has itself applied the same principle of self-limitation in dealing with cases on admission, coming from the Committee of Bar Examiners. Thus it has declared that in this type of case it "will refuse to exercise its power in contravention to the adverse recommendation of the Committe of Bar Examiners unless a convincing showing is made . . . that such adverse recommendation is not based upon sound premises and valid reasoning." [89]

The inconsistency between this attitude in admission cases and the attitude in disciplinary cases has been called to the attention of the court and the court has been urged in vain to apply the same rule of self-limitation with respect to the Board of Governors.[90]

An analogy, indicating the propriety of self-limitation in reviewing the discretion of the Board of Governors may be found in that numerous group of cases under the older procedure where, as already stated, disciplinary complaints are initially tried in the courts, not by the bar, and are reviewed on appeal.[91] With few exceptions the discretion of the trial court is held not subject to be disturbed upon review unless clearly abused. The reasoning of these cases applies equally well where complaints are tried first by a body of the bar. Indeed, the reasoning applies here *a fortiori*, since here we have, not the opinion of a single trial judge,

[86] People ex rel. Colorado Bar Assn., 90 Colo. 440 at 443, 9 P. (2d) 611 at 612 (1932).

[87] In re A Solicitor (No. 2), 93 L. J. (K. B.) 761 (1924); In re A Solicitor, [1912] 1 K. B. 302.

[88] Hall v. Ball, 54 Ont. L. R. 147 (1923).

[89] Spears v. State Bar, 211 Cal. 183 at 191-192, 294 P. 697 at 700 (1930); Salot v. State Bar, (Cal. 1935) 45 P. (2d) 203. Cf. Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211 (1933).

[90] See, for instance, the "Answer of the State Bar of California to Petition for Writ of Review," pp. 4 and 5, in the Record of Bordner v. State Bar, 218 Cal. 580, 24 P. (2d) 459 (1933).

[91] See the following cases, among those already cited supra, note 66: In re Durant, 80 Conn. 140, 67 A. 497 (1907); Re Adriaans, 28 App. D. C. 515 (1907); Jones v. McCullough, 138 Ga. 16, 74 S. E. 694 (1912); Rice v. Commonwealth, 18 B. Mon. (57 Ky.) 472 (1857); In re Hopkins, 54 Wash. 569, 103 P. 805 (1909). See also, Ex parte Burr, 9 Wheat. (22 U. S.) 529 at 530 (1824). See 2 THORNTON, ATTORNEYS AT LAW 1326 (1914).

but the opinion of a group of three or more lawyers on the Local Administrative Committee, and of a majority of the fifteen lawyers on the Board of Governors.

Against the California rule of substitution one may also invoke the usual principle with respect to court review of administrative action, namely that where discretion has been lodged by statute in the administrative body its exercise will not be defeated by the substitution of the discretion of the court.[92]

Considerations of policy and convenience are all against the California rule and in favor of a rule of self-limitation. The recommendations of the Board of Governors represent the judgment of an experienced body of representative lawyers, familiar from daily contact with the conditions of practice and the standards of conduct currently prevailing at the bar. Judges of the Supreme Court, separated from practice by long terms not only in their own court but often in courts below, cannot possibly have the same intuitive judgment as to degrees of misconduct, or know so well the critical reaction of the bar, or of public opinion. Such judges are not likely to be able so well to discern in the particular dereliction a reflection of some general evil; nor are they so competent to estimate the effect of a particular penalty either on the individual attorney accused or as a check upon the more general evil, when such evil exists. It may be recalled in this connection that ambulance-chasing and its grave concommitant abuses became a reproach to the administration of justice in many of the larger American cities, with no attempt on the part of the bench, so far as the writer knows, either to investigate or correct the evil until the bar brought pressure for reform.[93]

The failure of the California Supreme Court to limit its review of facts and of recommended discipline, in addition, of course, to its well-known tendency toward leniency, has operated as a standing invitation to attorneys to petition for review of the action of the Board of Governors. Though the misconduct may have been flagrant, the proof clear, and the recommendation reasonable, the time of the court is again and again taken up in the hearing and decision of petitions for review, the

[92] See FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 295 (1928); Biklé, "Administrative Discretion," 2 GEO. WASH. L. REV. 1 at 7 (1933).

[93] See e.g., People ex rel. Karlin v. Culkin, 248 N. Y. 465 at 458, 162 N. E. 487 at 488 (1928). For a bibliography of materials on ambulance-chasing, see HICKS, ORGANIZATION AND ETHICS OF THE BENCH AND BAR 269-270 (1932).

very filing of which should have been considered an affront.[94] The already heavy docket of the court is thus unnecessarily burdened, and the expenses of the State Bar are increased.

The type of man for whose benefit the Supreme Court has been willing to override the recommendation of the Board of Governors is perhaps sufficiently illustrated by the cases of *X* and *Y*. In at least five cases, in addition to that of attorney *Y*, successful petitioners for clemency have rewarded the court only by reappearing later in more serious trouble.[95]

Finally, the court's attitude, as reflected in the two principles of review under discussion, cannot but have the effect of decreasing the prestige of the Board of Governors and of the State Bar. In the long run this may be the most serious consequence of the *Shattuck* case. Qualified observers have seen in the state-bar movement a "new day" for the profession, a means of reviving in its members the spirit of loyalty to the ideals of the profession and of rehabilitating the bar in the estimation of the public.[96] When it was held that the bar could not be given the same power of self-regulation which is cheerfully conceded to professions such as medicine,[97] one corner-stone of the State Bar was re-

[94] See, for instance, such cases as Fish v. State Bar, 214 Cal. 215, 4 P. (2d) 937 (1931); Farrar v. State Bar, 1 Cal. (2d) 359, 34 P. (2d) 1024 (1934); Peck v. State Bar, 217 Cal. 47, 17 P. (2d) 112 (1932); Clark v. State Bar, 214 Cal. 281, 4 P. (2d) 944 (1931); Green v. State Bar, 210 Cal. 603, 292 P. 638 (1930); Lantz v. State Bar, 212 Cal. 213, 298 P. 497 (1931); and the cases of X and Y commented upon at length earlier.

[95] McCue v. State Bar, (Cal. 1935) 47 P. (2d) 268; Mayer v. State Bar, 2 Cal. (2d) 71, 26 P. (2d) 9, 39 P. (2d) 206 (1934); Barton v. State Bar, 209 Cal. 677, 289 P. 818 (1930), 213 Cal. 186, 2 P. (2d) 149 (1931), 2 Cal. (2d) 294, 40 P. (2d) 502 (1935); In re Barton, (D. C. N. D. Cal. 1931) 54 F. (2d) 810; Marsh v. State Bar, 210 Cal. 303, 291 P. 583 (1930), 2 Cal. (2d) 75, 39 P. (2d) 403 (1934); Ring v. State Bar, 218 Cal. 747, 24 P. (2d) 821 (1933), (Cal. 1935) 47 P. (2d) 704.

[96] "The new implementation of the California Bar and of that of some of the other states has furnished an unparalleled opportunity for raising professional standards and accomplishing many other good things." Justice Owen J. Roberts in 17 J. AM. JUD. SOC. 124 (1933). See also Geo. T. McDermott, U. S. Circuit Judge, in 16 J. AM. JUD. SOC. 135 (1933); and Judge E. A. Rogers, President of the Salt Lake City Bar Association, in 16 J. AM. JUD. SOC. 6 (1932).

[97] See In re Bruen, 102 Wash. 472 at 475, 172 P. 1152 at 1153 (1918); State Board of Dental Examiners v. Savelle, 90 Colo. 177 at 186, 8 P. (2d) 693 at 696, appeal dismissed, 287 U. S. 562, 53 S. Ct. 5 (1932). See also, In re A Solicitor (No. 2), 93 L. J. (K. B.) 761 at 763 (1924). Cf. Rosenthal v. State Bar Examining Committee, 116 Conn. 409 at 416-417, 165 A. 211 at 213-214 (1933).

moved.[98] How much the court's attitude in respect to review operates to discourage efforts by leaders of the bar toward its improvement cannot well be known. One thing is sure: without the continued interest and efforts of such leaders, no form of organization or machinery for raising standards and eliminating the unfit will amount to much.

[98] It has been stated, mistakenly, it is submitted, that decisions such as the Shattuck case are not prejudicial to the disciplinary function of state bars. See 14 J. AM. JUD. SOC. 171 at 172 (1931). President Guy M. Thompson, addressing the American Bar Association in 1932, stressed the importance of self-governing powers in respect to discipline and disbarment. See 16 J. AM. JUD. SOC. 106 (1932).