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Constitutional Law: Does a Privacy Right Protect a Bar Applicant's Mental Health Records from Complete Disclosure?

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CONSTITUTIONAL LAW: DOES A PRIVACY RIGHT PROTECT A BAR APPLICANT'S MENTAL HEALTH RECORDS FROM COMPLETE DISCLOSURE?

Florida Board of Bar Examiners, Re: Applicant, 443 So. 2d 71 (Fla. 1983)

Petitioner, an applicant for admission to the Florida Bar, refused to answer item 28(b) of the application requesting disclosure of all previous regular mental health treatment including names and addresses of attending psychotherapists.[1] He also declined to execute an unaltered disclaimer insulating from liability all physicians and psychotherapists who provided the Board of Bar Examiners with his records.[2] The Board refused to process petitioner's application absent the information requested in 28(b).[3] Petitioner sought review by the Florida Supreme Court insisting the required disclosure invaded his privacy rights under the Florida and United States Constitutions.[4]

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1. 443 So. 2d 71, 73 (Fla. 1983), *reh'g denied*, 443 So. 2d 77 (Fla. 1984). Question 28(b) requests in full:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? Yes _____ No _____. If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12-month period).

Following a policy session of the Board in August 1982, the number of visits to a psychologist or psychiatrist was changed from two in any 12 month period to four. *Id.* at 73 n.1.

2. *Id.* at 73. The authorization and release form states in pertinent part:

> I hereby release and exonerate every medical doctor . . . and . . . every other person . . . which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records, and other information or the investigation made by said Florida Board of Bar Examiners.

Id.

3. *Id.* The Board's executive director advised petitioner that his failure to provide requested information would halt action on his application. Several correspondences ensued, resulting in the Board's decision not to process the incomplete application. *Id.* at 73-74.

4. *Id.* at 74. Article I, section 23 of Florida's Constitution states: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *See* Fla. Sup. Ct. Bar Admiss. Rules, art. I, *approved in* Petition of Fla. Bd. of Bar Examiners, 397 So. 2d 627, 629 (Fla. 1981) (delineating the composition and authority of the Florida Board of Bar Examiners) [hereinafter cited as Fla. Bar Admiss. Rules]. *See also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (recognizing "right to be let alone - the most comprehensive of rights and the right most valued by civilized man"); *see generally* Warren & Brandeis, *The Right of*

The Florida Supreme Court found petitioner's claim meritless and HELD, all applicants must answer item 28(b) to be considered for admission to the Florida Bar.[5]

Although the Bill of Rights contains no express privacy right,[6] the United States Supreme Court declared such a right is implicit in the fourteenth amendment due process clause[7] and other constitutional provisions.[8] The Supreme Court has recognized an individual's interest in preventing public disclosure of personal matters but has not established standards for protecting confidential information.[9] Never, in cases concerning lawyers or laymen, has the Supreme Court precluded the government from disseminating personal information purely on privacy grounds.[10]

Because attorneys are essential to administration of justice[11] their privacy may be subject to a greater governmental intrusion than that

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Privacy, 4 HARV. L. REV. 193 (1890) (laying foundation for modern privacy concept and recognizing right to protection from government intrusion in one's home).

5. 443 So. 2d at 72. The court ruled question 28(b) does not violate a bar applicant's privacy rights under the Florida or United States Constitutions. *Id.* at 76.

6. Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc., 379 So. 2d 633, 636 (Fla. 1980); *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 734-35 (2d ed. 1983) (discussing the history of the privacy right) [hereinafter cited as CONSTITUTIONAL LAW].

7. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

8. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing a second privacy right of personal decisional autonomy, which inheres in the fourteenth amendment's "concept of ordered liberty"); CONSTITUTIONAL LAW, *supra* note 6, at 735 (identifies the oldest and best understood privacy interest protected by the federal constitution as the fourth amendment guarantee of freedom from unreasonable search and seizure). *See generally* CONSTITUTIONAL LAW, *supra* note 6, at 735-65 (right of personal decisional autonomy narrowly defined to include rights of a uniquely private nature such as marriage, procreation, contraception, and abortion; these fundamental decisionmaking freedoms may be abridged by government only when a compelling state or federal interest exists and no less restrictive alternative will protect the government's interests).

9. The Supreme Court directly addressed the disclosure interest in only two cases. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (upholding constitutionality of federal act allowing Administrator of General Services custody of former President Nixon's papers and tapes for viewing by government archivists); Whalen v. Roe, 429 U.S. 589 (1977) (upholding constitutionality of New York statute requiring physicians and pharmacists to identify patients taking certain prescription drugs so the identities could be recorded in a centralized computer file).

10. Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977). The early cases concerning bar applicant's objections to specific inquiries focused on first amendment associational rights rather than privacy. Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (affirming California Supreme Court's decision denying admission on grounds that petitioner's refusal to answer relevant questions about communist party membership prevented California Bar from assuring attorneys' fitness). *But cf. In re* Stolar, 401 U.S. 23 (1971) and Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (both disallowing rejection of a bar applicant for refusing to answer whether he had ever been a member of any organization advocating forcible overthrow of the government).

11. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); State v. Evans, 94 So. 2d 730, 733, *reh'g denied*, 94 So. 2d 737 (Fla. 1957).

of laymen.[12] In *Martin-Trigona v. Underwood,* the Seventh Circuit Court of Appeals authorized the Illinois Bar's Character and Fitness Committee to examine an applicant's Selective Service records.[13] Some of the information obtained consisted of records of private communications with a mental health examiner.[14] The *Martin-Trigona* court never articulated a precise standard to assess the amount of disclosural privacy reserved for psychotherapist-patient communications.[15] Instead, the court emphasized the state's freedom to gauge the bar applicant's fitness on a case by case basis.[16]

Similarly, in *Wilson v. Wilson,* a United States District Court required a bar applicant to disclose expunged offenses and to answer questions and release records concerning past events.[17] The applicant was also instructed to waive all claims against authorities who provided the government with information concerning his character and fitness.[18] The court determined character and fitness committees could obtain information by any method reasonably calculated to promote the state's interest in the competency and veracity of its bar.[19] Thus, like *Martin-Trigona, Wilson* reflects the continued deference to state investigative practices into a bar applicant's background.[20]

Despite the *Wilson* court's forceful conclusion, it never mentioned the degree of protection necessary for psychotherapist-patient com-

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12. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1937) (Frankfurter, J., concurring); *Ex Parte* Minor, 280 So. 2d 217, 220 (1973).

13. 529 F.2d 33, 38 (7th Cir. 1975). *See also In re* Latimer, 143 N.E.2d 20, 23 (Ill.) (holding that a state may inquire into an applicant's private and professional qualifications by procuring documentary evidence), *cert. denied,* 355 U.S. 82 (1957).

14. 529 F.2d at 34. The case might have been viewed as presenting an improper seizure issue because the committee took the records without notifying the applicant. *Id.*

15. *Id.*

16. *Id.* at 37. *See In re* Griffiths, 413 U.S. 717, 725 (1973).

17. 416 F. Supp. 984, 988 (D. Or. 1976) (OR. STAT. § 9.210 (1981) and Or. Sup. Ct. Rule 1.30 together give the Board of Bar Examiners authority to investigate candidates). *See also* Fla. Bar Admiss., *supra* note 4.

18. 416 F. Supp. at 986. The Prospective Exoneration Clause provided: "I hereby release and exonerate those so authorized and any person or organization supplying requested information from liability of any kind resulting from the investigation or from furnishing information." *Id.*

19. *Id. Cf. In re* Eimers, 358 So. 2d 7, 9 (Fla. 1978) (upholding the rational method test in determining whether homosexual orientation was relevant to fitness to practice law). *See generally* Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law,* 28 RUTGERS L. REV. 861 (1975) (comparing societal attitudes toward those who have criminal records with societal attitudes toward those with mental treatment records). Considering the fifth amendment's guarantee against self incrimination, *Wilson* might conceivably have made a persuasive argument for at least more limited disclosure. The parallel between criminal records and psychotherapeutic records suggests a fifth amendment analogy would have been supportable in the instant case as well. *See infra* note 69.

20. 416 F. Supp. at 988.

munications.[21] Florida cases are also silent regarding the privacy rights of bar applicants wishing to keep mental health records confidential.[22] While a privacy right is an explicit constitutional guarantee in Florida, the Florida Supreme Court found this right does not guarantee disclosural privacy in *Shevin v. Byron, Harless, Schaffer, Reid & Associates.*[23] In *Shevin,* psychologists were commissioned to screen applicants for a public agency position.[24] Subsequently, the psychologists were required to divulge information confided in them during the interviews.[25] The *Shevin* court balanced the state's interest in screening out unfit employees against the applicant's and psychologists' interest in assuring confidentiality.[26] Although the court tacitly recognized a legitimate privacy concern, it found a greater state interest requiring disclosure.[27]

Adopting an analysis similar to the *Shevin* rationale, the instant court balanced the Board of Bar Examiners' interests against those of the applicant.[28] As in *Martin-Trigona,* the instant court stressed the unique position of public trust lawyers should occupy.[29] The court determined certain elements must be considered in licensing an attorney that are less important in licensing other tradesmen or businessmen.[30] Declining to limit the extent of required disclosure, the instant decision emphasized the bar committee's need for sufficient access to all material relevant to a law student's character and com-

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21. The *Wilson* court did not consider whether patient-therapist communications might merit more protection than expunged records. *Cf.* Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 482 (Alaska 1977) (Alaska law required professional corporations to disclose the names of clients or customers. The court enjoined disclosure of a doctor's clients until narrowing regulations could be implemented to protect patients' right to privacy. While not involving bar applicants, *Falcon* did hold that where some visits would demand confidentiality, disclosure would violate a significant privacy interest).

22. 443 So. 2d at 74.

23. 379 So. 2d 633, 639 (Fla. 1980). *See* FLA. CONST. art. 1, § 23.

24. 379 So. 2d at 635. Byron, Harless, Schaffer, Reid & Assoc., Inc., is an independent consulting firm consisting of psychologists trained in evaluating management personnel. The firm was hired by the Jacksonville Electric Authority (JEA) to conduct a nationwide search for a new managing director. *Id.*

25. *Id.* at 635. A local television executive requested access to the information, alleging the reports were public records because the JEA was a public agency. The court found some of the reports to be public records and required disclosure. *Id.*

26. *Id.* at 638. The court ruled the individual's privacy right is much more narrowly defined than the district court understood it to be. *Id.*

27. *Id.* at 632.

28. 443 So. 2d at 76. *See* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (disclosural privacy did not merit "strict scrutiny" analysis, but did deserve more protection than mere rationality test more common to due process claims. Balancing standard would force state to consider carefully an individual's interest in avoiding disclosure), *cert. denied,* 439 U.S. 1129 (1979).

29. 443 So. 2d at 75.

30. *Id.* (citing The Florida Bar, Petition for Rubin, 323 So. 2d 257 (Fla. 1975)).

petence.[31] The court concluded that even if the requested disclosure encroached on the applicant's fundamental privacy expectation, the Board demonstrated an interest so compelling it would withstand petitioner's challenge.[32]

Petitioner further asserted that a psychotherapist-patient privilege was statutorily guaranteed.[33] The statute, however, expressly exempts communications from the psychotherapist-patient privilege when a patient relies upon his mental fitness as an element in his claim or defense.[34] The instant court interpreted a request for admission to the bar as an implied waiver of the privilege because an element of any bar applicant's claim is mental competence.[35] Dismissing the privilege claim, the instant court advised the petitioner that the practice of law in Florida is not a right, but a prerogative of the state.[36]

In a persuasive dissent, Justice Atkins observed few communications would inspire greater privacy expectations than the dialogue between patient and psychotherapist.[37] Fearing the Board's question was overbroad, he suggested limiting the extent of the privacy invasion.[38] Although Justice Atkins agreed that mental fitness is relevant to law practice, he cited examples of mental and emotional treatments he found irrelevant to the Board's inquiry.[39] Justice Atkins recommended that question 28(b) elicit only information the medical community believes would be relevant to an applicant's current abil-

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31. 443 So. 2d at 75-76.

32. *Id.* For a discussion of limitations on those rights classified as meriting the compelling interest, strict scrutiny standard of protection, see San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

33. 443 So. 2d at 76. This assertion was intimated in *Shevin* by psychologists reluctant to breach an applicant's confidences. 379 So. 2d at 635.

34. 443 So. 2d at 76-77. FLA. STAT. § 90.503(4)(c) (1983) states "(4) There is no privilege under this section . . . (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense."

35. 443 So. 2d at 77.

36. *Id.* (citing State v. Evans, 94 So. 2d 730, 733-34, *reh'g denied*, 94 So. 2d 737 (Fla. 1957)).

37. 443 So. 2d at 77 (Atkins, J., dissenting).

38. *Id. See generally* Kaslow, *Moral, Emotional and Physical Fitness for the Bar: Pondering (seeming) Imponderables*, 51 BAR EXAMINER 38 (1982) (discussing ethical dilemma of mental health examiners asked to divulge information about bar applicants they have treated).

39. 443 So. 2d at 77 (Atkins, J., dissenting). Justice Atkins suggested:

> An applicant's past treatment for some emotional disturbance, such as loss of a parent for instance, or treatment for amnesia which occurred, say, as a child ten or fifteen years ago surely is not relevant to the potential of that applicant to be a fit and worthy member of The Florida Bar today.

Id.

ity to practice law.[40] Despite the state's compelling interest in protecting the public from unfit lawyers, Atkins insisted less intrusive means should have been employed to ensure fitness.[41] Whether the majority applied a stringent compelling interest standard or *Shevin*'s more lenient balancing test, Justice Atkins maintained the applicant's privacy deserved more protection than is afforded by the present inquiry.[42]

Entrusted with regulating the legal profession and preserving the attorney's role as guardian of the public interest, the states have a legitimate interest in ensuring competence and professionalism.[43] *Martin-Trigona, Wilson,* and the instant case all acknowledged the state's compelling interest in regulating lawyers.[44] *Shevin* further confirmed Florida's lack of authority for an unqualified disclosural privacy right.[45] Despite this support for reasonable investigation of an applicant, the psychotherapist-patient relationship raises unprecedented disclosural privacy problems for the Florida Bar.[46] *Wilson* differed from the instant case because the applicant was forced to reveal expunged criminal records.[47] A criminal history, even when records are closed, carries less privacy expectation than a mental health record.[48] Unlike the instant dispute, the disclosural problem in *Martin-Trigona* was mitigated because the committee obtained records from the applicant's Selective Service file.[49] Although the records taken pertained to psychiatric treatment, no psychiatrists were compelled to divulge confidences beyond the file's contents.[50]

In the instant case disclosure may be linked with stigmatizing personal information and could invade a protected privacy right.[51]

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40. *Id.*

41. *Id. See also* Kaslow, *supra* note 38, at 46: "Certain projective psychological tests for which there are validated national norms might provide a viable alternative to the psychiatric or psychological clinical interview when a question arises about a candidate's mental or emotional fitness." Kaslow indicated these tests might compensate for the lack of disclosure available if the Bar drafts less encompassing questions. *Id.*

42. 443 So. 2d at 77.

43. *Goldfarb,* 421 U.S. at 792; *Evans,* 94 So. 2d at 733.

44. *Martin-Trigona,* 529 F.2d at 37; *Wilson,* 416 F. Supp. at 986; 443 So. 2d at 76.

45. 379 So. 2d at 639. *But cf. Falcon,* 570 P.2d at 482 (enjoining disclosure of patients' names until narrowing regulations were implemented).

46. 443 So. 2d at 74.

47. 416 F. Supp. at 986.

48. *See* FLA. STAT. § 90.503 (1983). The psychotherapist-patient privilege gives the mental health patient a greater privacy expectation than the person with a criminal history because criminal prosecution is a matter of public record.

49. 529 F.2d at 34.

50. *Id.*

51. *Cf. In re* Stolar, 401 U.S. 23 (1971) (disallowing rejection of bar applicant for refusing to answer whether he had ever been a member of any organization advocating forcible overthrow of the government); Konigsberg v. State Bar of California, 366 U.S. 36, 72 (1961) (Black,

The Florida Board of Bar Examiners maintained their regulations minimized the privacy intrusion by providing the information only to authorized personnel.[52] Despite the Board's precautions, however, required disclosure may lead to unreliable conclusions.[53] Psychologists fear that patients perceptive and strong enough to seek professional counseling will have mental treatment histories, making them more vulnerable to the screening process than less stable individuals who never sought treatment.[54] Fearing blemished records, some might simply avoid psychotherapy.[55] Irrespective of the Board's confidentiality protections, question 28(b) and the release form may "chill" an applicant's willingness to seek or continue treatment.[56] Although rejected bar applicants may seek recourse in the Florida Supreme Court, judicial review further jeopardizes privacy, thus diminishing the likelihood applicants will appeal questionable rejections.[57]

Not only did the instant court overlook the possible chilling effect on bar applicants, it failed to consider any ethical dilemma therapists might encounter in breaching a patient's trust.[58] Under their own ethics code, psychiatrists and psychologists are required to honor patients' confidences.[59] The effectiveness of psychotherapists, like that of attorneys, depends on the inviolability of their patients' trust.[60] If psychotherapists refuse to reveal information they consider irrelevant, courts must either respect their judgment and commitment to patients' confidentiality, or take action against them. Action against psychotherapists under such circumstances would affront profes-

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J., dissenting) ("A man does not have to tell all about his previous beliefs and associations in order to establish his good character and loyalty."). Just as the first amendment right of association could be invaded by expansive disclosure, so could the right to privacy. Justice Black's dissent focused on present loyalty to the United States as the only relevant issue in *Konigsberg*. *Id.* Parallels may be drawn regarding present mental fitness. *See also supra* note 41 and accompanying text.

52. 443 So. 2d at 76.

53. *See* Kaslow, *supra* note 38, at 42-43.

54. *Id.* at 43.

55. *Id.*

56. *Cf. Konigsberg,* 366 U.S. 36, 73 (Black, J., dissenting). Justice Black believed disclosure of controversial or unpopular associations would impact upon the associations entered into by anyone who might want to practice law in California. For a general discussion of the social approbation associated with those who have undergone psychotherapy, see Ingber, *supra* note 19. The author suggest that those who undergo psychotherapy are just as ostracized as the criminal, and often for a longer period of time. Ingber, *supra* note 19, at 891-92, 913-15.

57. *Cf.* 366 U.S. at 73 (Black, J., dissenting): "[T]he Court fails to take into account the fact that judicial review widens the publicity of questions and answers and thus tends further to undercut its first ground [of invasion, that interrogations are private]."

58. *See* Kaslow, *supra* note 38, at 43.

59. *See* American Psychological Association, Ethical Principles of Psychologists, Principle 5 (1981), *cited in* Kaslow, *supra* note 38, at 44.

60. *See* Kaslow, *supra* note 38, at 43-44 (therapy requires a heavy commitment to an inviolate confidentiality).

sional integrity.

The instant court's refusal to limit the bar's inquiry regarding an applicant's past mental health treatment demonstrates the Florida judiciary's admirable commitment to a well qualified bar.[61] Bar admission decisions establish a firm pattern allowing state character and fitness committees access to any information relevant to an applicant's qualifications to practice.[62] While other courts have found the state's interest in bar applicant's disclosure "compelling," outweighing privacy claims, none has specifically considered the mental treatment question the instant case raises. The instant court's holding may deter a bar applicant from seeking professional counseling or requesting review of a disputable rejection.[63] While the Board of Bar Examiners must possess authority to demand some disclosure of an applicant's mental treatment record,[64] under the instant decision its demands risk being overbroad.[65] The Board should limit its inquiry to mental conditions that both bar examiners and psychotherapists agree will impair the attorney's function as a guardian of public trust in the law.

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61. 443 So. 2d at 75.
62. *See, e.g., Wilson*, 416 F. Supp. at 986.
63. *See supra* notes 53-57 and accompanying text.
64. 443 So. 2d at 76.
65. *Id.* at 77 (Atkins, J., dissenting).