

2003 U.S. Dist. LEXIS 17895, \*

FRANK J. LAWRENCE, JR., Plaintiff, v. RAE LEE CHABOT, et al., Respondent.

Case No. 4:03-cv-20

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN  
DIVISION

2003 U.S. Dist. LEXIS 17895

September 29, 2003, Decided

**SUBSEQUENT HISTORY:** Motion granted by, in part, Motion denied by, in part Lawrence v. Van Aken, 2004 U.S. Dist. LEXIS 956 (W.D. Mich., Jan. 14, 2004)

**PRIOR HISTORY:** Lawrence v. Chabot, 2003 U.S. Dist. LEXIS 17894 (W.D. Mich., May 7, 2003)

**DISPOSITION:** [\*1] Magistrate's recommendation approved; preliminary injunction denied. Certain claims dismissed. Motions ruled upon.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff applicant objected to a magistrate's recommendation to dismiss civil rights claims against defendants State Bar of Michigan (SBM), Michigan Board of Law Examiners, and members of the Michigan Supreme Court due to Eleventh Amendment or legislative immunity. The magistrate also recommended that the damage claims against defendant officials of those entities not be dismissed, and that claims for injunctive relief be dismissed.

**OVERVIEW:** The applicant sought the disqualification of the judge and magistrate, but the judge's and magistrate's membership in a committee on federal courts had no link to an investment in the outcome of the matter under Mich. Model Code Jud. Conduct Canon 4 (1990). The SBM was immune under the Eleventh Amendment. The Michigan Supreme Court members had absolute legislative immunity as to promulgating bar admission rules. The applicant lacked standing to challenge the rules as applied to him because he withdrew his application prior to the interview for character and fitness assessment. Similarly, the as-applied challenge to the attorney-licensing scheme was not ripe. The licensing scheme did not impose a prior restraint or impose special regulations on any expressive activity on the basis of content for First Amendment purposes. Any incidental intrusion on freedom of speech was justified by the state's substantial interest in assessing an applicant's fitness to practice law. The licensing scheme did not bar applicants or attorneys from questioning particular laws, did not promote one type of attorney advocacy over another, and were not, on their face, insulated from judicial challenges.

**OUTCOME:** The report and recommendation was adopted. All claims against the State Bar of Michigan and the State Board of Law Examiners were dismissed. The motion of the state officers to dismiss the claims for prospective relief was denied. The claims against the members of the Michigan Supreme Court were dismissed. All claims for injunctive relief were dismissed.

**CORE TERMS:** recommendation, licensing, disqualification, evidentiary hearing,

membership, facial challenge, as-applied, legislative immunity, motion to dismiss, case law, failure to state a claim, good moral character, injunctive relief, immunity, fitness, bias, rules governing, impartiality, withdrew, facial, summary judgment, legal system, promulgation, approves, preliminary injunction, standing to bring, processing, promulgating, frivolous, misplaced

### LexisNexis(R) Headnotes

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN1** See 28 U.S.C.S. § 455(a).

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN2** The law under 28 U.S.C.S. § 455(a) requires disqualification when the judge has personal knowledge of disputed evidentiary facts or when a reasonable person, knowing all the facts, might reasonably question his impartiality.

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN3** A judge does not forfeit the opportunity to participate in other social, civic, and extra-judicial activities by taking the bench, provided that the judge's participation is consistent with the Canons of the Model Code of Jud. Conduct.

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN4** See Mich. Model Code Jud. Conduct Canon 4 (1990).

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN5** Complete separation of a judge from extra-judicial activities is neither possible nor wise. Indeed, a judge is encouraged to contribute to the improvement of the law and the legal system, either independently or through a bar association.

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN6** A judge's duty not to recuse himself when confronted with a motion with no basis in reality is as strong as his duty to recuse himself when his impartiality might reasonably be questioned.

Civil Procedure > Trials > Disqualification & Recusal  
Legal Ethics > Judicial Ethics

**HN7** The Mich. Model Code Jud. Conduct does not govern the conduct of judges' spouses. A judge should, to the extent possible, dissociate himself from the political involvement of his spouse.

Civil Procedure > Magistrates > Pretrial Orders

**HN8** Under U.S. Dist. Ct., W.D. Mich., R. 72.3(b), a judge may consider the record developed before the magistrate judge, making a de novo determination on the basis of that record, and need conduct a new hearing only where required by law.

Civil Procedure > Dismissal of Actions > Involuntary Dismissal  
Civil Procedure > Joinder of Claims & Parties > Self-Representing Parties

**HN9** The court is required under 28 U.S.C.S. § 1915, to dismiss an in forma pauperis

case "at any time" if the court finds that it is frivolous, fails to state a claim, or involves immune defendants. 28 U.S.C.S. § 1915(e)(2). The language of § 1915(e)(2) does not differentiate between cases filed by prisoners and cases filed by non-prisoners. While the previous version of the statute allowed dismissal only if the complaint was frivolous, the amended statute requires dismissal for failure to state a claim. Section 1915(e)(2) states that regardless of whether a filing fee has been paid, the district court must dismiss the case if the complaint satisfies the factors of § 1915(e)(2). Thus, even if the full filing fee is paid, the district court must dismiss the complaint if it comports with § 1915(e)(2).

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel

**HN10** ↓ A Fed. R. Civ. P. 12(b)(6) dismissal for failure to state a claim upon which relief may be granted operates as an adjudication on the merits for issue and claim preclusion purposes.

Civil Procedure > State & Federal Interrelationships > Amendment 11

Legal Ethics > Admission to the Bar

**HN11** ↓ The State Bar of Michigan is immune from suit under the Eleventh Amendment.

Legal Ethics > Admission to the Bar

Governments > Courts > Judicial Immunity

Constitutional Law > Civil Rights Enforcement > Immunity > Legislative Immunity

**HN12** ↓ Like legislators, members of the state's highest court are entitled to absolute legislative immunity in conjunction with promulgating bar admission rules. The Michigan Supreme Court's promulgation of rules of practice and procedure is a legislative activity and complete immunity is granted whether the relief sought is money damages or injunctive relief.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Prior Restraint

Legal Ethics > Admission to the Bar

**HN13** ↓ The attorney licensing scheme of Michigan does not impose a prior restraint under the First Amendment, nor does it seek to impose special regulations on any expressive activity on the basis of content.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Prior Restraint

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

**HN14** ↓ The First Amendment does not forbid laws justified by a valid governmental interest where such laws are not intended to control the content of speech but incidentally limit its unfettered exercise.

Legal Ethics > Admission to the Bar

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

**HN15** ↓ The State of Michigan has a substantial interest in determining applicants' fitness for membership in its legal institutions. The state's inquiry about the conduct of applicants who abuse the legal process to determine their fitness to practice law is at least as important an interest, if not more so, as inquiry about an applicant's political associations. The state's interest in assessing the conduct of an applicant who has a history of abusing the legal system as one part of its inquiry for determining character for membership in the legal profession, in whose hands so largely lies the safekeeping of this country's legal and political institutions, is certainly substantial. The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of

administering justice. Thus, any incidental intrusion on freedom of speech is justified by Michigan's substantial interest in assessing an applicant's fitness to practice law.

Legal Ethics > Admission to the Bar

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

**HN16** ↓ The Michigan statutes and rules governing attorney admission are content-neutral.

Legal Ethics > Admission to the Bar

**HN17** ↓ Mich. St. Bar R. 15 allows disappointed applicants a variety of chances to interview before committees of the State Bar and seek review of an unfavorable recommendation.

Legal Ethics > Admission to the Bar

**HN18** ↓ All states prescribe qualifications of moral character as preconditions for admission to the practice of law.

Legal Ethics > Admission to the Bar

**HN19** ↓ The Michigan licensing provisions for attorneys do not inquire into applicants' beliefs or require applicants to hold a certain belief. Thus, the Michigan licensing provisions stand on strong footing.

Civil Procedure > Magistrates > Pretrial Orders

**HN20** ↓ The district court need not provide de novo review of a magistrate's report and recommendation where the objections are frivolous, conclusive or general.

**COUNSEL:** Frank J. Lawrence, Jr., plaintiff, Pro se, Bloomfield Hills, MI.

For Rae Lee Chabot, Michigan Board of Law Examiners, Maura D. Corrigan, defendants: Denise C. Barton, Michigan Department of Attorney General (Employ, Elect, Torts), Lansing, MI.

For John Berry, Michigan, State Bar of, Diane Van Aken, Nicole Armbrustmacher, defendants: Thomas K. Byerley, Michigan, State Bar of, Lansing, MI, LEAD ATTORNEY.

**JUDGES:** Hon. DAVID W. McKEAGUE, UNITED STATES DISTRICT JUDGE.

**OPINIONBY:** DAVID W. McKEAGUE

**OPINION: MEMORANDUM OPINION APPROVING REPORT AND RECOMMENDATION**

Proceeding *pro se* and *in forma pauperis*, plaintiff Frank Lawrence brought this civil rights action against the State Bar of Michigan (SBM); John Berry, in his capacity as the executive director of the SBM; Diane Van Aken and Nicole Armbrustmacher, in their capacity as employees of SBM; the Michigan Board of Law Examiners (BLE); Rae Lee Chabot, as chairperson of the BLE; Chief Justice Maura D. Corrigan, in her capacity as chief judicial officer of the Michigan Supreme Court; and members of the Michigan Supreme Court.

Plaintiff passed the bar examination in November [\*2] 2001 and applied for admission to the Michigan Bar. Processing of plaintiff's application to the SBM was delayed because of the pendency of a misdemeanor prosecution against him in the state district court. Plaintiff subsequently withdrew his application and filed this lawsuit seeking two types of relief: (1) declaratory and injunctive relief arising from facial and as-applied First and Fourteenth Amendment challenges to the attorney licensing process; and (2) monetary relief arising

from defendants Diane Van Aken's and Nicole Armbrustmacher's allegedly unconstitutional conduct as employees of the SBM in processing his application. Several dispositive motions were subsequently filed.

In a detailed report and recommendation, the magistrate judge, after conducting a hearing on all pending dispositive motions, recommended that the claims against SBM and BLE be dismissed on the grounds of Eleventh Amendment immunity; that the state officers' motion to dismiss the claims for prospective relief on Eleventh Amendment grounds be denied; that the motion of the justices of the Michigan Supreme Court to dismiss be granted on grounds of legislative immunity; that all claims against all moving [\*3] defendants for injunctive relief be dismissed for failure to state a claim upon which relief can be granted with regard to plaintiff's facial challenges to the Michigan attorney admission system; that all claims against all moving defendants for injunctive relief be dismissed for lack of standing and ripeness with regard to plaintiff's as-applied constitutional challenges; and that plaintiff's motion for preliminary injunction be denied. n1

----- Footnotes -----

n1 Because the Court adopts the recommendations in the report and recommendation, only the claims for damages against defendants Van Aken and Armbrustmacher in their personal capacity will remain pending, as recommended by the magistrate judge. Since no objections have been filed in response to this recommendation, the Court will not discuss this matter.

----- End Footnotes-----

Thereafter, plaintiff filed objections to the report and recommendation and defendants filed a response to those objections. Plaintiff then filed a reply to defendants' response to plaintiff's objection to the report and recommendation. [\*4] Additionally, plaintiff filed a motion for expedited consideration and evidentiary hearing on July 8, 2003, together with a motion requesting the disqualification of this Judge and Magistrate Judge Joseph G. Scoville. Defendants filed a motion to strike the pleadings and plaintiff responded to said motion.

This Court has considered all of the pleadings filed. It has conducted *de novo* review of those portions of the report and recommendation to which plaintiff objects. For the reasons stated below, the Court overrules plaintiff's objections and approves the report and recommendation.

**I. BACKGROUND**

Plaintiff graduated from an accredited law school, passed the July 2001 Michigan Bar examination, and applied for admission to the Michigan Bar. While plaintiff was still enrolled in law school, he was charged with allegedly violating a Bloomfield Township ordinance that prohibited interference with a police officer. City Attorney Thomas Ryan n2 represented Bloomfield Township in the misdemeanor prosecution which plaintiff sought to enjoin by filing a lawsuit in the United States District Court for the Eastern District of Michigan. The district court abstained from interfering [\*5] with the pending state-court prosecution but retained jurisdiction over plaintiff's civil rights complaint.

----- Footnotes -----

n2 Thomas Ryan later became president of SBM. For purposes of this opinion, the Court assigns no significance to this fact for resolution of plaintiff's objections.

- - - - - End Footnotes- - - - -

As a result of the pending prosecution, the SBM withheld immediate processing of plaintiff's application. Plaintiff claims that defendant Van Aken held his admission process in abeyance as a means of pressuring him to drop his lawsuit challenging the Bloomfield Township prosecution. Thereafter, plaintiff's application was referred by defendants Van Aken and Armbrustmacher to a State Bar district committee, as mandated by State Bar Rule 15 § 1(5) (b). Plaintiff was ordered to appear before the district committee for a personal interview in October but plaintiff requested an adjournment which was subsequently denied. Plaintiff then withdrew his application for membership to the State Bar.

## II. DISCUSSION

### A. Judicial Bias and Disqualification [\*6]

Plaintiff raises several objections which will be discussed in turn. Initially, however, this Court will begin by addressing plaintiff's claim of judicial bias and his request for disqualification of this Judge and Magistrate Judge Scoville.

First, plaintiff asserts that this Judge and Magistrate Judge Scoville should be disqualified from deciding this case because both are members of defendant State Bar of Michigan's Standing Committee on United States Courts, thus creating an appearance of impropriety. Second, plaintiff contends that this Judge should be disqualified for the additional reason that because this Judge's wife is senior vice president of administration of the Michigan Chamber of Commerce, which plaintiff describes as a business advocacy group that has campaigned for the election of certain Michigan Supreme Court Justices, an appearance of impropriety is also created.

In response, defendants contend that disqualification is not warranted because there is no connection between membership in the State Bar Committee on United States Courts and bias in this particular case. Defendants further contend that disqualification of this Judge based on his wife's employment is [\*7] not warranted when no connection exists between this Judge's wife's employment and the outcome of this case.

Under 28 U.S.C. § 455(a), <sup>HN1</sup> "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." <sup>HN2</sup> The law requires disqualification when the judge has personal knowledge of disputed evidentiary facts or when a reasonable person, knowing all the facts, might reasonably question his impartiality. *See United States v. Bonds*, 18 F.3d 1327, 1331 (6th Cir. 1994). Plaintiff simply points to no set of facts or legal sources requiring disqualification of this Judge or Magistrate Judge Scoville.

A judge is encouraged to contribute to the improvement of the legal system. <sup>HN3</sup> A judge does not forfeit the opportunity to participate in other social, civic, and extra-judicial activities by taking the bench, provided that the judge's participation is consistent with the Canons of Judicial Ethics. Canon 4 of the Model Code of Judicial Conduct provides in pertinent part:

<sup>HN4</sup> A judge, subject to the proper performance of judicial duties, may engage in the following law-related [\*8] activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:

...

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice...

Model Code of Judicial Conduct Canon 4 (1990). The Commentary to Canon 4 states that <sup>HNS</sup> "complete separation of a judge from extra-judicial activities is neither possible nor wise." Indeed, a judge is encouraged to contribute to the improvement of the law and the legal system, either independently or through a bar association. See *also* Committee on Codes of Conduct Advisory Opinion No. 34 (1998) (concluding that a judge may properly serve as an officer or member of a committee of a bar association, subject to the restrictions set forth in Canon 4).

Magistrate Judge Scoville's and this Judge's membership in the Standing Committee on United States Courts is in no way related to the Committee on Character and Fitness. Neither Magistrate Judge Scoville nor this Judge is in any way personally invested or interested in the outcome of [\*9] this case. Plaintiff fails to produce any evidence linking membership in the Standing Committee on United States Courts to personal investment in the outcome of this matter or to personal knowledge of disputed evidentiary facts, nor is this Judge aware of any such evidence.

<sup>HNS</sup> A judge's duty not to recuse himself when confronted with a motion with no basis in reality is as strong as his duty to recuse himself when his impartiality might reasonably be questioned. Plaintiff's bare assertion that membership in the Committee requires disqualification, without more, provides no basis for an appearance of impartiality which would require disqualification of this Judge or Magistrate Judge Scoville.

Second, there is no relationship between this Judge's wife's employment with the Michigan Chamber of Commerce and the subject matter of this litigation which would merit disqualification. <sup>HNS</sup> The Code of Judicial Conduct does not govern the conduct of judges' spouses. See Committee on Codes of Conduct Advisory Opinion No. 53 (1998). A judge should, to the extent possible, dissociate himself from the political involvement of his spouse and this Judge has assiduously done so. Plaintiff alludes to [\*10] no incident in which this Judge has ever been engaged in his wife's political activities and this Judge is not aware of any such incident. Furthermore, the Michigan Chamber of Commerce has no interest that would be substantially affected by the outcome of this litigation. This Judge is not required to recuse himself when there are no circumstances giving rise to the appearance of impropriety.

Finally, plaintiff's attempt to suggest bias arising from this Judge's wife's employment is simply too far-fetched. Plaintiff's complaint against the defendant Michigan Supreme Court Justices is based on the Supreme Court's promulgation of Rules Concerning the State Bar of Michigan. These rules have been in effect since at least 1972, long before any current Justice became a member of the Michigan Supreme Court. There is simply no connection between the promulgation of the Rules and the Michigan Chamber of Commerce. Thus, the allegations of bias based on the employment of this Judge's wife likewise provide no basis for disqualification.

## **B. Motion for Evidentiary Hearing**

Plaintiff asserts that he is entitled to an evidentiary hearing to explore defendants' practices with regard to attorney [\*11] licensing decisions, provide the Court a settled record, and explore this Judge's and this Judge's wife's involvement with the defendants.

<sup>HNS</sup> Under W.D. Mich. L. Civ. R. 72.3(b), a judge may consider the record developed before

the magistrate judge, "making a *de novo* determination on the basis of that record," and "need conduct a new hearing only where required by law..." Plaintiff's request for an evidentiary hearing fails to cite any law that would require an evidentiary hearing in this matter.

Plaintiff contends that defendants' motion to dismiss was converted into a motion for summary judgment, requiring an evidentiary hearing to settle the record. Plaintiff cites to the district court's obligation to provide an opportunity to present all material made pertinent to a summary judgment motion if the district court chooses to treat a motion to dismiss as one for summary judgment. A review of the report and recommendation, however, clearly indicates that defendants' motion to dismiss was not considered a motion for summary judgment. Plaintiff states that evidence outside of the pleadings was considered in the report and recommendation but does not state what evidence was considered [\*12] nor where in the report that evidence was considered. n3 This Court, after reviewing the report and recommendation, finds no merit in this claim, particularly when the report and recommendation discusses only standards for motions to dismiss and restrictes the analysis to the pleadings.

- - - - - Footnotes - - - - -

n3 Plaintiff objects to the recommendation that his facial challenge to the attorney licensing scheme be dismissed for failure to state a claim upon which relief can be granted. It is unclear whether plaintiff cites this proposed *sua sponte* dismissal as evidence that defendants' motions to dismiss were improperly converted into motions for summary judgment or whether plaintiff simply objects to the proposed dismissal. Regardless, plaintiff's argument is without merit because <sup>HN9</sup> the Court is required under 28 U.S.C. § 1915, to dismiss an *in forma pauperis* case "at any time" if the Court finds that it is frivolous, fails to state a claim, or involves immune defendants. 28 U.S.C. § 1915(e)(2). Moreover, "the language of § 1915(e)(2) does not differentiate between cases filed by prisoners and cases filed by non-prisoners." *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997). While the previous version of the statute allowed dismissal only if the complaint was frivolous, the amended statute requires dismissal for failure to state a claim. Plaintiff's reliance on *Denton v. Hernandez*, 504 U.S. 25, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992) is misplaced as that case was decided under the old standard. As the Sixth Circuit stated,

"Section 1915(e)(2) states that regardless of whether a filing fee has been paid, the district court must dismiss the case if the complaint satisfies the factors of § 1915(e)(2). Thus, even if the full filing fee is paid, the district court must dismiss the complaint if it comports with § 1915(e)(2)."

*McGore v. Wrigglesworth*, 114 F.3d at 609.

Additionally, plaintiff argues in the alternative that the Fed.R.Civ.P. 12(b)(6) dismissal should be without prejudice. However, <sup>HN10</sup> a Fed.R.Civ.P. 12(b)(6) dismissal for failure to state a claim upon which relief may be granted operates as an adjudication on the merits for issue and claim preclusion purposes. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399, n.3, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986).

----- End Footnotes----- [\*13]

Finally, this Judge's wife's employment with the Michigan Chamber of Commerce does not provide a basis for an evidentiary hearing. Neither this Judge nor his wife is legally or economically bound to the interests of any of the parties or their positions in the matter. Indeed, plaintiff has not alleged, nor is this Judge aware of, any stance taken by the Chamber with relation to this matter or any dispute arising from this matter. This Court need not afford an evidentiary hearing based on an unsupported allegation of bias.

Thus, this Court finds that there is no legal or factual basis for an evidentiary hearing and plaintiff's motion for an evidentiary hearing is denied.

### **C. Objections to Report and Recommendation**

#### *1. State Bar of Michigan*

Plaintiff first objects to the conclusion that the SBM should be granted Eleventh Amendment immunity. In a recently decided case, the Sixth Circuit concluded that <sup>HN11</sup> the State Bar of Michigan is immune from suit under the Eleventh Amendment. *Dubuc v. Mich. Board of Law Examiners*, 342 F.3d 610, 2003 U.S. App. LEXIS 18153 \*13 (6th Cir. 2003). Thus, SBM is properly dismissed from this suit.

#### *2. Justices of the Michigan Supreme Court* [\*14]

Plaintiff next objects to the recommendation that defendant, justices of the Michigan Supreme Court should be granted legislative immunity. The report and recommendation concludes that all claims against members of the state Supreme Court be dismissed on the basis of legislative immunity, based on Supreme Court and Sixth Circuit case law pertaining to legislative immunity.

Plaintiff asserts in his objections that defendants lack the power to create substantive law and are therefore not engaged in legislative activity of the sort that would entitle them to immunity. His complaint makes clear that the basis of plaintiff's claims against these defendants is their role in promulgating rules governing the state bar. Plaintiff makes no argument that defendants are engaged in adjudicatory, enforcement, or administrative matters. Instead, he relies on *People v. Glass*, 464 Mich. 266, 281, 627 N.W.2d 261 (2001), for the proposition that the Michigan Supreme Court's rulemaking authority extends only to matters of practice and procedure, rather than creation of substantive law.

Plaintiff's reliance on *People v. Glass* is misplaced. In *Glass*, the court held that [\*15] a criminal rule establishing a right to a preliminary examination went beyond the Michigan Supreme Court's rulemaking authority. The court based its decision partly on the inconsistency between the implementing court rule and a subsequent Michigan law. *Id.* at 282-283. In this case, no such inconsistency exists.

Further, the court in *Glass* recognized that the right to a preliminary examination is a matter of public policy for the legislative branch. *Id.* Unlike the law struck down in *Glass*, the rule of which plaintiff complains in this case is not a matter of public policy. It deals solely with the regulation of state bar practices and attorney admissions. Plaintiff cites neither case law nor legislative act suggesting otherwise.

Defendants' jurisdiction to promulgate these rules arises from the Michigan Constitution, as noted in the report and recommendation. Moreover, state law clearly and unequivocally sets forth the defendant justices' plenary and exclusive power to define and regulate bar membership. Mich. Comp. Laws § 600.904. <sup>HN12</sup> Like legislators, members of the state's highest court are entitled to absolute legislative immunity [\*16] in conjunction with

promulgating bar admission rules. *Supreme Court of Virginia v. Consumers Union of United States*, 446 U.S. 719, 730-734, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980). Additionally, as the report and recommendation makes clear, the Michigan Supreme Court's promulgation of rules of practice and procedure is a legislative activity and the *Consumers Union* decision has been interpreted as granting complete immunity whether the relief sought is money damages or injunctive relief. *Abick v. Michigan*, 803 F.2d 874, 877-78 (6th Cir. 1986); *Alia v. Michigan Supreme Ct.*, 906 F.2d 1100, 1102 (6th Cir. 1990). Thus, the Court adopts the recommendation to grant the motion to dismiss claims against members of the Michigan Supreme Court based on grounds of legislative immunity.

### 3. Facial and As-Applied Constitutional Challenges to Attorney Licensing Scheme

Plaintiff objects to the recommendation to dismiss plaintiff's facial challenge to the attorney licensing scheme for failure to state a claim upon which relief can be granted against all remaining defendants. He also objects to the recommendation to dismiss plaintiff's as-applied [\*17] constitutional challenges for lack of standing and ripeness.

This Court concludes, on the basis of an independent review of plaintiff's objections to recommendation of dismissal of his as-applied constitutional challenge to the Michigan licensing provisions, that the report and recommendation sets forth a thorough and well-reasoned assessment of the law. The Court approves the report and recommendation in this regard. As noted in the report and recommendation, plaintiff lacks standing to challenge the rules as applied to him because plaintiff withdrew his application prior to the interview for character and fitness assessment. Because plaintiff voluntarily withdrew his application and never received a decision on admission to the state bar, plaintiff's as-applied challenge to the attorney-licensing scheme is not ripe.

The Court further concludes that plaintiff's facial challenge to the attorney licensing provisions also fails. While plaintiff's standing to bring a First Amendment facial challenge to the licensing provision is assumed, the report and recommendation correctly concludes that <sup>HN13</sup> the attorney licensing scheme does not impose a prior restraint nor does it seek to impose special [\*18] regulations on any expressive activity on the basis of content. Additionally, even assuming the attorney licensing scheme were regulated by First Amendment case law governing prior restraints or restrictions on time, place, and manner, plaintiff's challenges fail.

Plaintiff argues that the report and recommendation fails to consider *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543, 548, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001), which deemed attorney advocacy a protected expressive activity. Plaintiff seems to be claiming that all attorney advocacy is protected by the First Amendment, including any inquiry of a state bar applicant's abuse of the legal process or history of litigation.

At the outset, it is important to note that <sup>HN14</sup> the First Amendment does not forbid laws justified by a valid governmental interest where such laws are not intended to control the content of speech but incidentally limit its unfettered exercise. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50, 6 L. Ed. 2d 105, 81 S. Ct. 997 (1961). In *Konigsberg*, an applicant to the California State Bar refused to answer whether he was at one time a member of a particular [\*19] political party. *Id.* at 47. The Supreme Court rejected the applicants' First Amendment argument and upheld the state's interest in determining the fitness of its applicants for membership in the legal profession. *Id.* at 52.

<sup>HN15</sup> The State of Michigan has a substantial interest in determining applicants' fitness for membership in its legal institutions. The state's inquiry about the conduct of applicants who abuse the legal process to determine their fitness to practice law is at least as important an interest, if not more so, as inquiry about an applicant's political associations. The state's

interest in assessing the conduct of an applicant who has a history of abusing the legal system as one part of its inquiry for determining character for membership in the legal profession, "in whose hands so largely lies the safekeeping of this country's legal and political institutions," is certainly substantial. *Id.* As the Supreme Court has noted, "the interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice..." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-793, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). [\*20] Thus, any incidental intrusion on freedom of speech is justified by Michigan's substantial interest in assessing an applicant's fitness to practice law.

Plaintiff also contends that the Michigan attorney licensing scheme places unbridled discretion in the hands of licensing officials without the necessary safeguards and allows substantial power to discriminate based on the content of speech. As the report and recommendation concludes, however, <sup>HN16</sup> the statutes and rules governing attorney admission are content-neutral. Plaintiff's relies unpersuasively on decisions such as *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988), for the proposition that a facial challenge lies when a licensing law gives a government official substantial power to discriminate based on the content or viewpoint of speech. Plaintiff explains neither in his objections nor in his pleadings which of the statutes and rules governing the attorney licensing provision favor one type of speech over another. Moreover, plaintiff fails to discuss the procedural safeguards set forth in State Bar Rule 15, <sup>HN17</sup> which allow disappointed applicants a variety of chances [\*21] to interview before committees of the State Bar and seek review of an unfavorable recommendation.

Further, plaintiff's reliance on *Velazquez* is misplaced because *Velazquez* deals with a government-funded program in which litigants and their attorneys were prohibited from raising constitutional challenges to welfare laws. 531 U.S. at 536-537. In other words, any lawyer funded by the program was effectively gagged from engaging in certain speech, namely speech pertaining to the constitutionality of welfare laws. The Supreme Court in *Velazquez* was troubled by what it perceived to be a congressional attempt to insulate certain laws from legitimate judicial challenges. *Id.* at 546.

In this matter, no part of the licensing scheme bars applicants or attorneys from questioning particular laws. The attorney licensing scheme does not promote one type of attorney advocacy over another. Nor are the statutes and rules governing admission to the bar, on their face, insulated from judicial challenges.

While the standard requiring an applicant to be of "good moral character" may be less precise than plaintiff would like <sup>n4</sup>, the Supreme Court has upheld a [\*22] similar statutory provision that required applicants to the bar to possess "the character and general fitness requisite for an attorney." *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159, 27 L. Ed. 2d 749, 91 S. Ct. 720 (1971). Indeed, as the Supreme Court has noted, <sup>HN18</sup> all states prescribe qualifications of moral character as preconditions for admission to the practice of law. *Konigsberg v. State Bar of California*, 366 U.S. at 41 n.4.

----- Footnotes -----

<sup>n4</sup> Plaintiff makes other general allegations based on due process vagueness grounds and the chilling effect that the "good moral character" standard purportedly creates. Plaintiff cites *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957), for the proposition that "good moral character" by itself is an ambiguous term. However, and as plaintiff concedes, the good moral character standard is defined by statute and not simply left for admissions officers to decide. Moreover, plaintiff does not claim, nor can he cite to any case law to support a finding, that the moral character standard is unconstitutional.

----- End Footnotes----- [\*23]

The Supreme Court in *Wadmond* was faced with a New York bar admission rule that required applicants to furnish proof of their beliefs in the form of the United States government and loyalty to the government. 401 U.S. at 162. Relying on the state authorities' interpretation of the rule, the Court accepted that a narrow construction was placed on the rule. *Id.* Similarly, the authorities entrusted with implementing and promulgating the rules in the matter at hand construe the "good moral character" standard narrowly and apply it only to conduct relevant to the practice of law. (Defendant's Motion to Dismiss, dkt. # 36, p 19).

Plaintiff asks this Court to distinguish *Wadmond* based on an allegation that he, unlike the plaintiffs in *Wadmond*, was told he would never be given a license to practice law. As stated, plaintiff does not have standing to bring an as-applied challenge because he has not yet been denied admission to the Michigan bar. Consequently, plaintiff's attempt to use statements "reportedly indicated" to the registrar of his law school to buttress his facial challenge is to no avail.

Moreover, <sup>HN19</sup> the Michigan licensing provisions do not inquire into [\*24] applicants' beliefs or require applicants to hold a certain belief. Thus, the Michigan licensing provisions stand on stronger footing than even that licensing provision upheld as acceptable by the Supreme Court in *Wadmond*.

For these reasons, the Court approves, over plaintiff's objections, the recommendations set forth in the report and recommendation regarding plaintiff's facial challenge to the attorney licensing scheme.

#### 4. Remaining Objections

This Court has thoroughly reviewed the remainder of plaintiff's objections, including his objection to the adequacy of the right of judicial review provided by the attorney licensing scheme, his general objections based on due process n5 and equal protection grounds, and his objection to the denial of a preliminary injunction. Upon close examination of the case law as well as the application of the case law in the report and recommendation, the Court finds that plaintiff's objections do not undermine the correctness of the recommendations and conclusions reached in the report and recommendation. The Court thus approves the report and recommendation over plaintiff's remaining objections.

----- Footnotes -----

n5 The Court notes that one of plaintiff's due process objections, while difficult to discern, centers around the promulgation of Rule 15, Section 1(18). This rule restricts applicants who have sought a *de novo* hearing from the BLE from reapplying for admission to the bar for five years. If plaintiff's challenge is a due process challenge to this rule, he fails to state anything more than a conclusory objection. He states only that there could be no possible rationale of sufficient merit to warrant the SBM's three-year add-on penalty. (Objections to the Report and Recommendation, p.21). <sup>HN20</sup> "The district court need not provide *de novo* review where the objections are "frivolous, conclusive or general." *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Even undertaking such review and assuming plaintiff has standing to bring this claim based on the theory that a five year restriction on reapplying for admission chills those applicants who would have exercised their right to a *de novo* hearing, plaintiff's conclusory and general statement does not provide the Court with reasoning, argument, or case law in support of his facial challenge on due process grounds. Additionally, plaintiff's statement that there could be no possible reason for imposing the five year restriction does

not address the reason given by defendants in their pleading. (See Defendants' Motion to Dismiss, dkt. # 36, p.20). Thus, plaintiff's objection in this regard fails.

- - - - - End Footnotes- - - - - **[\*25]**

### **III. CONCLUSION**

For the reasons stated above and after careful consideration of petitioner's objections, the magistrate judge's report and recommendation is approved over objection and for the reasons stated the motion for disqualification and evidentiary hearing is denied. An order consistent with this opinion shall issue forthwith.

Dated: September 29, 2003

Hon. DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE

### **ORDER**

In accordance with the opinion filed this date:

**IT IS ORDERED** that plaintiff's motion for an evidentiary hearing, inclusive of plaintiff's request for disqualification is **DENIED**.

**IT IS FURTHER ORDERED** that plaintiff's motion for a preliminary injunction is **DENIED**.

**IT IS FURTHER ORDERED** that all claims against the State Bar of Michigan and the State Board of Law Examiners are **DISMISSED** on the ground of Eleventh Amendment immunity.

**IT IS FURTHER ORDERED** that the motion of state officers named in their official capacities to dismiss the claims for prospective relief on Eleventh Amendment grounds is **DENIED**.

**IT IS FURTHER ORDERED** that defendant Michigan Supreme Court Justices' motion to dismiss **[\*26]** is **GRANTED** on the basis of legislative immunity.

**IT IS FURTHER ORDERED** that all claims against all moving defendants for injunctive relief are **DISMISSED** (a) for failure to state a claim upon which relief can be granted on plaintiff's facial challenges to the Michigan attorney admission system, and (b) for lack of standing and ripeness with regard to plaintiff's as-applied constitutional challenges.

**IT IS FURTHER ORDERED** that defendants Van Aken's and Armbrustmacher's motion to dismiss the damage claims against them, based on Eleventh Amendment immunity and state law immunity, is **DENIED**.

Dated: September 29, 2003






DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE

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