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The Administrative Muddle In Georgia

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COMMENTS

The Administrative Muddle In Georgia

In *Rogers v. Composite State Board of Medical Examiners,*[1] the Georgia Supreme Court dismissed as moot a constitutional challenge to the subpoena power of the State Board of Medical Examiners. Dr. John Rogers, a physician in Columbus, Georgia, was involved in civil litigation with the board concerning its composition and the appointment of its members.[2] The final disposition of this suit was in Rogers' favor. While this litigation was pending, Rogers was served with a subpoena to furnish certain information from his patient files to the Board's investigator. Rogers was informed that a criminal investigation was being conducted, however, the investigator refused to respond to Rogers' questions concerning the nature of the charges against him or the identity of his accusers. Rogers refused to comply with the subpoena.

Several months later Rogers was notified that the case against him was "closed". At that time he filed suit challenging the subpoena power of the Board as unconstitutional and demanding that the Board reveal the identity of his accusers. The Supreme Court of Georgia dismissed his case as moot stating: "The investigation is closed; he has been entirely exonerated."[3]

While devoid of any significant precedential value, this case does raise an issue which merits serious consideration—the application of procedural due process requirements to hearings by administrative tribunals. In disposing of Rogers' case the court stated, "Assuming without deciding that the right of confrontation may apply at some point in the board's

1. 245 Ga. 364, 265 S.E.2d 1 (1980).

2. Rogers v. Medical Ass'n of Ga., 244 Ga. 151, 259 S.E.2d 85 (1979). This case involved a challenge to the long-standing practice of appointing board members solely on the basis of recommendations submitted by the Georgia Medical Association. Rogers successfully challenged this procedure, on the basis that a board composed exclusively of Association members could not constitute a fair and impartial tribunal for physicians subject to its decisions who were not members of the Georgia Medical Association.

3. 245 Ga. at 364, 265 S.E.2d at 1.

proceedings, that right ended when the investigation was terminated."[4] At this point the court stated in a footnote that an accused enjoys the right to confront his accusers in all criminal prosecutions.[5] This raises the issue of whether or not certain board proceedings should be characterized as "criminal," thereby requiring the tribunal to comply with procedural safeguards. The purpose of this comment is to discuss the present state of both Georgia and Federal law pertaining to procedural safeguards in administrative hearings and to offer a model which would alleviate the present confusion in the Georgia courts.

I. GEORGIA LAW

A. *Characterization*

Title 84 of the Georgia Code governs the creation of the administrative boards in the state of Georgia. Under the office of the Secretary of State there are forty-three separate licensing boards with membership ranging from five to twelve members for each board. Because these boards are self-regulating, members must be selected on the basis of their expertise and knowledge of the field. Each sub-section of Title 84 establishes procedures to be used to obtain qualified applicants for board membership. Specific powers are given to these boards in order to facilitate their hearing determinations. These powers include license renewal and revocation, and the authority to conduct investigations through employees or agents of the board in order to enforce the provisions of the chapter.

Section 84-105 gives the Joint-Secretary the power to hire investigators who "shall have all the powers of a police officer of this State. . . ."[6] It is this investigatory power that triggers the question of whether the examining boards overstep their purely "administrative" functions, and invite constitutional questions. Because of the problems encountered in defining the nature of these board proceedings, the implications of utilizing such investigatory powers becomes of paramount concern.

The Georgia courts' recognition of the nature of investigations conducted by professional licensing and disciplinary boards has taken a schizophrenic course. This schizophrenia is in the most part a reaction to the hybrid[7] nature of administrative procedure. In order for judicial re-

4. *Id.* (citation omitted).

5. *Id.* at n.1.

6. GA. CODE ANN. § 84-105 (1979).

7. An administrative agency is a governmental authority other than a court, and other than a legislative body, which affects the rights of private parties either through adjudication, rule making, investigation, prosecution, negotiation, setting, or informal action. The administrative process is often compared or contrasted with the judicial process, the executive process, and the legislative process. K. DAVIS, ADMINISTRATIVE LAW TEXT 1 (3d ed.

view of administrative hearings to be consistent, a bottom-line determination as to the nature of the proceedings must be reached. The reluctancy of the courts to review hearings, combined with the failure of the courts to take a hard-line stand as to whether they are criminal or civil leaves the administrative process in a quandry. Thus, any attack upon administrative procedure in Georgia must initially focus on this dichotomy.

State Board of Medical Examiners v. Lewis[8] and *Alexander v. State*[9] are both examples of Georgia case law which highlight the dual characterization given to administrative proceedings. The Georgia Supreme Court in *State Board of Medical Examiners v. Lewis* unequivocally stated that "[t]he language of this provision, making it the duty of the board to 'prefer charges against the physician,' and providing for the revocation of his license 'in the *event of conviction*' by the jury, distinctly imports a trial in a criminal case;. . . ."[10] The court reasoned that the right to practice medicine, once granted by state license, is a valuable right protected under the constitution and laws of the licensing state, and proceedings which place that license in jeopardy threaten to penalize or punish a physician:

> The result, it is true, did not subject the defendant to imprisonment in the chain-gang [but] . . . merely in the revocation of his physician's license and the striking of his name from the record [of physicians] kept [by] . . . the clerk of the superior court. But this itself was a penalty, and the proceedings are in the nature of criminal proceedings.[11]

In *Alexander v. State,* the court distinctly characterized the administrative proceedings involved as civil. Petitioner asserted that the imposition of a fine imported a proceeding in a criminal case. The court held that the forfeiture of the bond was not the equivalent of saying that the proceedings were criminal. The court stated "that the regulation in issue is a rule of a state administrative body; . . . and without power to hold any criminal proceedings."[12]

Upon close examination, the question still remains as to whether the Georgia courts have definitively stated that administrative proceedings are criminal proceedings. This question of whether the administrative proceedings are to be characterized as bureaucratic or criminal is of great import, for this fundamental threshold concept determines whether cer-

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1972).

8. 149 Ga. 716, 102 S.E. 24 (1920).

9. 129 Ga. App. 395, 199 S.E.2d 918 (1973).

10. 149 Ga. at 723, 102 S.E. at 24 (1920) (construing 1913 Ga. Laws 101). *See also* Hughes v. State Bd. of Medical Examiners, 158 Ga. 602, 123 S.E. 873 (1924).

11. 149 Ga. at 722-23, 102 S.E. at 27.

12. 129 Ga. App. at 399, 199 S.E.2d at 921.

tain constitutional safeguards will be afforded the defendant and considered in judicial review.

B. Due Process Requirements and Other Constitutional Safeguards

Administrative hearings must comply with due process requirements. The tenets of due process that govern these hearings have been stated in *Clary v. Mathews.*[13] "[T]he hearing granted by an administrative body must be a full and fair one, before an impartial officer, board, or body free of bias, hostility, and prejudgment. . . ."[14]

Georgia courts have sketchily addressed the application of certain constitutional areas to the administrative process. A survey of three such areas, the fourth,[15] fifth[16] and sixth[17] amendments, will afford insight into the courts perception of the application of these due process standards and highlight the still unresolved question of whether criminal procedure is recognized as applicable in the administrative arena.

The fourth amendment's prohibition against unreasonable searches, the U.S. Supreme Court has concluded, protects against "warrantless intrusions during civil as well as criminal investigations."[18] The Court has found the subpoena, such as the one used in administrative investigation procedures, to be equivalent to a search and seizure.[19] Thus, to be constitutional, it must be a reasonable exercise of the power.[20] The most basic component of a constitutional search in a *criminal* setting is that it be preceded by government compliance with a suitable warrant procedure.[21] An essential element of this constitutional warrant procedure is the participation of a neutral and detached magistrate in the decision-making process,[22] which subsequently leads to the issuance of the subpoena.

The U.S. Supreme Court in *Mancusi v. Deforte*[23] has explained its conceptualization of valid warrant procedure. In *Mancusi,* state investigators obtained a subpoena duces tecum from the District Attorney calling for a union to produce certain books and records. The Court found the subpoena procedure used constituted unreasonable search of plaintiff's office.

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13. 224 Ga. 82, 160 S.E.2d 338 (1968).
14. *Id.* at 83, 160 S.E.2d at 338.
15. U.S. CONST. amend. IV.
16. U.S. CONST. amend V.
17. U.S. CONST. amend. VI.
18. Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978).
19. Camara v. Municipal Court, 387 U.S. 523, 534 (1967).
20. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).
21. Weeks v. United States, 232 U.S. 383, 393 (1914).
22. Johnson v. United States, 333 U.S. 10, 13-14 (1948).
23. 392 U.S. 364 (1968).

They reiterated the rule that, absent exigent circumstances[24] which establish justification for a warrantless search, the search of private property without proper consent is unreasonable unless authorized by a valid warrant. The Court held that the subpoena involved here could not in any event qualify as a valid search warrant under the fourth amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that "the inferences from the facts which lead to the complaint . . . 'be drawn by a neutral and detached magistrate instead of being judged by the officer. . . .' "[25]

The statutory subpoena scheme in Georgia lacks this procedure. Georgia courts, by characterizing the administrative proceedings as *quasi*-criminal, effectively impose no greater burden on the hearings than what is set forth in the Administrative Procedure Act.[26]

Georgia Code Ann. section 84-916(d),[27] an example of Georgia's statutory scheme, vests the authority to conduct investigations with the state examining boards. Documents, writings and other materials which purportedly relate to the licentiate's fitness to practice are made accessible to the boards through the subpoena power of the Joint-Secretary. The important question thus arises as to the propriety of vesting the authority to issue subpoenas with the Joint-Secretary and the President of the board, the entity which acts as prosecutor in the administrative proceedings.

Other areas of concern in the administrative process arise under the fifth amendment, namely, the availability of the entrapment defense to enjoin the administrative determination, and whether adequate notice has been afforded the defendant. The court in *Schaffer v. State Board of*

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24. *See* C. WHITEBREAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 8.01, at 152-53 (1980):

> All of the exceptions of the warrant requirement . . . are based on the concept of exigency. Each of them embodies recurring types of searches and seizures which involve either imminent danger to the police, the impending destruction or disappearance of possible evidence, or both. In these emergency situations, the Supreme Court has recognized that only protection of privacy afforded by the warrant requirement is outweighed by the needs of effective law enforcement.

25. 392 U.S. at 371. *See also* See v. City of Seattle, 387 U.S. 541 (1967) in which the Court stated that a suitable warrant procedure is essential for compliance with the fourth amendment's standard of reasonableness in an administrative setting.

26. GA. CODE ANN. § 3A-101 to 124 (1975). This rule is defined in Sheppard v. McGowan, 137 Ga. App. 408, 224 S.E.2d 65 (1976), as "[a] finding of fact, . . . supported by any evidence, is conclusive and binding upon the court, and the Judge of the Superior Court does not have any authority to set aside an award, . . . merely because he disagreed with the conclusions reached therein." *Id.* at 410, 224 S.E.2d at 67. In Georgia State Bd. of Dental Examiners v. Daniels, 137 Ga. App. 706, 224 S.E.2d 820 (1976), the court held that the Civil Practice Act was inapplicable to an action brought under the Georgia Administrative Procedure Act.

27. GA. CODE ANN. § 84-916(d) (Supp. 1980).

Veterinary Medicine,[28] established that entrapment could be asserted as a defense in an administrative hearing. The question, at that time, was one of first impression in Georgia. The court was persuaded primarily by the California case of *Patty v. Board of Medical Examiners*,[29] which stated:

> "Sound public policy" and "good morals" are incompatible with entrapment of an innocent person into the commission of a crime in order to revoke his professional license as clearly as they are incompatible with entrapment in order to obtain a criminal conviction. . . .The public's concern with the fair administration of justice attaches equally to administrative as to judicial proceedings.[30]

In *Schaffer*, the court also held that proper notice must be afforded the defendant to constitute a fair hearing.[31] Georgia Code Ann. section 3A-114(a)(2)(D)[32] provides that notice of a hearing shall include "[a] short and plain statement of the matters asserted."[33] Here, the defendant made a timely request for a more definite statement, which the Board denied on the grounds that adequate notice had already been provided. The notice consisted of allegations which involved two rabies vaccinations administered to a dog named "Smokey" and heartworm medication to a dog named "Mopsey". The court concluded that while these statements were "short", they were far from "plain" and held this limited notice to be unreasonable.

The fifth amendment prohibition against putting any person in double-jeopardy for life or limb, has been found to apply only where the individual is subjected to criminal process for the same offense. In *Alexander v. State*,[34] appellant was charged with multiple violations of the laws of Georgia concerning the sale of alcholic beverages. In an administrative hearing before the commissioner, his license was suspended for forty-five days. Appellant asserted that the pending state prosecution constituted double jeopardy. In reviewing this fifth amendment claim the court held that there was no bar to the sovereign's imposing both civil and criminal penalties for the same act. The proceedings before the Revenue Commissioner were characterized as civil and remedial; therefore, no possibility of double jeopardy existed.

The sixth amendment right of the defendant to confront his accusers

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28. 143 Ga. App. 68, 237 S.E.2d 68, *cert. dismissed*, 240 Ga. 313, 240 S.E.2d 887 (1977).
29. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).
30. *Id.* at 364, 508 P.2d at 1126, 107 Cal. Rptr. at 478 (citations omitted).
31. 143 Ga. App. 68, 69, 237 S.E.2d 510, 510 (1977).
32. GA. CODE ANN. § 3A-114(a)(2)(D) (1975).
33. *Id.*
34. 129 Ga. App. 395, 199 S.E.2d 918 (1973).

and to know the nature of the charges applies where the defendant has been identified as the target of the investigation. In administrative procedure, if it is determined that there is sufficient evidence to warrant a hearing, the defendant will be afforded full procedural due process, which includes disclosure of the identity of his accusers.[35] It is the case of the internally exonerated defendant, one who is vindicated without a hearing subsequent to a finding of insufficient evidence, that raises a constitutional question.

Provisions are made in the Georgia Code that afford the defendant a right of action for malicious prosecution. For example, section 84-916(h)[36] provides physicians with a right of action against persons who file against them in bad faith: "A person shall be immune from civil and criminal liability for reporting the acts or omissions of a licentiate . . . which violate . . . any . . . provision of law relating to a licentiate's fitness to practice medicine *if* such report is made in good faith without fraud or malice."[37] But in the instance where no formal charges are preferred against the accused, the courts have held that due process, at that stage of the matter does not require that the accused be informed of the names of his accusers.[38]

Malicious prosecution, as provided for in the Code, insures that a defendant has redress from charges brought in bad faith. Ironically, this protection extends only to those situations where the board has progressed beyond the investigative stages and has gone into the full proceedings.[39] Delimiting these safeguards to a fixed stage in the administrative process severely impacts upon section 84-916(h). A charge brought maliciously will affect the defendant equally, whether it be at the investigative stage or at a latter point in the proceeding.

C. *A Hint of Perception in Georgia*

The court in *Bentley v. Chastain*,[40] has made perceptive inroads into review of the administrative process. While the Georgia courts, for the

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35. GA. CODE ANN. § 84-917 (1979).

36. GA. CODE ANN. § 84-916(h) (Supp. 1980).

37. *Id.*

38. Gilmore v. Composite State Bd. of Medical Examiners, 243 Ga. 415, 254 S.E.2d 365 (1979). No charges were preferred against Dr. Gilmore. The physician claimed the method of investigation violated his constitutional rights and sought to know the nature of the charges and access to the letters of complaint. He claimed the Board's failure to reveal the letters precluded him from filing a defamation action based upon the letters. Thus, all physicians *except* those internally exonerated are accorded subpoena power sufficient to determine the identity of the accuser.

39. *Id.*

40. 242 Ga. 348, 249 S.E.2d 38 (1978).

most part, have exhibited an unwillingness to fully sustain any one characterization of administrative proceedings, this court may offer the key to the resolution of this dilemma. Here, the court concluded that administrative agencies exercise "neither judicial nor legislative, but administrative, powers. . . ."[41] Because the sphere of administrative law is a component unto itself, having the legislation as its life-sustaining force, the attributes of criminal or civil safeguards were held inapplicable. The court found guidance in a Maryland decision which isolated the unique characteristics of the administrative process:

> The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives-the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State. While these agencies at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, they in addition take on judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity. This dual role which administrative agencies play has long been accepted in this state as being constitutionally permissible.[42]

Unfortunately, the Georgia courts have not accepted *Bentley* as a definitive characterization, and thus Georgia law has added a third, and not final, view of the administrative process. Using *Bentley* as a beacon, the courts must recognize the unique character of administrative proceedings and develop a scheme of appropriate procedural safeguards. Georgia has laid the conceptual foundation; guidance is now needed for the practical implementation of this new policy. The best source of this guidance is found in Federal case law.

II. FEDERAL LAW

A. *Characterization of Individual Interests*

The general tenor of federal decisions involving procedural requirements for administrative hearings is reflected in *Schware v. Board of Bar Examiners*.[43] This decision dealt primarily with the requirements for sub-

41. *Id.* at 351.

42. *Id.* at 350 (*quoting* Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 222, 334 A.2d 514, 522 (1975)).

43. 353 U.S. 232 (1957).

stantive due process:[44] however, it clearly held that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."[45] *Schware* has been consistently interpreted as imposing a requirement for adherence to the requirements of procedural as well as substantive due process. An important example of the precedential value of *Schware* is found in *Willner v. Committee on Character and Fitness.*[46] There the Supreme Court, citing *Schware,* held that "the requirements of procedural due process must be met before a State can exclude a person from practicing law."[47]

To fully understand the significance of these decisions it is necessary to evaluate the reasoning which justifies the imposition of procedural due process requirements upon administrative board proceedings. The critical factors are the nature of the individual rights and interests at issue and the possible effect of administrative action upon those rights and interests. The fourteenth amendment to the United States Constitution says that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ."[48] If a right to practice one's selected profession exists, and it can be characterized as either a property or liberty interest, compliance with the fourteenth amendment appears to be required of any tribunal possessing the power to exclude one from that profession.

When a property or liberty interest is at stake, the Supreme Court has rejected any distinction between "rights" and "privileges" for purposes of the application of fourteenth amendment due process guarantees.[49] The theory that the government must afford an individual certain procedural safeguards when it acts to deprive him of a "right", but is free of any fourteenth amendment restrictions when it acts to deprive him of a privilege, has been undermined by recent decisions of the Supreme Court.[50] In *Graham v. Richardson,*[51] the Court held that "this Court now has rejected the concept that constitutional rights turn upon whether a govern-

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44. In *Schware,* the Supreme Court held that an individual could not be denied admission to the practice of law in New Mexico as a result of affiliation with the Communist Party which had been terminated over fifteen years prior to application for admission to the state bar. *Id.* at 246.

45. 353 U.S. at 238-39.

46. 373 U.S. 96 (1963).

47. *Id.* at 102.

48. U.S. CONST. amend. XIV.

49. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

50. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 374 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).

51. 403 U.S. 365 (1971).

mental benefit is characterized as a 'right' or as a 'privilege.' "[52] The fact that the State regulates and grants admission to a profession does not justify its exclusion of an individual from that profession without due process of law.

In *Board of Regents v. Roth*,[53] the Supreme Court discussed the scope of protected property and liberty interests:

> The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[54]

In this case, a non-tenured professor at a state university was dismissed after one year of employment. He was not given an opportunity to be heard on the issues relevant to the Board of Regents' decision. He claimed that the failure to afford him a hearing resulted in a denial of due process. The Court held that no liberty interest was impacted by the Board's decision because no action was taken which precluded the professor from obtaining employment elsewhere in his chosen profession.[55] The Court indicated that an opposite result would be reached if the state had attempted to bar the professor from all employment at other state universities.[56]

Once an individual has been granted admission to a profession or fulfilled all preliminary requirements, his interest in its practice can no longer be characterized as a unilateral expectation. When the state establishes criteria for admission to a certain profession, it is certainly a matter of mutual understanding between the applicant and the state that admission will be granted if the mandated criteria are satisfied. The right of an individual who has been admitted to a profession to continue its practice is likewise the subject of mutual understanding between the state and the individual. In addition, the right is both protected and limited by state law. A "legitimate right of entitlement" arises from this state law and mutual understanding between the government entity and the individual.

Roth indicates that the denial of a particular position can be distinguished from the exclusion from one's chosen profession altogether. This

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52. *Id.* at 374.
53. 408 U.S. 564 (1972).
54. *Id.* at 571-72 (citations omitted).
55. *Id.* at 573.
56. *Id.* at 573-74. *See also* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (denial of applications to state bar); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (blacklisting group members from any government employment); Truax v. Raich, 239 U.S. 33 (1915)(statute limiting the precentage of aliens).

distinction is supported by the decision in *Grove v. Ohio State University, College of Veterinary Medicine*.[57] In that case the court held that a denial of the opportunity to participate in a chosen profession impinges upon an individual's liberty interests.[58] As a result, compliance with the due process clause of the fourteenth amendment is mandatory in any proceeding which potentially impacts this interest.

In *Roth*, the Supreme Court stated that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."[59] Expanding upon this the Court said, "[t]o have a property interest in a benefit, a person clearly . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[60] Property interests are not created by the Constitution; rather, they arise from benefits which are created and secured by an independent source such as state law.[61] Once these protected benefits have arisen the Constitution provides procedural safeguards for their protection. The Court in *Roth* illustrated such an interest by reference to the right of a tenured college professor to his position.[62] This indicates that a property interest may exist in the right to practice one's profession if that right arises and is secured by state law or mutual understanding.

This has significant implications for professional licensing and disciplinary boards. Once an individual is granted admission to a profession his right to continue its practice is protected by state law and is certainly the subject of mutual agreement between himself and the state. For this reason, he must be afforded due process of law before he can be excluded from the profession.[63]

It is established that under certain circumstances the right to practice one's chosen profession constitutes a liberty or property interest. An administrative board may not interfere with this interest except by due process of law. It is necessary at this juncture, however, to point out that an administrative board may not be subject to these requirements with respect to all of its activities. In *Hannah v. Larche*,[64] the Supreme Court held that an administrative board is not required to comply with certain procedural due process requirements if it is acting solely in an investiga-

57. 424 F. Supp. 377 (S.D. Ohio 1976).
58. *Id.* at 382.
59. 408 U.S. at 576.
60. *Id.* at 577.
61. *Id. See also* Leis v. Flynt, 439 U.S. 438 (1979).
62. 408 U.S. at 575-76.
63. *See* Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979), *rev'd on other grounds*, 100 S. Ct. 1790 (1980).
64. 363 U.S. 420 (1960).

tive capacity.[65] However, in the same decision, the Court stated that "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."[66] Professional licensing and disciplinary boards frequently make decisions which affect an individual's right to practice his chosen profession. Any such procedure by a board must comport with the requirements of procedural due process.

B. Specific Procedural Safeguards

The question remains: what specific procedural requirements are mandated by the application of the due process clause of the fourteenth amendment to administrative board proceedings? It is well established that an individual subject to board action must be afforded an opportunity for a hearing on the charges against him.[67] Additionally, he must be given sufficient notice of the nature of the charges against him to afford him an opportunity to prepare his case.[68] Additionally, in *Willner v. Committee on Character and Fitness*,[69] the Supreme Court stated that "[w]e have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."[70]

In *Camara v. Municipal Court*[71] and its companion case, *See v. City of Seattle*,[72] the Supreme Court held that administrative boards are subject to the fourth amendment prohibition against unreasonable search and seizure. The cases require investigators or inspectors acting on behalf of administrative boards to obtain a warrant to search an individuals premises. However, the requirement is a qualified one.[73] The Court stated that "warrants should normally be sought only after entry is refused. . . ."[74]

C. Characterization of Administrative Proceedings

While the federal courts have provided a broad spectrum of procedural

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65. *Id.* at 443.
66. *Id.* at 442.
67. *See* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979); Grove v. Ohio State Univ., College of Veterinary Medicine, 424 F. Supp. 377 (S.D. Ohio 1976).
68. In re Ruffalo, 390 U.S. 544 (1968).
69. 373 U.S. 96 (1963).
70. *Id.* at 103. *See also* Greene v. McElroy, 360 U.S. 474, 496 (1959).
71. 387 U.S. 523 (1967).
72. 387 U.S. 541 (1967).
73. 387 U.S. at 540.
74. 387 U.S. at 539.

safeguards for an individual subject to board action, they have been reluctant to characterize administrative hearings as "criminal" proceedings. At least one decision does exist labeling disbarment proceedings as quasi-criminal.[75] The Supreme Court in *In re Ruffalo*[76] stated that disciplinary hearings were "adversary proceedings of a quasi-criminal nature."[77] The Court was led to this conclusion by its belief that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."[78]

The circuit courts have not, however, interpreted this language as a definitive characterization of administrative disciplinary hearings. In *In re Daley*,[79] the seventh circuit held that the fifth amendment protection against self-incrimination was not applicable in administrative board proceedings.[80] The court held that disbarment proceedings "are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers."[81] Expanding upon the nature of these proceedings the court stated that:

> a clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law. The former type of proceedings is, in actuality, "criminal" in nature and therefore within the ambit of the Fifth Amendment safeguards against self-incrimination; the latter is not.[82]

The court avoided implementation of the quasi-criminal characterization found in *In re Ruffalo* by labeling it as dicta.[83] The seventh circuit's refusal to characterize administrative disciplinary proceedings as criminal was consonant with the holdings of numerous other federal courts.[84]

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75. In re Ruffalo, 390 U.S. 544 (1968).
76. *Id.*
77. *Id.* at 551.
78. *Id.* at 550.
79. 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).
80. *Id.* at 476.
81. *Id.* at 474-75.
82. *Id.* at 475, *quoting* In Re Echeles, 430 F.2d 347, 349-50 (7th Cir. 1970).
83. *Id.* at 476.
84. *See, e.g.*, Napolitano v. Ward, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972) (proceedings for removal of a judge); Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976) (proceedings for revocation of professional certificate of registration).

III. Conclusion

A consistent characterization of the nature of administrative hearings is essential to any effective definition of the scope of procedural safeguards applicable to such proceedings. Georgia case law in this area is marred by the courts' apparent inability to choose one path and follow it to some logical and workable conclusion. The schizophrenic course followed by the Georgia courts makes it impossible for the individual and the members of the various administrative boards to determine, with any precision, which procedural safeguards are essential to due process within the context of an administrative proceeding. Until the Georgia courts effectively define the nature of administrative proceedings, case law in Georgia will serve as a source of confusion rather than guidance to the individual subject to board action, his attorney, and the board members themselves.

In their efforts to extract Georgia law from its present quagmire of inconsistency, the courts would be well advised to focus on the analysis utilized by the federal courts in the administrative area. The beneficial lesson to be garnered from federal case law is that attempts to characterize administrative proceedings as either criminal or civil are fruitless. When they are placed into either category, an awkward fit results.

Rather than placing emphasis upon delineating administrative disciplinary hearings as either civil or criminal, the federal courts have analyzed the nature of the individual interest at stake and provided appropriate safeguards to protect that interest. Because the consequences of board action can seriously impact the vital interests of the individual involved, due process requires the imposition of rather stringent procedural safeguards upon the conduct of certain administrative proceedings. At the same time, the federal courts have given consideration to the necessity for preserving an administrative format with board proceedings. This format allows those individuals with the greatest degree of expertise, generally members of the regulated profession, to make decisions concerning the conduct of members of the profession.

The end result is a scheme of procedural safeguards which is unique to the administrative hearing. This scheme incorporates some but not all of the safeguards generally associated only with criminal cases.[85] This has allowed the courts to provide the individual engulfed in the administrative process with necessary protections, without imposing the full spectrum of criminal procedural reqirements upon the administrative board, thereby negating the benefits derived from the administrative format.

This unique scheme of procedural safeguards will not be triggered by every type of board activity. When the board is functioning solely as an

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85. *See* discussion in text at notes 67-73 *supra*.

investigative body these safeguards will be inapplicable.[86] This is because no significant threat is posed to individual interests. Likewise, when board activity lacks potential to impact an individual's "property" or "liberty" interests he will not be afforded these unique protections. For instance, when board action would entirely exclude an individual from participation in his chosen profession a significant "liberty" interest is at stake and the application of the unique procedural scheme is mandated. Its application is not appropriate when the mere loss of a particular position is threatened. No "liberty" or "property" interest is a stake in that situation.[87]

Through this approach, the federal courts have taken substantive steps towards recognizing the unique character of the administrative process. While they have avoided labeling administrative disciplinary proceeding as either "criminal" or "civil", they have failed to definitively recognize the actions of the administrative tribunals as a third, unique sphere. While their decisions indicate a tacit acceptance of such a position, a clear statement in support of this characterization is necessary. Such a statement would provide much needed guidance for states such as Georgia, which have not formulated a consistent approach to this area of the law.

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86. *See* discussion in text at notes 64-66 *supra*.
87. *See* discussion in text at notes 53-58 *supra*.