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Illinois Supreme Court Rule 774: Interim Attorney Suspension and Due Process Requirements: Suggestions to Make the Two Compatible, 20 J. Marshall L. Rev. 509 (1987)

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ILLINOIS SUPREME COURT RULE 774: INTERIM ATTORNEY SUSPENSION AND DUE PROCESS REQUIREMENTS: SUGGESTIONS TO MAKE THE TWO COMPATIBLE

In 1984, the Illinois Supreme Court adopted Rule 774,[1] enabling the court to suspend attorneys from the practice of law, prior to a hearing, for alleged misconduct that it deems serious.[2] The court may suspend an attorney either on its own motion or on the Attorney Registration and Disciplinary Commission's[3] (ARDC) petition for a rule to show cause.[4] Rule 774 was designed to be used in lieu of

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1. ILL. REV. STAT. ch. 110A, para. 774 (1985). The Rule provides in part:

> During the pendency of a criminal indictment, criminal information, disciplinary proceeding or disciplinary investigation, the court on its own motion, or on the Administrator's petition for a rule to show cause, may suspend an attorney from the practice of law until further order of the court. The petition shall allege:
>
> (1) The attorney respondent has been formally charged with the commission of a crime which involves, moral turpitude or reflects adversely upon his fitness to practice law, and there appears to be persuasive evidence to support the charge; or
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> (2) A complaint has been voted by the Inquiry Board; the attorney-respondent has committed a violation of the Code of Professional Responsibility which involves fraud or moral turpitude or threatens irreparable injury to the public, his or her clients, or to the orderly administration of justice; and there appears to be persuasive evidence to support the charge.

Id.

Additionally, Rule 774 allows the Illinois Supreme Court to make such orders and impose such conditions upon the attorney as it deems necessary. ILL. REV. STAT. ch. 110A, para. 774(c) (1985). The orders and conditions include: "(1) Notification to clients of the respondent's interim suspension; (2) Audit of the respondents books, records, and accounts; (3) Appointment of a trustee to manage respondent's affairs; and (4) Physical and mental examination of the Respondent." *Id.*

2. The word "serious" is used to represent the type of misconduct required under Rule 774. Interim suspension will not be granted unless the attorney's conduct involves fraud, moral turpitude, or irreparable injury to the public or the orderly administration of justice. ILL. REV. STAT. ch. 110A, para. 774(a) (1985). "Moral turpitude" is anything done knowingly contrary to justice, honesty or good morals, and the conduct need not amount to a crime to involve moral turpitude. *In Re* Needham, 364 Ill. 65, 4 N.E.2d 19, 21 (1936).

The United States Supreme Court has held that the term moral turpitude is not unconstitutionally vague, and that it has deep roots in the law. Jordan v. DeGeorge, 341 U.S. 223, 227 (1951). Black's Law Dictionary defines moral turpitude as "[a]n act of baseness, vileness or depravity in the private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man." BLACK'S LAW DICTIONARY 910 (5th ed. 1979).

3. For a discussion of the creation and duties of the Attorney Registration and Disciplinary Commission, see *infra* note 23 and accompanying text.

4. Because the Illinois Supreme Court may suspend an attorney on its own motion, a rule to show cause need not always issue. However, most, if not all, actions

Rule 753[5] which provides for confidential[6] hearing and review procedures prior to attorney discipline. While the Illinois Supreme Court has retained exclusive control over disciplinary decisions,[7] the court's establishment of Rule 774 places an inordinate amount of discretionary power with the ARDC. The rule allows the commission to publicly petition the court for suspension when the commission has decided that the attorney's misconduct constitutes moral turpitude or irreparable injury to either the public or the orderly administration of justice.[8]

During the summer of 1986 the ARDC petitioned the court for the interim suspension of five attorneys.[9] These attorneys filed objections which argued that Rule 774 violates procedural due pro-

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under Rule 774 originate with the ARDC and so a rule to show cause is usually issued. The answer to the rule to show cause allows the attorney some chance, at least, to present his arguments but, as this comment will show, the protection is not enough in light of the seriousness of the action. Rules to show cause are normally used in less serious circumstances to determine if a cease and desist order should be issued. *See, e.g.*, ILL. REV. STAT. ch. 111, para. 1704-9 (1985) (a rule to show cause is used prior to a cease and desist order for barbers and cosmetologists practicing without a license).

5. ILL. REV. STAT. ch. 110A, para. 753 (1985).

6. ILL. REV. STAT. ch. 110A, para. 766 (1985). Rule 766 is entitled "Confidentiality and Privacy" and it provides that, with few exceptions, attorney disciplinary proceedings are confidential and private until final order of the Supreme Court. Rule 766, however, expressly states that it does not apply to petitions for interim suspension under Rule 774. *Id.* Rule 766 contains a provision that allows proceedings be made public "in the interests of justice," and with the approval of at least one member of the state Supreme Court. ILL. REV. STAT. ch. 110A, para. 766(4) (1985). Rule 774 requires no court approval prior to public disclosure of an ARDC petition for interim suspension. *Id.*

7. The Illinois Supreme Court is the only authority that can carry out disciplinary decisions. *In Re* Sherman, 60 Ill. 2d 590, 328 N.E.2d 553 (1975); Swett; *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325, 331 (1977) (decisions by the ARDC's inquiry, hearing and review boards are merely recommendations and are not binding on the court).

8. The ARDC defines misconduct as any "behavior of an attorney which violates the Illinois Code of Professional Responsibility or which tends to defeat the administration of justice or to bring the courts or legal profession into disrepute." Rules of the Attorney Registration and Disciplinary Commission, ILL. REV. STAT. ch. 110A, Rule 2(a) Foll. para. 774 (1985). The Illinois Code of Professional Responsibility was adopted in 1980. It basically is a compilation of disciplinary rules which state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *See Committee Comments*, Illinois Code of Professional Responsibility, ILL. ANN. STAT. ch. 110A, para. 774 (Smith-Hurd, 1985).

9. *In Re* Melvin A. Heller, Administrator's No. 86Ch143; *In Re* Jerrold L. Morris, Administrator's No. 86Ch143; *In Re* Walter M. Ketchum, Administrator's No. 86CH137; *In Re* Oscar O. DeAngelo, Administrator's No. 86Ch132; *In Re* Basil Chris Elias, 114 Ill. 2d 321, 499 N.E.2d 1327 (1986). In the *Basil Chris Elias* case, the ARDC petitioned the Illinois Supreme Court for interim suspension but conducted a hearing and review prior to Supreme Court action. Elias challenged the constitutionality of Rule 774 but the Illinois Supreme Court ignored the issue and ordered Elias suspended for three years, based on the hearing board's recommendation. *Basil Chris Elias*, 114 Ill. 2d at 329, 499 N.E.2d at 1335. *See also* Chicago Daily Law Bulletin, Oct. 1, 1986 at 1, col. 4.

cess.[10] They contended that the vague wording[11] of the rule gives the ARDC too much discretion in implementing disciplinary measures. They also argued that the publicity surrounding a 774 petition creates a "cloud of prejudice" over the subsequent hearings.[12] Because of the dramatic increase of disciplinary actions in recent years,[13] and the ARDC's promise of a "banner year" in 1986,[14] the attorneys correctly argued that Rule 774 is "of major significance to the entire profession."[15]

This comment discusses the disciplinary system in Illinois and focuses on the conflict between Supreme Court Rule 774 and due process guarantees. The analysis begins with a look at the disciplinary system and its rules. Next, the need for quick action in serious misconduct cases is discussed. Finally, Rule 774 is examined under a United States Supreme Court test for the sufficiency of due process, and some weaknesses in the rule are noted. The comment then concludes with a revision of Rule 774 that will assure its constitutionality, while preserving its design to protect the public.

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10. Due process is generally divided into two categories: procedural due process and substantive due process. Procedural due process, the topic of this comment, requires that notice and the right to a fair hearing be accorded prior to a deprivation. Frank v. Mangum, 237 U.S. 309 (1914). Substantive due process requires that all laws have a rational relationship to a legitimate government objective. *See* Wells and Eaton, *Substantive Due Process and the Constitutional Tort*, 18 GA. L. REV., 201, 215 (1985) (provides a more detailed distinction between procedural and substantive due process issues).

11. The attorneys' response to the ARDC's rule to show cause alleges that the language of Rule 774 does not define "serious misconduct" strictly enough. One attorney points out that other attorneys named in the complaint against him were given full Rule 753 evidentiary hearings. Answer to Rule to Show Cause and To Petition For Interim Suspension pursuant to Supreme Court Rule 774 at 22, *In Re* Walter P. Ketchum (M.R. No. 3984). The attorneys charged also rely on the holding in Louisiana State Bar Association v. Ehmig, 277 So. 2d 137 (La. 1973), where the Louisiana Supreme Court struck down a state statute allowing for the prehearing suspension of attorneys for serious misconduct. *Id.* The Louisiana Court held that minimum due process standards required at least an adversarial hearing to determine that the alleged misconduct involves a serious crime. *Id.* at 141.

12. Illinois disciplinary proceedings place the burden of proving misconduct on the administrator. *In Re* Damisch, 38 Ill. 2d 195, 200, 230 N.E.2d 254, 260 (1967). The attorneys argue that a suspension prior to a hearing would eliminate this presumption because subsequent proceedings will be "heavily tainted." Answer to Rule To Show Cause Issued Pursuant to Supreme Court Rule 774 at 12, *In Re* Melvin A. Heller and Jerrold L. Morris (M.R. No. 3987).

13. In 1976 the Administrator began 1,740 investigations. By 1985 the number was 3,995, an increase of 126%. Between 1985 the number of complaints issued by the Inquiry Board went from 82 to 184, a 124% increase. Sixty-four matters were filed with the Supreme Court in 1976 and by 1985 the number increased 230% to 211 matters. *Fourteenth Report of the Attorney Registration and Disciplinary Commission to the Supreme Court of Illinois* (1985).

14. Interview with James J. Grogan, Senior Counsel, and Naomi J. Woloshin, Counsel, Illinois Attorney Registration and Disciplinary Commission, in Chicago (August 29, 1986).

15. Chicago Daily Law Bulletin, Aug. 6, 1986 at 1, col. 3.

THE DISCIPLINARY SYSTEM IN ILLINOIS

The Illinois Supreme Court supervises attorney conduct in Illinois and has exclusive control over disciplinary cases.[16] The court has frequently stated that the basic purposes of the disciplinary system is to safeguard the public, maintain professional integrity, and protect the administration of justice from reproach.[17] In light of these purposes the court has declared that disciplinary proceedings are neither civil nor criminal in nature.[18]

Between 1967 and 1973, the Illinois State Bar Association and the Chicago Bar Association voluntarily acted as the disciplinary agents of the court. The court appointed a commissioner from each association with the power to investigate and report charges of attorney misconduct.[19] By 1971, the two bar associations, finding their disciplinary duties to be expensive and time consuming, petitioned the court for relief from their responsibilities.[20] The result was the adoption of Illinois Supreme Court Rules 750-756 in 1973.[21] The most fundamental change the new rules brought to the disciplinary system was the creation of the Attorney Registration and Disciplinary Commission pursuant to Rule 751.[22]

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16. *In Re* Sherman, 60 Ill. 2d 590, 328 N.E.2d 553 (1975). The Illinois Supreme Court also regulates the admission of attorneys to the bar. *See* ILL. REV. STAT. ch. 110A, paras. 701-750 (1985); Murphy, *A Short History of Disciplinary Procedures In Illinois*, 60 ILL. B. J. 528, 529 (1972) (a discussion of the Illinois disciplinary system prior to the creation of the Attorney Registration and Disciplinary Commission).

17. *In Re* Harris, 93 Ill. 2d 285, 443 N.E.2d 557 (1982); *In Re* Lacob, 50 Ill. 2d 277, 278 N.E.2d 795 (1972). State courts did not always have control over the conduct of attorneys. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFFALO L. REV. 525 (1983). Historically, state legislatures and state courts have struggled with each other to regulate attorney conduct, and it was not until the end of the nineteenth century that the courts successfully dominated. *Id.* Mr. Alpert argues for the return of control of attorney discipline to the state legislatures. *Id.*

18. *In Re* Harris, 93 Ill. 2d 285, 443 N.E.2d 557 (1982). *But see In Re* Ruffalo, 390 U.S. 544 (1968). Disbarment is a punishment imposed on the lawyer. *Id.* at 550. The proceedings are adversarial and quasi-criminal in nature. *Id.* at 551.

19. ILL. ANN. STAT. ch. 110A, para. 751. Historical and Practice Notes (Smith-Hurd, 1985). These two bar Associations' involvement in attorney discipline matters started in 1933. Between 1933 and 1973, supreme court rule changes gradually involved the associations more and more into the disciplinary process. *Id.* Attorney discipline in Illinois originally was enforced by the state Attorney General. *Id.*

20. *Id.* During the same time period that the two bar associations were overseeing attorney discipline, the American Bar Association was examining attorney disciplinary systems and was preparing to recommend substantial changes in the existing systems. The Illinois Bar Association's recommendations were made to the supreme court in anticipation of the ABA report. *Id.*

21. ILL. REV. STAT. ch. 110A, para. 750-56 (1985). Rules 757-68, containing provisions for confidentiality and discipline for criminal convictions, were adopted one month after Rules 750-56. ILL. ANN. STAT. ch. 110A, part B Foll. para. 750, Historical and Practice Notes (Smith-Hurd, 1985). Rules 769 (now repealed) to 774 were added between 1975 and 1984. *Id.*

22. ILL. REV. STAT. ch. 110A, para. 751 (1985). *See generally* Bassitt, *The Attor-*

The ARDC and its Rules

The supreme court appoints five members of the Illinois bar[23] to the ARDC for three-year terms.[24] The court also appoints an administrator to run the daily activities of the commission and enforce its rules.[25] The ARDC has the authority to investigate complaints, gather evidence, make findings of fact and issue recommendations for discipline to the court.[26]

Prior to the enactment of Rule 774 in 1984 every disciplinary proceeding followed the guidelines of Supreme Court Rule 753.[27] That rule provides that attorneys charged with misconduct be given the opportunity to present their defenses before formal inquiry, hearing and review boards prior to any supreme court action.[28] Ad-

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ney Registration and Disciplinary System, ATTORNEY CONDUCT (IICLE) § 2.5 (1985).

23. ILL. REV. STAT. ch. 110A, para. 751 (1985). The commissioners make the rules for disciplinary proceedings, supervise the Administrator, hire staff attorneys, collect fees and make an annual report to the Illinois Supreme Court. *Id.* By 1985, the ARDC had grown into an organization that included 22 attorneys and investigators with a large support and administration staff. *Fourteenth Report of the Attorney Registration and Disciplinary Commission to the Supreme Court of Illinois* (1985).

24. ILL. REV. STAT. ch. 110A, para. 751 (1985).

25. ILL. REV. STAT. ch. 110A, para. 752 (1985). The Administrator is the principal executive officer of the system. Bassitt, *supra* note 22, at § 2.7 (1985). The Administrator maintains a full time professional staff and receives and investigates complaints against attorneys. The Administrator also prosecutes disciplinary cases before the Hearing and Review and the Supreme Court. *Id.*

26. ILL. REV. STAT. ch. 110A, para. 751 (1985). In 1985 the Illinois Supreme Court disbarred 36 attorneys, suspended 43 and censured 9. *Fourteenth Report of the Attorney Registration and Disciplinary Commission to the Supreme Court of Illinois* (1985).

27. ILL. REV. STAT. ch. 110A, para. 753 (1985).

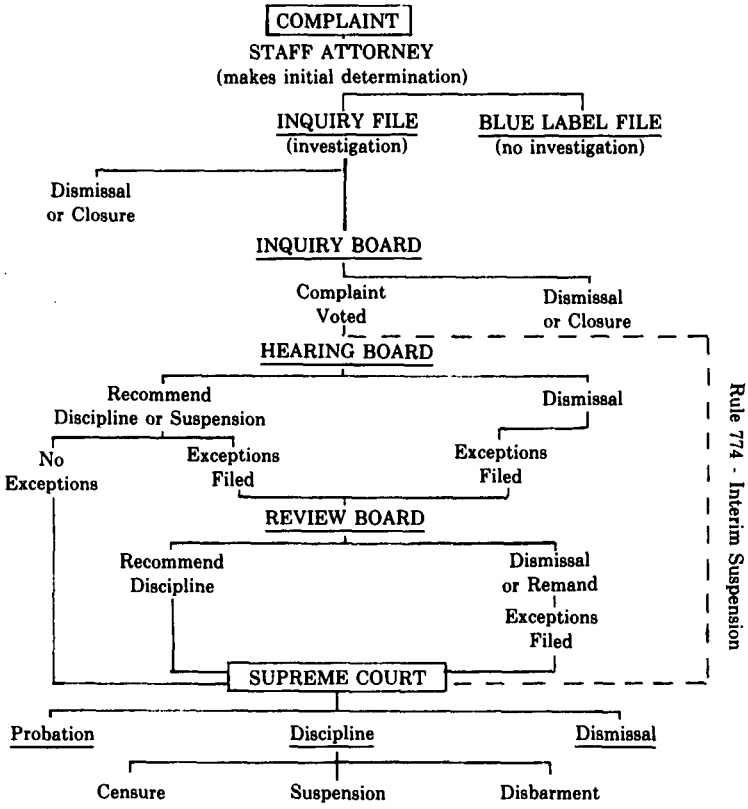
28. The following flow chart is taken from Bassitt, *The Attorney Registration and Disciplinary System*, ATTORNEY CONDUCT (IICLE) § 2.1 (1985) and is amended to show the effect of Rule 774.

ditionally, Supreme Court Rule 766 mandates[29] that inquiries, hearings and reviews under Rule 753 be private and confidential[30] until final supreme court action.

The inquiry board acts as the grand jury of the disciplinary system in Illinois.[31] The board does not determine the merits of a com-

I. [2.1] COMPLAINT FLOW CHART

ATTORNEY DISCIPLINARY SYSTEM



29. Rule 766 contains a provision permitting proceedings be made public "in the interest of justice," and with the approval of at least one member of the state supreme court. ILL. REV. STAT. ch. 110A, para. 766(4) (1985).

30. Changes have been made to Rule 766 over the years to reflect the court's attitude that disciplinary actions should be made more public. ILL. ANN. STAT. ch. 110A, para. 766. Historical and Practice Notes (Smith-Hurd, 1985). The concern is that too great a solicitude for an attorney's reputation may result in his endangering the public. *Id.* In spite of this changing attitude, every public disclosure of a disciplinary proceeding requires the approval of at least one member of the supreme court, except for interim suspension petitions. ILL. REV. STAT. ch. 110A, para. 766(b)(2) (1985).

31. The Inquiry Board consists of 21 members of the Illinois Bar which act in panels of not less than three. ILL. REV. STAT. ch. 110A, para. 753(a) (1985). The ARDC's rules guarantee a charged attorney the opportunity to appear before the board and present arguments. ILL. REV. STAT. ch. 110A., Rule 105 Foll. para. 774

plaint but instead it investigates the alleged misconduct and votes for either dismissal of the complaint or a hearing.[32] The hearing board, if called, makes findings of fact and conclusions of law which result in either a recommendation to the commission for dismissal of the complaint or a recommendation to the Illinois Supreme Court for discipline.[33] Attorneys charged may testify on their own behalf, present evidence and cross-examine witnesses.[34] If the hearing board votes for discipline, its recommendation may go directly to the supreme court unless either the ARDC or the attorney charged files an exception.[35] In the event of such an exception, the case is transferred to the commission's review board[36] prior to supreme court action.

The review board's options are substantial and include the power to approve, modify or reject the findings and recommendations of the hearing board.[37] If the board chooses to dismiss the proceeding, the action stops, but if the board decides that discipline is appropriate the review board makes its recommendation to the supreme court.[38] Although the review board's recommendation to the court is given considerable weight, it is not binding.[39]

The Need to Act in Emergency Situations

The very nature of Rule 753 proceedings make them time consuming. Ample time for discovery, verification, testimony, decision and review prevent hasty, mistaken decisions which would either undermine the legal profession or devastate an attorney's practice.

(1985). The board is run with fewer formalities than the hearing or review board because the inquiry board does not make recommendations to the Illinois Supreme Court. Bassitt, *The Attorney Registration and Disciplinary System,* ATTORNEY CONDUCT (IICLE) § 2.7 (1985).

32. ILL. REV. STAT. ch. 110A, para. 753(a)(3) (1985).

33. ILL. REV. STAT. ch. 110A, para. 753(c) (1985). The hearing board follows a modified version of the Illinois Code of Civil Procedure, but the technical rules of evidence, including the hearsay rule, need not be mechanically followed. *In Re* Sherman, 60 Ill. 2d 590, 328 N.E.2d 553 (1975). Murphy, *supra* note 16 at 531-32. The charged attorney may, at the discretion of the hearing board, present evidence of his character or reputation. ILL. REV. STAT. ch. 110A, Rule 273 Foll. para. 774 (1985); Swett, *supra* note 7, at 337.

34. Bassitt, *The Attorney Registration and Disciplinary System,* ATTORNEY CONDUCT (IICLE) § 2.12 (1985).

35. ILL. REV. STAT. ch. 110A, para. 753(e)(1) (1985).

36. ILL. REV. STAT. ch. 110A, para. 753(d) (1985). The Review Board is made up of nine members, and the concurrence of not less than five members is necessary for a decision. *Id.*

37. ILL. REV. STAT. ch. 110A, para. 753(e)(3) (1985).

38. ILL. REV. STAT. ch. 110A, para. 753(e)(4) (1985). The Review Board also has the power to make additional findings or even remand the case back to the Hearing Board. *Id.*

39. *Swett, supra* note 7, at 338. *See In Re* Schelly, 94 Ill. 2d 234, 446 N.E.2d 236 (1983).

The price paid for these assurances, however, is sometimes prohibitively high. The time from inquiry to supreme court final decision normally takes from one to three years.[40] When an attorney's alleged misconduct involves actions such as judicial bribery[41] or conversion of client[42] or public funds,[43] supreme court discipline must be expedited in order to immediately stop this irreparable misconduct.[44]

Rule 774

Rule 774 allows the Illinois Supreme Court to suspend an attorney, prior to a hearing, for misconduct that the court deems serious.[45] The court may take the action either on its own motion or on the ARDC's petition for a rule to show cause.[46] The alleged misconduct must include one of the following: fraud, moral turpitude, or irreparable injury — either to the public or to the orderly administration of justice. Because the confidentiality protections of Rule 766 do not apply to Rule 774,[47] the ARDC's petition to the court for suspension is a matter of public record. Further, Rule 774 has no time limit provision, either for the supreme court's answer to the commission's petition or for the length of time an attorney may be suspended before a hearing begins.[48]

Due Process Examination

In 1968, the United States Supreme Court held that attorneys are entitled to procedural due process[49] in disbarment actions.[50]

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40. Interview with James J. Grogan, Senior Counsel, and Naomi J. Woloshin, Counsel, Illinois Attorney Registration and Disciplinary Commission, in Chicago (August 29, 1986).

41. *In Re* Melvin A. Heller and Jerrold L. Morris, Administrator's No. 86CH143.

42. *In Re* Stanley Cook, Administrator's No. 85CH22.

43. *In Re* Mike Fawell, Administrator's No. 85CH80.

44. The Operation Greylord investigation, involving widespread judicial bribery in Cook County, Illinois, has clearly cast an air of scandalous conduct over the local legal profession. Rule 774 was designed to solve the substantial deficiencies that result when serious misconduct of this type goes unchecked while lengthy, confidential disciplinary proceedings progress. Ill. Ann. Stat. ch. 110A, para. 774, Historical and Practice Notes (Smith-Hurd, 1985).

45. *See supra* note 1.

46. Ill. Rev. Stat. ch. 110A, para. 774 (1985).

47. Ill. Rev. Stat. ch. 110A, para. 766(b)(2) (1985).

48. Ill. Rev. Stat. ch. 110A, para. 774 (1985).

49. The fourteenth amendment prohibits any state from depriving any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1.

50. *In Re* Ruffalo, 390 U.S. 544 (1968). *See also In Re* Ming, 469 F.2d 1352 (7th Cir. 1972) (a license to practice law is a type of "new property" the deprivation of which must conform to due process of the law). Prior to *Ruffalo*, the Supreme Court held that a state may not even exclude a person from admission to the bar without first affording the applicant due process procedures. Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957). The Supreme Court recognizes

Prior to 1970, due process inquiries in the setting focused primarily on whether the attorney's affected interest was a property[51] interest covered under the clause. If the courts found that a property interest was involved, they simply held that a "hearing" was required. Seldom were the courts called on to determine what exactly constituted a fair hearing.

In 1970, however, the Supreme Court's holding in *Goldberg v. Kelly*[52] set off a due process "explosion." The *Goldberg* Court held that a full hearing[53] was required before a state could discontinue a citizen's welfare payments, a "property" interest.[54] While the Court expanded the concept of property[55] under the due process clause,[56]

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a strong distinction between due process analysis of government revocation of a license and government refusal to grant a license. Bell v. Burson, 402 U.S. 535, 540 (1971). A person who loses a license already owned is affected much more than someone denied a license. As the Court pointed out, "the continued possession may become essential in the pursuit of a livelihood." *Id. See also* Mack v. Florida State Board of Denistry, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1297 (1975) (the revocation of a license to practice a profession deprives a person of a way of life to which he has devoted years of preparation and which he and his family have come to rely on).

51. *See* Friendly, *supra* note 50, at 1268.

52. 397 U.S. 254 (1970). In the *Goldberg* case, New York residents challenged the adequacy of due process procedures prior to the termination of welfare payments. *Id.* The Court held that welfare benefits are a matter of statutory entitlement without sufficient procedural due process. *Id.* at 263.

53. The language of the *Goldberg* majority acknowledged that not all due process circumstances require the same amount of protection. *Goldberg*, 397 U.S. at 264, *citing* Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961). The *Goldberg* Court held, however, that welfare recipients are entitled to a pretermination hearing that includes the right to be represented by counsel, present evidence, cross examine witnesses and present oral argument. *Goldberg*, 397 U.S. at 269.

While the *Goldberg* Court did not expressly deny the flexible nature of due process procedures, its holding apparently made due process flexibility a study in futility. Within two years, however, the Court was again changing its focus back to the flexible nature of due process. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

54. Goldberg v. Kelly, 387 U.S. 254, 297 (1970).

55. The term "concept" is used to represent the vast amount of new property covered by the due process clause in the post *Goldberg* era. *See generally* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*. 74 YALE L.J. 1245 (1965) (an analysis of the lack of procedural safeguards for administrative social welfare deprivations prior to *Goldberg*).

56. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971). In *Bell*, an uninsured motorist was involved in an accident and lost his license prior to any determination of fault. The Supreme Court held that the driver was not given minimum constitutional due process protections. *Id.* at 543. The Court further held that due process would be satisfied by a limited inquiry into the determination of whether there was a "reasonable possibility" of fault attributable to the driver. *Id.* at 541. *See also* Fuentes v. Shevin, 407 U.S. 67 (1972). The *Fuentes* Court struck down Florida and Pennsylvania statutes that allowed a private party to obtain a prejudgment writ or replevin through a summary process of *ex parte* application to a court clerk. The Court held that household items such as a stove, stereo and bed were property interests protected by the fourteenth amendment. *Id.* at 90. Before these items could be removed from the buyers home, even though not fully paid for, notice and some form of hearing must be conducted. *Id.* at 91. The Court emphasized the absence of state judicial

it also emphasized that the type of hearing[57] required depended on the needs of each particular situation.[58] Currently, most due process inquiries focus not on whether a hearing is due, but instead on the type of hearing required. It was perhaps inevitable that after highlighting the flexibility[59] of due process requirements, the Court would find it necessary to explain how its flexible standard worked.

In *Matthews v. Eldridge*,[60] the Supreme Court created a framework[61] to test the sufficiency of due process safeguards for particular actions.[62] Under *Matthews*, three factors must be considered:[63] the

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control over the Florida and Pennsylvania replevin procedures, where a plaintiff appears only in front of a judicial clerk. No state official participated in, reviewed or evaluated the application for the writ under the statutes. *Id.* at 94. Under these circumstances, the state failed to show any important interest that might justify summary seizure. *Id.* at 94. According to the Court in *Fuentes*, a government body has a better chance of limiting due process procedures when the state is doing the taking. *Id.* at 92. State intervention in a private dispute does not compare in importance to state action furthering the public health or safety. *Id.* at 94.

Additionally, in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), a Wisconsin teacher with no tenure and only one year academic experience was told that he would not be hired for a second year. *Roth*, 408 U.S. at 565. No explanation was given. *Id.* The Court held that the teacher was not deprived of any "liberty" protected by the fourteenth amendment because the refusal to rehire carried no stigma that would affect the teachers standing in the community. *Id.* at 576. The Court emphasized, however, that property interests extend beyond the ownership of money, chattel or real estate, and include a person's good name, honor and integrity. *Id.* at 573. Property interests are not constitutionally created but instead are created from independent sources such as state or federal law. *Id.* at 578. But in Perry v. Sindermann, 408 U.S. 593 (1972), the Court held that a teacher with an express or implied right to reemployment is entitled to some form of hearing prior to termination. The pretermination hearing need not completely resolve the propriety of a discharge however, it need only be an initial check against mistaken decisions. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1495 (1985). In Gross v. Lopez, 419 U.S. 565 (1975), nine students whose conduct included disobedience, disruption and attacking a police officer were given 10 day suspensions from high school without any hearing. *Id.* The Court held (by a 5-4 majority) that educational benefits are a form of property entitled to due process. *Id.* at 575. The Court did not require hearings prior to termination for all cases, but admitted that there may be situations where prior notice and hearing may be impossible. *Id.* at 581. The *Gross* Court emphasized that the hearing may be rudimentary. It may be as simple as telling the student what he is accused of doing, and giving him a chance to explain himself. *Id.* at 583.

57. *See* Friendly, *supra* note 50, at 1277.

58. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). *See also* Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1493 (1985).

59. Morrissey v. Brewer, 408 U.S. at 482 (1972).

60. 424 U.S. 319 (1976).

61. The Court created test in *Matthews* measures and balances both private and state interests, and it also considers the probable value of substitute safeguards. *Matthews*, 424 U.S. at 336. The Court expressly realized the changing values of society, and thus the changing nature of due process protection. *Id.* at 334 (citing Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)). The due process considerations delineated in *Matthews* allow for these changing situations.

62. *Matthews*, 424 U.S. at 336.

63. The author has changed the order of these factors because the unique nature of attorney discipline makes the analysis of the "probable value of substitute safeguards" the critical factor under the *Matthews* test. It will be covered in detail

private interest affected;[64] the government interest in the action;[65] and the risk of erroneous deprivation[66] with the probable value of additional or substitute safeguards.[67] While the *Matthews* test did not reduce due process analysis to a simple mechanical application,[68] it did establish the fundamental considerations that must be included in any due process analysis.[69] The *Matthews* test is the standard still used today.[70]

Attorney Discipline and the Private Interest

The United States Supreme Court has firmly established that temporary property deprivations are no less serious than permanent takings.[71] To justify postponing the hearing the situation must be

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after an analysis of the state and individual interests involved in attorney discipline.

64. *Matthews*, 424 U.S. at 335. In *Matthews*, a citizen's social security disability benefits were terminated after administrative procedures that provided notice and numerous opportunities to respond. *Id.* at 325. The Supreme Court held that an evidentary hearing was not required before the termination of the benefits. *Id.* at 350. The Court emphasized the elaborate procedures the administrative agency provided for the recipient, and determined that in light of the interests involved, the procedures were constitutionally adequate. *Id.* at 339-40. The Court heavily relied on one aspect of the facts in *Matthews* that is totally absent in attorney discipline situations, the possibility of post hearing compensation to correct for wrongful deprivations. *Id.* at 341. The Court found that if a wrongful deprivation occurred, the administrative agency could later compensate the individual for back payments. This point first raised in *Matthews* appears to apply to the welfare situation in *Goldberg*, but the Court distinguished. It limited its reasoning in *Matthews* to situations involving such things as disability benefits, which are not based on financial need. *Id.* at 341. *See also* Arnett v. Kennedy, 416 U.S. 134, 146 (1974).

65. *Matthews*, 424 U.S. at 335. The government's interest includes the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* The Court tempered this language when later in the opinion it emphasized that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 349. *See also* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (an indepth analysis and criticism of *Matthews v. Eldridge*).

66. Professor Mashaw presents a strong argument to show that administrative agencies seldom have the proper information in front of them to make a knowledgeable decision. *See* Mashaw, *supra* note 65, at 45.

67. *Matthews*, 424 U.S. at 336.

68. Professor Mashaw argues that the "calculus" type factors presented in *Matthews* are too mechanical and thus too easy to be misapplied to the myriad of individual factual situations that arise in government welfare cases. Mashaw, *supra* note 65, at 37.

69. *Matthews*, 424 U.S. at 334-35.

70. *See* Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1494 (1985); Maronry, *Constitutional Ramifications of Emergency Suspension Orders*, 58 FLA. B.J. 293 (1984).

71. Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972). *See also* Bell v. Burson, 402 U.S. 535 (1971) (driver's license suspension for being involved in an accident violates due process unless the state first provides a forum for determination of driver's fault); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (employee's prehearing gar-

"extraordinary."[72] When the state takes an individual's property the impact to that person is not lessened simply because the state promises a hearing on the matter "at some future date." A wrong may not be done simply because it can later be undone.[73] It is therefore improper to examine an interim suspension rule with anything less than the full scrutiny usually given to permanent deprivations.

The impact of an interim suspension on the accused attorney involves not only the immediate loss of a livelihood, but it also creates a long lasting public stigma[74] and a cloud of prejudice that may affect the subsequent hearing.[75] A suspension that carries a moral stigma is more serious than one that does not.[76] The misconduct alleged in attorney discipline situations often involve issues of fraud or criminal activity and therefore high standards of due process protection must be applied.[77] Rule 774 only applies to conduct alleging fraud, moral turpitude or irreparable injury to the public.[78] It was designed to be used only against the most serious and scandalous conduct yet the protections of confidentiality afforded lesser accusations were eliminated.[79] The criminal nature of the public allega-

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nishment of wages, without any opportunity for employee to be heard, violates due process).

It is interesting to note that the Court relies heavily on due process protection when the prehearing deprivation affects the livelihood of an accused. *Bell*, 402 U.S. at 540; *Sniadach*, 395 U.S. at 340. The suspension of a law license not only directly affects an attorney's livelihood, but unlike *Bell* and *Sniadach*, it also places a strong moral stigma on the attorney. *See* Friendly, *supra* note 50, at 1297.

72. *Fuentes*, 407 U.S. at 90; Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

73. Stanley v. Illinois, 405 U.S. 645, 647 (1972). *Stanley* involved a child custody proceeding. The Court held that an unwed father was entitled to a hearing on his fitness as a parent before his children could be taken away from him. *Id.* at 658. "[I]f there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from the uncertainty and dislocation." *Id.* at 648. *See also Fuentes*, 407 U.S. at 83, note 71.

74. Friendly, *supra* note 50 at 1298. *See also* Hammer, *License Disclosure and Due Process*, 12 CONN. L. REV. 870, 877 (1980) (a temporary suspension is potentially irreparable because the accused may lose not just income but also long standing clients).

75. The "cloud of prejudice" that is created by an interim suspension, with or without protections of confidentiality, refers to the bias that will be carried over into the hearing and review boards. As members of the ARDC, board members will have knowledge of any interim suspension. The attorneys charged argue that their suspension without a hearing would eliminate the presumption of innocence granted each attorney. *See supra* note 12.

The "moral stigma" referred to is a factor distinct from, but no less serious, than a "cloud of prejudice." Moral stigma affects the public, not just the hearing and review boards, and its effects do not end at the completion of a hearing if the respondent is found innocent. Moral stigma causes the loss of longstanding clients. Barry v. Barchi, 443 U.S. 55, 74 (1979) (Brennan, J., concurring). *See also* Hammer, *supra* note 74 at 877.

76. *See supra* note 75.

77. *See* Friendly, *supra* note 5, at 1297.

78. *See supra* note 1 and accompanying text.

79. *See supra* note 47 and accompanying text.

tions, the prejudice, moral stigma and loss of a livelihood are all serious factors which demonstrate that the private interest affected in attorney discipline situations is a strong one.

The State's Interest in Attorney Discipline

The state's interest in protecting the judicial system from attorneys who bribe judges and convert client funds is no less substantial than the private interest involved. Serious attorney misconduct draws significant attention because of the overwhelming importance of the judicial system and the risk to the public. In *Fuentes v. Shevin*,[80] the Supreme Court held that in situations involving the public health or safety, prehearing deprivations are permitted.[81]

In order to be constitutional, however, the prehearing deprivation must be carried out to protect an important state interest that requires prompt action.[82] The Supreme Court has allowed prehearing takings involving the IRS,[83] bank failures,[84] misbranded drugs[85] and contaminated food.[86] Considering these holdings it is an untenable proposition that the Illinois Supreme Court, which has ultimate control over attorney conduct, cannot suspend an attorney prior to a hearing for serious misconduct. The difficulty arises, however, in trying to establish specific guidelines for determining what constitutes misconduct serious enough to threaten the public health or safety without prompt action.

In recent years, the Illinois Supreme Court has ordered disciplinary sentences that appear inconsistent with the court's high level of concern for serious attorney misconduct. The court found that a

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80. 407 U.S. 67 (1972).

81. *Id.* at 91-92. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 13:10 at 504 (1978) [hereinafter DAVIS]. "If the emergency prevents trial procedure because . . ., the party whose liberty or property is about to be taken can be told what is contemplated and why, and the officer may be required to listen to his oral response, or in some circumstances to read his written response." *Id.* at 506. *See also* Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 57 (1972) (Judicial review of administrative agency decisions is not adequate to prevent abuses of the exercise of summary authority).

82. *See* Matter of Padilla, 67 N.Y. 2d 440, 494 N.E.2d 1050, 503 N.Y.S.2d 550 (1986) (New York appellate division does not violate due process when it suspends an attorney without a hearing when the attorney's misuse of client funds presents a substantial risk to others and attorney has ample opportunity to respond). *But cf.* Matter of Nuey, 61 N.Y.2d 513, 463 N.E.2d 30, 474 N.Y.S.2d 714 (1984) (appellate division may not suspend an attorney pending determination of charges). It is important to note that the state statute that the New York Court relies on provides that any interim suspension petition shall be private and confidential, unlike Illinois Rule 774. N.Y. JUDICIARY LAW § 90(10) (McKinney 1985).

83. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931).

84. Fahey v. Mallonee, 332 U.S. 245 (1947).

85. Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950).

86. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

three year suspension was appropriate for an attorney who bribed a public official.[87] One attorney was suspended for eighteen months for commingling and converting client funds.[88] Most recently, an attorney's federal conviction of mail fraud for participating in a scheme to defraud an insurance company warranted a two year suspension.[89] In light of the relative leniency of the sentences given, it is inconceivable that the misconduct in the above cases is the same misconduct the court considers severe enough to override constitutional protections.

Because the time for a hearing and review can take from one to three years,[90] it is possible that an attorney accused of bribing a public official, for example, may receive an interim suspension that runs longer than the final discipline normally handed out. This is inconsistent with the "public health or safety" requirement of a prehearing deprivation. While the misconduct cited in the cases noted above is reprehensible, the Illinois Supreme Court, with its less than severe sanctioning, has implied that the misdeeds were lesser offenses. In one instance the court states that fraud, moral turpitude, and irreparable injury to the public are actions requiring the suspension of constitutional protections, while in another instance, the court holds that a mere eighteen month suspension for the same misconduct is sufficient punishment. Rule 774 should contain specific guidelines delineating the misconduct that must be charged for prehearing deprivation, along with a requirement for the ARDC to articulate the danger the public is exposed to because of the misconduct.[91] Both the state and private interests are substantial with respect to attorney discipline; therefore, the final factor of the *Mathews* test, the value of substitute safeguards, is the critical one.

Value of Substitute Safeguards

In order to afford constitutionally sufficient due process protections, Rule 774 needs revision. First, as has already been stated, the text of Rule 774 is vague. In order to keep the Rule within the bounds of the public health or safety, the language should be aligned with the language contained in the state's guidelines for a temporary restraining order,[92] which requires the issuing judge to

87. *In Re* Harris, 93 Ill. 2d 285, 443 N.E.2d 557(1982).

88. *In Re* Cohen, 98 Ill. 2d 133, 456 N.E.2d 105 (1983).

89. *In Re* Williams, 111 Ill. 2d 105, 488 N.E.2d 1017 (1986). In *Williams*, the attorneys' conviction for mail fraud resulted in federal probation. The Illinois Supreme Court determined that a two year license suspension was appropriate punishment, but they were careful not to let the attorneys be reinstated while still on federal probation. *Williams*, 488 N.E.2d at 1024.

90. *See supra* note 40 and accompanying text.

91. *See infra* note 92 and accompanying text.

92. ILL. REV. STAT. ch. 110, para. 11-101 (1985). "Every temporary restraining

define the injury and state why it is irreparable.[93] With more specific guidelines the ARDC would not have the burden of deciding when to invoke the rule. This should reduce the chance of the ARDC filing an erroneous petition.

The second suggested change is to give attorneys charged under Rule 774 the same protections of confidentiality as those charged under Rule 753. Rule 774 gives the ARDC too much discretion to publicly petition for an attorney's suspension. The court has stated that the ultimate purpose of attorney discipline is to protect the public rather than punish the accused.[94] Given this statement, it is hard to understand why the court expressly allows the ARDC to go public with its petition for interim suspension. The reason the court removed the privacy protection from Rule 774 appears to be tied to the final weakness of the rule: the lack of time restrictions.

Rule 774 has no express or implied time limits either for the court's initial determination after an ARDC petition, or for the time between suspension and final review.[95] As of this writing, four attorneys against whom the ARDC has petitioned for suspension have waited an average of ten months,[96] and still the court has not answered any petitions. If the alleged misconduct is serious enough to threaten the public health or safety, the court, or a portion of it,[97] should quickly[98] answer the ARDC's petition.

The publicity surrounding an ARDC petition forces an attorney and his clients to make hard decisions with little or no reliable information. Even if the ARDC's petition were treated as a confidential matter, the absence of a time limit strains the attorney's relationship with the clients. The attorney is in a difficult situation, knowing that the court is considering his suspension, but not knowing when, if ever, it will rule. The attorney is left with only two options in this circumstance: to tell his or her clients about the petition, or just go on with normal business as if nothing had happened. Both options are impractical and contrary to the basic function of the disciplinary system — protecting the public. The absence of a time limitation has a punitive[99] effect that can create enough unnecessary damage

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order . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within . . . 10 days." *Id.*

93. *Id.*

94. *In Re* Williams, 111 Ill. 2d 105, 108, 488 N.E.2d 1017, 1022 (1986); *In Re* Lenz, 108 Ill. 2d 445, 450-51, 484 N.E.2d 1093, 1095 (1985).

95. ILL. REV. STAT. ch. 110A, para. 774 (1985).

96. *See supra* note 9.

97. It is not necessary that the full court hear the matter. Any portion of the court is enough to assure judicial control over an administrative agency. See 2 DAVIS, *supra* note 81 § 8:4 at 167.

98. A twenty-one day time limit is suggested.

99. Punishment is contrary to the function and purpose of the Illinois Disciplinary System. *See supra* note 94 and accompanying text.

to an attorney's practice that the rule borders on the vindictive. An express,[100] very short time limit between the ARDC's petition and the court's decision should be included in Rule 774.

If the court does decide to impose interim suspension then the Constitution mandates that a post-suspension hearing be conducted without a delay. The Supreme Court, in *Barry v. Barchi*,[101] held that in prehearing suspension cases the state must provide the accused a prompt post-suspension hearing that should be concluded without appreciable delay.[102] *Barry* did not require that state suspension statutes contain a rigid time limit for the commencement of a hearing, but the Court did hold that under the circumstances of the case, the accused's suspension was constitutionally infirm because he was forced to wait 15 days for his hearing.[103] The Court, however, left open the possibility that interim suspensions may be delayed for reasons outside of the state's control.[104] Interim suspensions under Rule 774, therefore, must be brief unless the ARDC can show that for reasons outside of its control, a hearing cannot be expedited. Because it is the ARDC who initiates the interim suspension request, a time limit of 21 days between suspension and the commencement of a hearing is suggested. The accused attorney should be given the opportunity to extend the 21 day limit, if needed.

CONCLUSION

Under the *Matthews v. Eldridge*[105] test, Illinois Supreme Court Rule 774 is constitutionally infirm. The rule must not be totally abandoned, however, because the state has a valid interest in quickly stopping serious attorney misconduct. In order to more equitably balance the interest between state and attorney, some simple changes should be incorporated into the rule. A petition for interim suspension should be a confidential matter until initial supreme court action, and specific time limits should be included to eliminate unnecessary and unfair delays between the petition for a hearing and its conclusion. The Illinois Supreme Court should not neglect attorneys when it oversees the orderly administration of justice.

John G. McAuley

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100. *See supra* note 98.
101. 443 U.S. 55 (1979).
102. The *Barry* Court held that a New York statute authorizing the suspension of harness racing trainers without a hearing did not affront due process, as long as a prompt post suspension hearing was conducted. *Id.* at 67. *See also* Hammer, *supra* note 74, at 870.
103. *Barry*, 443 U.S. at 67.
104. *Id.*
105. 424 U.S. 319 (1976).