State Versus Federal Jurisdiction and Control over Admission and Discipline of Attorneys

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Courts are generally in agreement that the "right to practice law is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment to the Constitution of the United States." Due process of law, equal protection of the laws, first amendment freedoms and other federal constitutional guaranties may be invoked in attorney admission and discipline procedures. Within the last five years, the Supreme Court of the United States has wrestled with several fundamental issues of vital interest to the legal profession. An examination of the issues and the decisions thereon merits our immediate attention.

A "dangerous procedent" is the way one writer describes the 1957 decision of the Supreme Court in Konigsberg v. State Bar of California. The Court's decision in Schware v. Board of Bar Examiners of State of New Mexico, rendered on the same day, prompted a critique that an erosion of the loyalty standards of bar associations had taken place. Other writers expressed dissatisfaction with either the substantive reasoning or the political and sociological effects contemplated to follow.

The holdings in these two cases are simple enough. In Konigsberg, the Court held: (1) that the applicant in refusing to answer questions concerning his political opinions or associations, including membership in the Communist party, did not justify inference of bad moral character; and (2) that the state may not arbitrarily exercise power in bar membership selection in a manner infringing on freedom of political expression or association. In Schware, the Court held: (1) that the bar applicant's past membership in the Communist party, his prior use of aliases and his arrest record could not be said to raise substantial doubts about his present good moral character; and (2) that it would deprive him of constitutional due process to deny him the right to qualify for the practice of law.

6 Comment, 71 Harv. L. Rev. 154 (1957); Comment, 3 Vill. L. Rev. 93 (1958); Comment, 60 W. Va. L. Rev. 81 (1958).
What in these opinions causes so much concern? Did the Supreme Court encroach on the traditional domain of the several states in limiting their jurisdiction and control over their respective bars?  

A brief historical summary of the legal profession will serve to show how it has traditionally imposed self-restrictions and controls on its members. This should aid in understanding why a state, and more particularly the state judiciary, considers the regulation of the bar to be a state function and why the Konigsberg and Schwarze decisions created such concern. However, in light of four recent Supreme Court decisions, Cohen v. Hurley,6 In re Anastaplo,7 Konigsberg v. State Bar of California8 and Lathrop v. Donohue,9 it will become obvious that the more recent trend of the Court is to respect the states' dignities and to stop interfering with their local responsibilities.

During medieval England, the Inns of Court, judges and Parliament supervised the activities of the barristers and attorneys.10 By the end of the middle ages, the English lawyers had become a well organized profession.11 Although American colonization was not receptive nor conducive to a highly organized legal profession,12 it was learned through bitter experience during the young country's development that professional organization was the only means of survival from decadence.13

Now as during the medieval period, most of the responsibility for supervising the profession rests upon the courts. Of course, state legislatures may contribute their views as to how they believe the state bars should be managed, but this is allowed more or less in a sense of acquiescence by the courts out of a desire for harmony14 since there is generally recognized to be an inherent power in the courts to supervise the practice of law.15 The reason why, in addition to revered tradition, is because an attorney is an officer of the

7 Bradwell v. The State, 16 Wall. 130 (1872).
12 POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 100 (1953).
13 Id. at 93.
14 Id. at 109.
15 Id. at XXVIII.
court,18 and under the doctrine of separation of powers, the judicial branch is sovereign over its own affairs.19

But regardless of the problem of which branch of government may exercise control over the state bar, the point sought to be made is that the control of admissions and discipline of the state bar is primarily local in nature and, therefore, fundamentally a state function.20 The states have always taken pride in their autonomy in this sphere. The police power of the states is not a grant from the Constitution of the United States21 but is subject to and limited by that document.22 The Supreme Court was early cognizant of these facts and has given recognition thereto on numerous occasions.23

However, before the fourteenth amendment was welded and fused into the Constitution in 1868, no general limitation circumscribed the powers of the states, since the Bill of Rights was generally considered to be a restriction upon the national government and not applicable to the states.24 Not until after World War I did the fourteenth amendment become really significant in protecting individual liberties from state action.25 Tradition and reason, therefore, largely explain the present position of the states that they have primary control and jurisdiction over their bars.

That was the situation before the 1957 Konigsberg26 and Schware27 cases. In fact, only a few years before, the Supreme Court had strengthened the states' beliefs that they were masters

18 Powell v. Alabama, 287 U.S. 45 (1932); Ex parte Garland, 4 Wall. 333 (1866); Emanuel v. Cooper, 153 Iowa 572, 133 N.W. 1064 (1912); See generally TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY 62-85 (1957).
20 Bradwell v. The State, 16 Wall. 130 (1872); See generally TRUMBULL, op. cit. supra note 18, at 62-85.
22 Buchanan v. Warley, 245 U.S. 60 (1917).
23 E.g., In re Summers, 325 U.S. 561, 570 (1944): "The responsibility for choice as to the personnel of its bar rests with Illinois." An order of the highest court of a state which disbars a member cannot be re-examined and reversed by the Supreme Court acting in the capacity of a court of review. Selling v. Radford, 243 U.S. 46 (1917). The power of a state to prescribe the qualifications for admission to its own bar is unaffected by the fourteenth amendment, and the Supreme Court cannot inquire into the reasonableness or propriety of the rules that the state may prescribe. Bradwell v. The State, 16 Wall. 130 (1872).
over their respective bars when the Court held that the choice as to the personnel of its bar rests with the state. But the general disinclination on the part of the Supreme Court to consider claims arising under the fourteenth amendment in state bar admission proceedings vanished with its rulings in the 1957 Konigsberg and Schware decisions. In these cases, for the first time, the Court reviewed a state's application of bar admission standards to the facts of a particular bar admission application.

These cases were not the end, because the Court's attitude was later reflected in In re Patterson, when the case was remanded for reconsideration by the state in light of the Konigsberg and Schware cases. Also, in In re Sawyer, another local court's determination was reversed by the Supreme Court upon grounds that the Court did not believe the record was sufficient to support a finding that the attorney's speech out of the courtroom during progress of the trial impunged integrity of the presiding judge or reflected upon his impartiality and fairness in presiding at the trial. Thus, another twist of the vise was placed on the states' freedom to control their bars.

Nevertheless, this new situation was to continue only for approximately four years. In April 1961, the Supreme Court loosened the vice and practically restored the states' control over their bars by giving them a way around the Konigsberg and Schware decisions. The four cases, Cohen v. Hurley, In re Anastaplo, Konigsberg v. State Bar of California and Lathrop v. Donohue virtually causes a return to the status quo.

Two of the cases, In re Anastaplo and Konigsberg v. State Bar of California, are the most prominent in manifesting a change in the Court's position since they deal with bar admissions, the area in which the Court had seemingly broken tradition.

In In re Anastaplo, the Court held that the state's interest in enforcing a rule precluding an applicant's admission to practice law if he obstructs the bar examining committee by refusing to answer

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material questions regarding Communist party membership outweighs any deterrent effect upon freedom of speech and association and does not offend the fourteenth amendment. Further, the Court held in the 1961 Konigsberg case that the protection of the fourteenth amendment against arbitrary state action does not forbid the state from denying bar admission to an applicant so long as he refuses to provide unprivileged answers to questions as to Communist party affiliation having substantial relevance to his qualifications.

These two decisions will enable the states to avoid the 1957 Konigsberg and Schware rulings and still accomplish their desired control over bar admissions and discipline. The difference lies in the fact that, if a bar applicant refuses to answer questions reaching into the first and fourteenth amendments, the bar committee, although it cannot infer bad moral character from the refusal, merely needs to base its position of denying the application on the ground that the applicant's behavior has obstructed the bar committee in performing its duties and thereby base its case on the proposition that the state interest involved outweighs the individual's rights under the first and fourteenth amendments.

The other two 1961 decisions, Cohen v. Hurley and Lathrop v. Donohue, indicate that the Supreme Court has definitely decided to leave management of state bars to the states. In the Cohen case, the Court held that the fourteenth amendment did not forbid the state from making an attorney's refusal to answer questions at an inquiry as to the propriety of his professional conduct a per se ground for disbarment and that such ground was not rendered unconstitutional when the refusal rested upon a bona fide claim of a privilege against self-incrimination. So it would seem that neither bar applicants nor bar members may remain silent during an inquisition.

The Lathrop case considered and sustained the constitutionality of an integrated state bar, holding that an integrated bar did not infringe upon an attorney's constitutionally protected freedom of association. The decision reflects the traditional attitude of the Court toward state control.

Thus it seems that while the Supreme Court did not hesitate to give the due process clause a liberal interpretation which contravened the time-honored rights of the states as to the legal profession, yet the Court's respect and esteem for the praise-worthy tradition allowed the tradition to remain intact. However, a petition for certiorari has been granted for review by the Supreme Court in the case of *In re Zipkin*, in which is presented the question of whether a state's determination of a bar applicant's having bad moral character because he attempted to influence testimony of a witness connected with a state hearing on unprofessional conduct charges against a psychiatrist is a violation of due process. After a decision has been rendered in this case, it will be possible to determine further whether the Court intends to leave the states with total control over bar admissions and discipline, in line with the traditional practice, or if the Court wishes to return to their position of 1957. It has been suggested that the answer to the due process problem could be solved by looking to settled usages in an historical approach. If this method is ever used exclusively, then the states should regain their autonomy in this area as this approach will leave them entirely on their own.

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