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Admission to the Bar—Denial of Admission to Admitted and Suspected Subversives

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CASE COMMENTS

ADMISSION TO THE BAR—DENIAL OF ADMISSION TO ADMITTED AND SUSPECTED SUBVERSIVES.—Petitioner was denied certification to practice law by state committee of bar examiners of California and review of committee's action was denied by the Supreme Court of California. Petitioner, in several hearings before bar examiners, refused to answer questions as to whether he was a communist or member of the Communist Party, claiming that he was not obliged to answer questions pertaining to his political beliefs and that denial of certificate to practice law for failure to answer such questions was a denial of due process. The bar examiners maintained that the petitioner's application was turned down because he did not sufficiently demonstrate that he was of good moral character or that he did not advocate the overthrow of the Government of the United States by force and violence. On certiorari, United States Supreme Court reversed the judgment of the California court. *Konigsberg v. State Bar of California*, 77 Sup. Ct. 722 (1957).

In another case, a petitioner's application to take the New Mexico bar examination was denied by State Board of Bar Examiners of New Mexico. Denial was based on the grounds that past membership in the Communist Party, a record of previous arrests but no convictions, and the use of aliases on numerous occasions did not substantiate petitioner's claim that he had the requisite good moral character necessary for admission to the bar. On petition, the New Mexico Supreme Court sustained the Board's action. *Held*, reversing the judgment, that such denial violated the due process clause of the fourteenth amendment. *Schware v. Board of Bar Examiners of the State of New Mexico*, 77 Sup. Ct. 752 (1957).

Generally, most courts will agree that the practice of law is a privilege and not a right, therefore, the burden of proof is on the applicant to establish that he possesses the required good moral character. *Spears v. State Bar of California*, 211 Cal. 183, 294 Pac. 697 (1930); *In re Wells*, 174 Cal. 467, 163 Pac. 657 (1917). For an accumulation of these cases, see 5 AM. JUR., *Attorneys at Law* § 14 (1957). But the Supreme Court of the United States has indicated that it is a right of the applicant not to be denied admission on the basis of arbitrary findings by the bar examiners. Arbitrary findings are offensive to due process, a right afforded every citizen of the United States. *Wieman v. Updegraff*, 344 U.S. 183 (1952). In a Florida decision, the court held that, when no actual evidence

of moral unfitness was adduced at a hearing on an application to take the bar examination and the board relied entirely on undisclosed information to exclude the applicant, there was a denial of the right of due process. *Coleman v. Watts*, 81 So. 2d 650 (Fla. 1955). So, confusing as it may seem, it appears that the practice of law is a privilege, but only insofar as it does not destroy the applicant's personal rights.

This question was raised in the *Konigsberg* case: Can bar examiners withhold from an applicant a license to practice law for refusing to answer inquiries pertaining to his political and social beliefs and Communist Party membership? The Illinois court, faced with a similar set of facts, held that the petitioner could not refuse to answer these questions as they were relevant and necessary for the establishment of the requisite good moral character. *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954). The Supreme Court of the United States, however, is of the opinion that the applicant cannot be denied a license where he has established his good moral character by other evidence, notwithstanding the fact that he has refused to answer these inquiries. *Konigsberg v. State Bar of California*, *supra*.

Is a person who refuses to answer questions about his private affairs acting candidly and is he exhibiting fair play, a necessary ingredient of all lawyers? In the case of *In re Hyra*, 15 N.J. 252, 104 A.2d 609 (1954), the applicant was held to be under a duty to disclose his private life insofar as it might have a bearing on his good moral character. From these decisions, it is apparent that it is a close question when an applicant relies on his alleged rights and refuses to answer the bar examiners' inquiries.

In the *Schware* case, the petitioner freely admitted his past membership in the Communist Party, but denied that he is now a member or that he believed in the communist doctrines. The United States Supreme Court was of the opinion that, at the time of his membership, adherents of communism were not considered subversive, therefore, it could not be inferred that he had bad moral character. The Court implies a requirement of scienter before the applicant can be denied the privilege of practicing law. On the facts of the case, the result seems to be just.

The basis for denying present communist members a license to practice law is based on the premise that the communist philosophy advocates the overthrow of democracy and the Govern-

ment of the United States, and, therefore, they would not be able to take an oath to defend the Constitution. In a similar vein, conscientious objectors, *In re Summers*, 325 U.S. 561 (1945); and members of organizations such as the I.W.W., *In re Smith*, 133 Wash. 145, 233 Pac. 288 (1925); and the Christian Front, *Application of Cassidy*, 268 App. Div. 282, 51 N.Y.S.2d 202 (2d Dep't 1944), have been disbarred or denied admission to the bar because they could not conscientiously take the necessary oath. Our courts are a bulwark of free people. Hence, it is obvious why the officers of those courts, *i.e.*, lawyers, could not advocate the overthrow of that judicial system by illegal and unconstitutional methods. Even present communist members and members of the Communist Party's allied organizations who admit their membership are refused the license to practice law though they emphatically deny they advocate the overthrow of the Government of the United States by force and violence. *Martin v. Law Society*, [1950] 3 D.L.R. 173 (B.C.C.A.); *Application of Patterson*, 302 P.2d 227 (Ore. 1955).

There are some who would argue that there is no longer any need for protecting the bar from communists and communist lawyers, but so long as our judicial system is to administer justice, it is necessary that its officers believe in its continued existence. See Note, 20 U. CHI. L. REV. 480, 506 (1953).

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CONSTITUTIONAL LAW—LEGISLATIVE INVESTIGATIONS—PERTINENCE AND SCOPE OF INQUIRY—Petitioner, before a House of Representatives sub-committee, refused to state whether or not he knew certain named persons to have been members of the Communist Party, claiming that the questions asked were outside the proper authority of the committee. He was then cited for contempt of Congress and the matter was referred to the courts; at the trial he was found guilty, and conviction was affirmed. On certiorari, *held*, that the authorized scope of the committee and its stated objects were too uncertain to enable a witness to determine whether or not he could rightfully refuse to answer questions on the ground of pertinence. *Watkins v. United States*, 77 Sup. Ct. 1173 (1957).

In a companion case, the Court held that lacking indication of legislative desire for answers to the questions asked, a state attorney-general—investigating by legislative direction—had no authority