Opinion No. 77-21

June 30, 1977

OPINION OF: Toney Anaya, Attorney General

TO: Wayne C. Wolf, President, State Bar of New Mexico, Post Office Box 25883, Albuquerque, New Mexico 87125

SEPARATION OF POWERS-REGULATION OF THE PRACTICE OF LAW-PRACTICE OF LAW-LEGAL PROFESSION-STATE BAR ASSOCIATION-FEES-INTEGREGRATED BAR ASSOCIATION-SUPREME COURT-REGULATION OF STATE BAR.-The Supreme Court has exclusive authority to regulate the practice of law and to supervise the disposition of fees imposed upon members of the State Bar by judicial rule.

QUESTIONS

May the Department of Finance and Administration, pursuant to Chapter 50, New Mexico Laws 1977, constitutionally exercise supervision over funds derived from fees imposed upon members of the State Bar of New Mexico by the Rules of the New Mexico Supreme Court?

CONCLUSIONS

No.

ANALYSIS

The General Appropriation Act of 1977, being Chapter 50, New Mexico Laws 1977, directs that the funds of the Board of Bar Commissioners, the Board of Bar Examiners, the Disciplinary Board and the Specialization Board of the State Bar of New Mexico.

. . . shall be deposited in the state treasury and shall be expended only pursuant to budgets approved by the department of finance and administration.

OPINION

Chapter 50, New Mexico Laws 1977, specifies, in addition, that an "administrative overhead" fee of 10% of the revenues received by the Board of Bar Commissioners and the Board of Bar Examiners shall be paid into the general fund of the State of New Mexico.

The funds of the Board of Bar Commissioners, the Board of Bar Examiners, the Disciplinary Board and the Specialization Board are derived from fees collected from members of the State Bar of New Mexico and from applicants for admission to the State

Bar pursuant to various Rules adopted by the Supreme Court as part of a system of regulation of the practice of law in the State of New Mexico. These Rules of the Supreme Court, or orders otherwise issued by the Court, direct that the fees collected by or on behalf of the respective Boards be retained by them for use in conducting their affairs and in discharging their respective responsibilities. See, for example, Rule 4 of the Rules Governing the New Mexico Bar, effective March 1, 1976.

*{*136}* This inquiry presents a question concerning the distribution of powers among the legislative, executive and judicial departments of state government pursuant to Article III, Section 1 of the New Mexico Constitution, which specifies:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted.

With certain exceptions not now pertinent, Article IV, Section 1 of the New Mexico Constitution vests the legislative power in the Senate and House of Representatives which are designated the Legislature of the State of New Mexico; Article V, Section 4 of the New Mexico Constitution vests in the Governor the supreme executive power; and Article VI, Section 1 of the New Mexico Constitution vests the judicial power in the Supreme Court and the several inferior courts therein specified.

Clearly, Article III, Section 1 of the Constitution requires that the three departments of state government must be kept separate and that each must function only within its particular sphere. No branch may usurp or impose upon the exercise of the functions of any other branch. See 16 C.J.S., Constitutional Law, § 104. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915).

While the New Mexico Constitution does not expressly designate which of the three departments of state government shall define and regulate the practice of law and the legal profession, it has been uniformly determined that the practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the authority to define and regulate the practice and the profession naturally and logically inheres in the judicial department of government. As the court explained in In Re Integration of Nebraska State Bar Association, 275 N.W. 265 (Feb. 1937):

The constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "it is a fundamental principle of constitutional law that each department of government, whether federal or state, has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." . . . The primary duty of

courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of *{*137}* law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our government. In Re Integration of Nebraska State Bar Association, 275 N.W. at 266.

The foundation for this conclusion was likewise articulated by the court in Petition of Florida State Bar Association, et al., 40 So.2d 902 (Fla. 1949), in the following terms:

Inherent power arises from the act of the court's creation or from the fact that it is a court. It is essential to its being and dignity and does not require an express grant to confer it. Under our form of government it is the right that each department of government has to execute the powers falling naturally within its orbit when not expressly placed or limited by the existence of a similar power in one of the other departments. . . . As we said in the case of In Re Integration of Nebraska State Bar Association, supra, the law practice is so intimately connected with the exercise of judicial power . . . that the right to define and regulate the practice naturally and logically belongs to the judicial department of government. Petition of Florida State Bar Association, et al., 40 So.2d at 905, 907.

In accordance with this rationale, the Supreme Court of New Mexico has reached the same conclusion with reference to the regulation of the practice of law in this State.

Unquestionably the regulation of the practice of law is the exclusive constitutional prerogative of this court. . . . Legislative attempts to confer any power over the control of the practice of law, including the power of suspension or disbarment, are violative of Article III, Section 1, Constitution of New Mexico. In the Matter of Patton, 86 N.M. 52, 54, 519 P.2d 288 (1974).

See also State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 514 P.2d 40 (1973); Application of Sedillo, 66 N.M. 267, 347 P.2d 162 (1959).

Indeed, it would appear that every jurisdiction in the United States has recognized that the judiciary, to the virtual exclusion of the legislative and executive departments of government, has the authority to regulate admission to the bar, membership in the bar, and the practice of law generally. In re Sullivan, 283 Ala. 514, 219 So.2d 346 (1969); Application of Houston, 378 P.2d 644 (Alas. 1963); McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973); In re Bailey, 30 Ariz. 407, 248 P. 29 (1926); Brydonjack v. State Bar of California, 208 Cal. 439, 281 P. 1018 (1929); In re Bar Association, 137 Colo. 357, 325 P.2d (1958); Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961); In re Member of Bar, 257 A.2d 382 (Del. 1969); Fuller v. Watts, 74 So.2d 676 (Fla. 1954); Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718 (1969); In re Integration of Bar of Hawaii, 50 Hawaii 107, 432 P.2d 867 (1967); Application of Kaufman, 69 Idaho 297,

206 P.2d 528 (1949); In re *{*138}* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954); State v. Moritz, 244 Ind. 156, 191 N.E.2d 21 (1963); Rowen v. LeMars Mut. Ins. Co. of Iowa, 230 N.W.2d 905 (Iowa 1975); State v. Schumacher, 214 Kan. 1, 519 P.2d 1116 (1974); Ky. Rev. Stat., Tit. 4, S. 30.030; Ex parte Steckler, 179 La. 410, 154 So. 41 (1934); Application of Feingold, 296 A.2d 492 (Maine 1972); Public Serv. Commission v. Hahn Transportation Inc., 253 Md. 571, 253 A.2d 845 (1969); Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949); Ayres v. Hadaway, 303 Mich. 589, 6 N.W.2d 905 (1942); Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973); Mississippi State Bar v. Collins, 214 Miss. 782, 59 So.2d 351 (1952); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1936); In re Unification of Montana Bar Ass'n, 107 Mont. 559, 87 P.2d 172 (1939); State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942); Petition of Batten, 83 Nev. 265, 428 P.2d 195 (1967); Harrington's Case, 100 N.H. 243, 123 A.2d 396 (1956); New Jersey State Bar Ass'n v. Northern N.J. Mtg. Ass'n, 32 N.J. 430, 161 A.2d 257 (1960); Application of Sedillo, 66 N.M. 267, 347 P.2d 162 (1959); N.Y. Const., Art. 3, Sec. 531 (1938); Gen. Stat. of N.C., Tit. 84, Sec. 84-23, Sec. 84-36 (1975); N.D. Stat., Tit. 27, Sec. 27-11-02 (1960); Judd v. City Trust & Savings Bank, 133 Ohio 81, 12 N.E.2d 288 (1938); Re Bledsoe, 186 Okla. 264, 97 P.2d 556 (1939); In re Crum, 103 Ore. 296, 204 P. 948 (1922); In re Olmsted, 292 Pa. 96, 140 A. 634 (1928); Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 190 A.2d (1937); Code of S.C., Tit. 56, Sec. 56-96 (1972); In re Hosford, 62 S.D. 374, 252 N.W. 843 (1934); Cantor v. Brading, 494 S.W.2d 139 (Tenn. 1973); Burns v. State, 76 S.W.2d 172 (Tex. Civ. App. 1934); Taft v. Taft, 32 Vt. 64, 71 A. 831 (1909); Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944); Code of Va., Tit. 54, Sec. 48 (1950); In re Bruen, 102 Wash. 472, 172 P. 1152 (1918); West Virginia State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959); In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932); Wyoming Stat., Tit. 33, Sec. 40 (1967).

The power which inheres in the New Mexico Supreme Court, as the highest authority within the judicial department of state government, to regulate the practice of law and the legal profession includes the right to require the integration of the bar and to compel the payment of fees for the support of the affairs of an integrated bar association. Application of Sedillo, supra; Annotation, 151 A.L.R. 617 (1944).

The justification for integrating the bar and compelling payment of fees . . . is rather that the court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members which serve in a measure the function of license fees, but which are not in a legal sense. In other words, the court by reason of its inherent or implied powers may, if it thinks the exigencies call for it, require the bar to act as a unit, to promote high standards of practice in the economical and speedy enforcement of legal rights, and to implement this may require [the members of] the bar to make such contributions in money to the joint effort as is deemed necessary and proper. In Re Integration of Bar, 249 Wis. 523, 25 N.W.2d 500, 502 (1946).

Similarly, in Petition of Florida State Bar Association, et al., supra, the court queried with reference to this matter:

*{*139}* Does the power to integrate the bar carry with it the power to impose a membership fee for support of bar integration activities?

If the fee could be construed as a tax, undoubtedly it should be imposed by the legislature under its police power. . . . A membership fee in the bar association is an exaction for regulation only, while the purpose of a tax is revenue. . . . [T]he cases recognize the rule that the power to regulate may carry with it the imposition of a charge for that purpose. If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a . . . fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expenses. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction. Petition of Florida State Bar Association, et al., 40 So.2d at 906.

As these cases suggest, the various fees which the Supreme Court may compel from members of the bar, pursuant to its inherent authority to regulate the practice of law and to integrate the bar as a means of governing the legal profession, are not considered taxes, in the usual sense, on the privilege of practicing law; rather they are considered charges imposed by the Court as an integral part of and as a means to effectuate the particular system of regulation of the profession which the Court has thus ordained. There is no suggestion in these authorities that the judiciary has the power to impose such fees in the absence of a scheme of regulation of the practice of law. Indeed, it would appear that, just as there cannot be, as a practical matter, an effectual system of regulation in the absence of the assessment of fees to sustain it, there can be no such assessment except in connection with a regulatory system which it is intended to support. The court in In Re Integration of Bar, supra, expressed this idea in the following fashion:

No matter what these funds be called, they are moneys required to be paid into the treasury of the bar for a public purpose connected with the administration of justice. In Re Integration of Bar, supra, 25 N.W.2d at 502.

Accordingly, in view of the nature and singular purpose of the fees imposed by judicial rule as part of a system of regulation of the practice of law, it has been held that control of these funds is likewise vested solely in the judiciary. This proposition was advanced by the court in Laughlin v. Clephane, et al., 77 F. Supp. 103 (D.D.C. 1947), in the following terms:

The court, in the exercise of . . . an inherent power, rightfully accumulated a fund in order that it might make effective the rules that it had promulgated. This fund did not belong to the United States but belonged to the court and was to be administered in a manner outlined by the court. . . . The fund thus created was available for the purpose for which it was created and was not a tax nor was it intended as a tax. Laughlin v. Clephane, et al., 77 F. Supp. at 106.

*{*140}* The proposition expressed in the Laughlin case finds further support in cases which have declared unconstitutional certain legislative efforts to impose various

controls with respect to the custody, disposition, expenditure of and accountability for fees imposed upon members of the bar by court rule in the exercise of judicial authority over the practice of law. For example, in Graham, et al. v. State Bar of Washington, 86 Wash.2d 624, 548 P.2d 310 (1976), the question was whether the Washington State Bar Association was subject to certain statutes requiring an audit of state agency accounts. The Washington Supreme Court reiterated its previous conclusion that the regulation of the practice of law is within the inherent power of the court, and noted that the ultimate constitutional power clearly lies within the sole jurisdiction of the court. In its decision the court held that the bar association is not a state agency or state department within the meaning of the applicable statutes and that the doctrine of separation of powers forbids the exercise by the state legislature of the power to audit funds derived from fees imposed upon members of the bar by court rule in the exercise of its jurisdiction over the practice of law. In the course of its opinion, the court stated:

We have earlier made clear that the regulation of the practice of law in this state is within the inherent power of this court. This is the holding of the vast majority of courts in this country that have considered this issue. See, e.g., Application of Kaufman, 69 Idaho 297, 302-03, 206 P.2d 528 (1949); In re Patton, 86 N.M. 52, 54, 519 P.2d 288 (1974); Public Serv. Comm'n v. Hahn Transp., Inc., 253 Md. 571, 253 A.2d 845 (1969).

In State ex rel. Schwab v. State Bar Ass'n, 80 Wash.2d 266, 269, 493 P.2d 1237 (1972), we stated that "this court does not share the power of discipline, disbarment, suspension or reinstatement with either the legislature or the state bar association. The ultimate constitutional power clearly lies within the sole jurisdiction of the Supreme Court" and further that "membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court." We also there established that in spite of the language of the State Bar Act, the association was not an "agency of government" so as to be one of the "state executive offices" required by State ex rel. Lemon v. Langlie, 45 Wash.2d 82, 273 P.2d 464 (1954) to move their principal place of business to the seat of government. The bar association, we recognized, is an association that is sui generis, many of whose important functions are directly related to and in aid of the judicial branch of government. State ex rel. Schwab v. State Bar Ass'n, supra, at 272. (Emphasis by the Court.)

The court concluded:

We believe the legislature did not intend to extend its audit functions to the Washington State Bar Association and that the auditor has mistaken his legislative mandate. In light of the principles set forth above, however, even if it was the intent of the legislature to so extend its powers, such an attempt is an unwarranted and unconstitutional interference with the power of this separate branch of government to make necessary *{*141}* rules and regulations governing the conduct of the bar. (Emphasis added.)

Similarly, in Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973), the Minnesota legislature passed a statute which proposed to divert into the general fund of the state certain registration fees pertaining to the practice of law which had been specified by

court rule, and left to legislative discretion the matter of an appropriation to the Supreme Court for the purpose of regulating the practice of law. The court determined that this enactment constituted regulation of the practice of law and was thus an unconstitutionally impermissible assumption of judicial power by the legislature. In reaching its conclusion, the court referred to the cases which ". . . recognize the authority of the judicial branch to provide by rule for the raising of funds from the members of the legal profession and the expenditure of such funds for regulating the profession without legislative authorization or participation," Sharood v. Hatfield, supra, 210 N.W.2d at 281, and it stressed the proposition that the separation of powers doctrine ". . . not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction. . . ." Sharood v. Hatfield, supra, 210 N.W.2d at 279. The court summarized its decision by observing:

. . . [T]he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the Supreme Court, free from the dangers of encroachment either by the legislative or executive branches. . . . Sharood v. Hatfield, supra, 210 N.W.2d at 280.

The policy and purpose to be served by preserving in the judiciary the exclusive supervision of funds derived from the fees imposed upon members of the legal profession by court rule would seem to be well summarized in In Re Integration of the Bar, 5 Wis.2d 618, 93 N.W.2d 601 (1968), in which it is observed:

We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the bar become an important part of that process and this relationship is characterized by the statement that members of the bar are officers of the court. An independent, active and intelligent bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law. . . .

. . . The integrated state bar of Wisconsin is independent and free to conduct its activities within the framework of such rules and bylaws. Within their confines the court expects the bar to act freely and independently on all matters which promote the purposes for which the *{*142}* bar was integrated subject to the general supervisory power of the court. These rules and bylaws constitute a democratic process by which members of the bar can govern themselves and can act in unison and by which minorities are protected; and they provide appropriate procedures for invoking the supervisory power of this court. In re Integration of the Bar, supra, 93 N.W.2d at 603, 605.

Accordingly, in view of the authorities which we have reviewed, it would appear that the directives in Chapter 50, New Mexico Laws 1977, pertaining to the funds of the Board of Bar Commissioners, Board of Bar Examiners, the Disciplinary Board and the Specialization Board, constitute a constitutionally impermissible imposition upon the power of the judiciary to exercise its inherent authority to provide a comprehensive system of regulation of the legal profession and the practice of law in the State of New Mexico.

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