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The Missouri Rule as to Regulation of the Bar

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It is now generally conceded that law is a profession peculiarly impressed with a public interest. The lawyer owes a primary duty to the court and to the public as well as to his clients. His profession is not a private business as such is generally understood. An essential difference between a profession and a business is that a member of a profession is required to place and serve the interests of another above every personal or selfish interest. The authority to practice law is not a right that may be demanded regardless of qualifications. Neither is it a privilege to be arbitrarily conferred. Lawyers are commissioned by the state to render a particular service because of special qualifications they are deemed to possess. Tests of character and learning as conditions of admission to the bar are designed to insure as far as is humanly possible that these essential qualifications shall be possessed by every applicant who is admitted. Hence, the necessity for strict enforcement of reasonable requirements for admission to the bar, not primarily for the protection of those who have already obtained the right to practice but for the protection of the public standing in need of such service.

The public interest extends further, even to protection against unauthorized practice of law. Bar standards, rules of court, loss of license mean nothing and constitute no deterrent to persons engaged in such practice, because they are not operating under the privilege of a license. It is, therefore, important that the public be rather definitely advised as to the character of service a lawyer is licensed to perform, not only in order that persons may not wittingly or unwittingly undertake to exercise a franchise they do not possess, but mainly to the end that all in need of such service may have it from one lawfully qualified and amenable to the statutory, judicial and professional requirements, standards and safe-guards surrounding its rendition. The public welfare is never safe in the hands of usurpers.

That courts have judicial powers which now lie unused or undeveloped is suggested by the fact that for the first half of our national history the judicial branch of government carried full responsibility for the administration of justice. The bench and bar were not then so constituted as to be responsive to needed reforms, and legislatures sometimes acted in matters strictly judicial because there was no other organ for the expression of the popular will. If it so

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happens that now the attitude is reversed and legislatures are generally unresponsive to reform needs it is but natural that people should turn to the courts. In this situation it will scarcely be said that a constitutional court of competent jurisdiction should omit or stay performance of any of its judicial functions because of prior legislative encroachment or until the passage of a legislative act "conferring" any judicial power that it possessed. By the mere encroachment of one or the neglect of another neither branch of government can gain or lose power in contravention of the constitutional separation of powers. Assuming the existence of such a constitutional provision, powers belonging to one branch cannot be legislatively conferred upon another. The solution lies in a proper determination of the limits of legislative and judicial power. However lightly some may regard the constitutional separation and distribution of governmental powers, it is still the pattern of our fundamental law. Whenever a better form of government for our people is devised we will doubtless adopt it, but until such is lawfully done it is neither honest nor safe to scramble or destroy the pattern.

One of the most solemn provisions of Missouri's state constitution is that vesting the judicial power in certain courts,¹ and our Supreme Court has long been committed to the doctrine of inherent or implied powers. Another constitutional provision is that giving the Supreme Court "a general superintending control over all inferior courts."² Probably with these two provisions and the doctrine of inherent or implied powers in mind, the executive committee of the Missouri Bar Association more than two years ago requested the Supreme Court "to appoint a commission of at least seven members with power to investigate the means of regulating professional matters and that said commission report to the court, within such time as the court may direct, its findings and recommendation with respect to the regulation of the practice of law in this state."

This request was not deemed unreasonable or without precedent in the history of bench and bar, and an outstanding commission consisting of eleven members of the bar was appointed and instructed to "make a thorough investigation and study of the subject of regulation of the practice of law particularly with a view of ascertaining its most practical and effective scope of administration in this state, and make report thereof to this court." After some months of investigation and study its report was prepared and filed. Upon careful consideration the court adopted and promulgated the rules recommended therein as rules of the court to become effective November first of 1934. They are now numbered 35 to 39, both inclusive, in the printed rules of that court.

1. MO. CONST. art. VI, § 1.
2. *Id.*, § 3.

These rules, together with statutes lending added sanction and legislative force, now present a fairly comprehensive scheme for regulating, improving and advancing the bar in its true relation to the administration of justice. The problem of admission to the bar is frankly and fairly met in the light of existing conditions. The canons of ethics of the American Bar Association, as therein set forth in rule No. 35 of the Court's rules, are declared to be "the measure of the conduct and responsibility of members of the bar," although nothing therein contained "shall be construed as a limitation upon the power of the courts to reprimand and discipline any member of the bar for conduct which, in the opinion of the Court, is fraudulent, unlawful or unethical." Provision is made for complaints against members of the bar and proceedings thereon, for the suppression of the unlawful practice of the law, and for the payment of an annual enrollment fee of Three Dollars by each person having a license to practice law in this state for the purpose of making these rules effective. Finally, a means of future advancement is provided in rule No. 39 in the creation of a Judicial Council "to make a continuous study of the organization and rules of practice and procedure of the judicial system and its various parts; to survey the condition of the business of the civil courts with a view to simplifying and improving the administration of justice; to receive and consider suggestions concerning remedial rules governing legal procedure; to recommend methods of expediting the transaction of judicial business and eliminating unnecessary delays therein; to study and make recommendations for the improvement and advancement of the practice of the law; and to submit to the courts such changes in the rules and methods of procedure as it may deem beneficial, and to the General Assembly such legislation as it may deem necessary for making the administration of justice more effective."

It will be observed that these rules are definitely directed to objectives that have long received legislative recognition in statutes relating to the admission and disbarment of attorneys, defining practice of the law and law business, and enjoining upon courts the duty to report to the President of the Senate or the Speaker of the House at every regular session of the General Assembly "all such omissions, uncertainties and incongruities in the statutory laws of this state as may come to their attention and be remediable by legislation."³ Even the annual enrollment fee provided for the purpose of making these rules effective finds analogy, and in principle legislative sanction, in the statute providing payment of a fee when applying for admission to the bar.

In suggesting rules in aid of administering the court's disciplinary powers the commission doubtless had in mind the weight of judicial decision as to the extent of such powers, so admirably stated by Chief Judge Cardozo on behalf

3. MO. REV. STAT. (1919) § 2370; *id.* (1929) § 1875.

of the highest court of the state of New York in *People ex rel. Karlin v. Culkin*⁴. The opinion, which concludes with an affirmance of the orders of the lower court, thus concisely states the case:

"A petition of three leading bar associations, presented to the Appellate Division for the first judicial department in January, 1928, gave notice to the court that evil practices were rife among members of the bar. 'Ambulance chasing' was spreading to a demoralizing extent. As a consequence, the poor were oppressed and the ignorant overreached. Retainers, often on extravagant terms, were solicited and paid for. Calendars became congested through litigations maintained without probable cause as weapons of extortion. Wrongdoing by lawyers for claimants was accompanied by other wrongdoing, almost as pernicious, by lawyers for defendants. The helpless and the ignorant were made to throw their rights away as the result of inadequate settlements or fraudulent releases. No doubt, the vast majority of actions were legitimate, the vast majority of lawyers honest. The bar as a whole felt the sting of the discredit thus put upon its membership by an unscrupulous minority.

"It spoke its mind through its associations, the organs of its common will. The court was asked to inquire into the practices charged in the petition, and any other illegal and improper practices, either through an investigation to be conducted by itself or through some other appropriate procedure. It was asked upon the conclusion of the investigation to deal with the offenders in accordance with the law, and to grant such other remedies as would avoid a recurrence of the evil and maintain the honor of the bar.

"The court responded promptly. It held (speaking by its presiding justice) that its disciplinary power is not limited to 'cases where specific charges are made against a named attorney'. It will act of its own motion whenever it has reasonable cause to believe that there has been professional misconduct either by one or by a class. Information may be adequate to define the offense and identify the offender. If so, charges will be preferred, and the offender brought to trial. On the other hand, information may be so indefinite as to make charges impossible or improper without further inquisition. If so, the power of inquisition, it was held, is commensurate with the need."

In the *Culkin* case the order of the Appellate Division designated a Justice of the Supreme Court to conduct the investigation at an appointed term with full authority "to summon witnesses and to compel the giving of testimony

4. 248 N. Y. 465, 477; 162 N. E. 487 (1928).

and the production of books, papers and documentary evidence." The petitioning associations were authorized to furnish counsel in aid of the inquiry, and the investigation was to extend into the practice described in the petition and any other practices obstructive or harmful to the administration of justice. The court conducting the inquiry was to report the proceedings to the court making the order, with its opinion thereon, and upon the coming in of the report there was to be such other and further action as should seem just and proper.

The rules submitted by our commission as "a workable plan of properly presenting to the courts those cases where lawyers are charged with misconduct" provide for a bar committee appointed by the Supreme Court in each judicial circuit to investigate such complaints and when the facts warrant to initiate and prosecute disbarment proceedings in the proper courts. It is the common experience of grievance committees that a large majority of the complaints lodged are without substantial merit. Hence, for the protection of those who may be unjustly accused, our rule No. 36 provides that the complaint and investigation thereon shall not be made public unless the accused shall so request, or the committee shall file information thereon. It is conceivable that even in the exercise of the utmost care mistakes will be made in choosing the personnel of these bar committees. Therefore, it is provided in rule No. 37 that any appointment made thereunder "may be revoked at will," and that these rules shall not "be construed as any limitation upon the rights of any individual to seek any remedy afforded by law, nor as an exclusive mode of regulating the practice of law." An amendment has already been adopted empowering the General Chairman of the bar committees to appoint an advisory committee and independently conduct hearings and prefer charges in any circuit in the state.

This general recognition of judicial control is not without reason and authority. In the early history of our profession beyond the seas we read that originally no one could appear by attorney without special warrant of the King. So there were lawyers even in those days and they were in a manner regulated by the Crown. But in 1292 Edward the First ordered the Lord Chief Justice of the Court of Common Pleas and his fellow-justices to provide, *according to their discretion*, from every county certain attorneys and apprentices, of the best and most apt for their learning and skill, who might do service to his court and people.⁵ The statutes subsequently enacted always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion. The first of these acts was adopted under Henry the Fourth in 1402.⁶ Among other things it expressly

5. Cravath, *Gray's Inn* (1924) 10 A. B. A. J. 19; Lee, *The Ancestral Home of the Common Law*, *id.* at 163.

6. 4 HENRY IV, c. 18 (1402).

provided that "all attorneys shall be examined by the justices and by their discretion their names put upon the rolls; . . . and the other attorneys shall be put out by the discretion of the said justices." Thus, the admission and disbarment of attorneys became judicial functions, and the attorneys themselves "officers of the court." Originally derived from the King's order or grant these powers were thereafter exclusively attributed to courts as necessary incidents to performance of the functions for which courts are created, namely, the administration of justice.

This ancient conception of the relationship between lawyers and courts came over to us in the latter part of the eighteenth century. When our state constitutions were framed there was no sovereign but the people and the fundamental law of some states expressly vested in certain courts the power to admit and the power to disbar attorneys, while that of others merely vested the judicial power in certain courts. As our fathers' conception of the judicial power was that of their English forebears, it is quite natural that the doctrine of inherent or implied powers at once attributed these unexpressed powers to the courts so created, except as limited or otherwise defined in the constitutions of the several states. As Chief Judge Cardozo said in *People ex rel. Karlin v. Culkin*, to which reference has already been made, a constitutional provision that attorneys might be regulated by rules and orders of the court is "declaratory of the jurisdiction that would have been implied if not expressed." Such is the view generally entertained in this and other jurisdictions. Mr. Henry M. Dowling, of the Indiana bar, in an article entitled *The Inherent Power of the Judiciary*, published in the October, 1935, number of the American Bar Association Journal,⁷ presents an excellent study of the authorities on this subject. This power in no sense conflicts with the conceded authority of the legislature to enact regulations under the police power to protect the public from harm.

So our new rules, considered as a whole, are not a radical experiment or even a departure from the experience, leaning and traditions of our bar. Formulated and recommended by representative lawyers after careful investigation, study and mature deliberation they spring from our own midst. They are the outgrowth of planning by plain, practical men to surmount increasing difficulties that must be met and conquered if the bar is to live. Their adoption has quickened public interest and the bar has given them a propitious reception.

The great danger is that too much or too little may be expected of these rules through a lack of sympathetic understanding of their true objectives. Whatever benefits the future may hold for an integrated bar, and I believe they are many, it should be clearly understood that such rules of court do not

7. (1935) 21 A. B. A. J. 635.

constitute bar integration by judicial order as that term is generally understood. We hope that a more perfect union of the entire bar may be an incident, but it is not their primary object. Nothing could be more harmful than a widespread notion that the Supreme Court is taking over the manifold responsibilities and activities of bar associations. Our judges have no such purpose in mind. They crave and have a right to expect the interest and active support of the bar in this effort to promote the administration of justice, but the bar must still act and speak through its associations, "the organs of its common will," and they must continue to function even more aggressively and efficiently than in the past.

Indeed, the object of our State Bar Association, which must be credited with initiating these rules, is thus stated in the first article of its constitution: "to advance the science of jurisprudence, promote the administration of justice, uphold the honor of the profession of the law, encourage cordial intercourse among the members of the Missouri Bar, encourage the formation of local bar associations throughout the state, articulate such local associations with this Association, and encourage the articulation of state bar associations with the national or American Bar Association." Moreover, it is a proper objective of a bar association to provide through meetings, periodicals, conferences and in other ways for prompt interchange of ideas among members of the legal profession, and to establish and maintain service centers as well to promote efficiency and dispatch in the rendition of professional service. Time would fail us to particularize the associational activities of the past. Do we now propose to dump them into the lap of the Supreme Court? Certainly not. The future of every bar association will be substantially the same as in the past. The call is for greater zeal and devotion to the end that lawyers and judges may stand shoulder to shoulder in better performance of their appointed tasks.

If these rules are administered by an indifferent bench or regarded by an indifferent bar they are bound to fail. The bar must see to it that they fall upon no such unhappy event. Repeated failure of meritorious efforts to inspire and maintain public confidence in bench and bar will bring just condemnation upon our profession and finally drive us from our ministrations in the halls of justice.

But "the proof of the pudding is in the eating", and you may well ask: "What are the results to date"? In this connection I am reminded of these words by Mr. Elihu Root spoken before the American Bar Association Conference of Bar Association Delegates in 1916: ". . . you can draw up 10,000 different and beautiful schemes on paper, but they are of no value at all unless men, living men, are going to do things under them, do the things that are contemplated in the scheme."⁸

8. (1916) 41 REPS. OF AM. BAR ASS'N, 593.

Fortunately, our Supreme Court selected just such men to serve as General Chairman, members of the Circuit Bar Committees, and members of the Judicial Council—one hundred sixty-four in all. There was an abundance of splendid material from which to choose. Some that have proved most efficient in point of service had not previously been identified with organized bar association work, but they had the welfare of the profession and the public at heart and the practical idealism of the plan has impelled them to freely give a willing, efficient and faithful service that money could not buy. With an annual enrollment fee of Three Dollars from more than 5,500 lawyers they are conducting an effective disciplinary campaign and have already made remarkable strides in suppressing the unlawful practice of the law, and the Judicial Council is engaged in studies looking to far reaching procedural reform.

At first there was some fear that the new rules would over-shadow the activities of voluntary bar associations which had long functioned so well, but the opposite effect is now in evidence. Lawyers of the state are becoming organization-conscious, and within the past year an additional bar association has been formed both in St. Louis and Kansas City. There has been a general awakening of interest in promoting the welfare of the bar in its proper relation to the public, and in all likelihood it will be sustained. The associations are active and responsive to the broad movement toward coordination of state, local and national bar associations.

On the whole, our experience to date under the new rules promulgated by the Supreme Court to promote the welfare of the bar has been satisfactory. Such rules are more flexible than statutes enacted for the same purpose. True, they can reach no higher than the practical standards of the bench and bar, but with the responsibility thus fixed their administration can be made fairly responsive to the professional and public needs.