

### III. STATE SUPREME COURT REGULATORY AUTHORITY OVER THE LEGAL PROFESSION

*Geoffrey C. Hazard, Jr.\**

The primary regulatory authority of the states over the legal profession is historically grounded and institutionally secure. There have been and will continue to be conflicts with the federal government over certain aspects of that regulatory authority. This is an inevitable aspect of our federal system. After all, inasmuch as there are conflicts between state and federal authority in the regulation of business, the environment, welfare and education, to say nothing of tax policy, how could we expect there would not be parallel conflicts concerning regulation of the legal profession?

The constitutional foundation of state authority over the legal profession is a simple result of our nation's history. The states pre-existed the union formed by the Constitution in 1787. The states all had courts and they all had legal professions, even if the bar at that early time was embryonic compared with its modern configuration. The early federal government had problems enough establishing its authority in foreign affairs and policy toward the western territories and in the relationship between the federal judiciary and the state court systems. Regulation of the legal profession, such as it was, remained with the states as a matter of tradition and by default. It remains there.

The states regulated the profession very loosely until well into the twentieth century. Discipline was handled by rather casually organized grievance committees, using procedures whose informality is shocking according to modern standards.<sup>1</sup> The courts were actively involved only in lawyer appeals from disciplinary dispositions and in occasional judicial pronouncements on such issues as the duties of loyalty and confidentiality.<sup>2</sup> The legal profession itself had no generally accepted standards of conduct until 1908 with the adoption by the American Bar Association Canons of Professional Ethics. Even then,

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\* Trustee Professor of Law, University of Pennsylvania; Director, American Law Institute. B.A. Swarthmore College 1953; LL.B. Columbia Law School 1954.

1 See Geoffrey C. Hazard, Jr. & Cameron Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060 (1987).

2 Legal treatises on the law governing lawyers began appearing around the turn of the century. See, e.g., EDWARD M. THORNTON, *A TREATISE ON ATTORNEYS AT LAW* (1914).

the Canons were admonitory and had very ambiguous status as authoritative pronouncements.<sup>3</sup>

The regulation of the legal profession by anything like a systematic body of law was forthcoming only after 1970. That year saw the promulgation by the ABA of the *Model Code of Professional Responsibility* (*Code*). The *Code* as such had no binding legal effect. Rather, it was adoption of the *Code* by the highest courts of the states that gave the *Code* legal effect. The same was true of the ABA's *Model Rules of Professional Conduct*, a revision of the *Code* promulgated by the ABA in 1983 and similarly adopted, although only in part in several states.<sup>4</sup> It was also in 1970 that systematic efforts were undertaken to strengthen the disciplinary machinery, under the impetus of the "Clark Report."<sup>5</sup>

In short, systematic regulation of the legal profession by the states is a phenomenon of the last two or three decades.

In the meantime the federal government made various intrusions. Some of these quite modest intrusions were undertaken by administrative agencies, for example, the Treasury Department and the Securities and Exchange Commission requirements that lawyers practicing before those agencies establish registration with them. Much more intrusive were decisions by the Supreme Court imposing limitations on state regulation under the aegis of the Due Process, Equal Protection and Privileges and Immunities Clauses and the First Amendment.<sup>6</sup> The liberation of lawyer advertising, for example, is a consequence of Supreme Court decisions and so is the atrophy of residence requirements for practice of law. More recently, a potentially much more penetrating intrusion has been made under color of the Americans with Disabilities Act, as demonstrated in another paper in this symposium.

Still more recently has been the controversy with the Department of Justice about Rule 4.2, the "anti-contact" provision in the *Model Rules of Professional Conduct*. That controversy became heated virtually at its outset by reason of the ill-considered "Thornburg Memorandum," in which the Department foolishly (and in my view erroneously) asserted the lawyers employed by the federal government were

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3 See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 55 (1986).

4 *Id.* at 56-63.

5 ABA Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations* (1970), conventionally referred to as the Clark Report after the chair of the Committee, retired Supreme Court Justice Tom C. Clark.

6 See Robert J. Martineau, *The Supreme Court and State Regulation of the Legal Profession*, 8 HASTINGS CONST. L.Q. 199 (1981); Paul G. Gill, *Invalidation of Residency Requirements for Admission to the Bar*, 23 U. RICH. L. REV. 231 (1989); see also *Barnard v. Thorstenn*, 489 U.S. 546 (1989).

wholly exempt from the governance of state ethical codes.<sup>7</sup> Fortunately, more sober counsel has prevailed. Negotiations, so far apparently productive, have been conducted that can lead to a satisfactory resolution of that controversy.

A less visible but more persistent challenge to the authority of state supreme courts in regulation of the bar comes from the bar itself. Put simply, there are and continue to be problems in conduct of lawyers where the outlook and orientation of the bar is different from that of the courts. These differences are reflected in provisions enacted into or proposed for the ethical codes.

The *Code* and the *Model Rules of Professional Conduct* were adopted and have the force of law by action of the highest courts of the states. However, the texts of these rules were formulated by a process under the direction of lawyers, with only marginal and incidental participation by judges. In my opinion the resulting formulations have been generally responsible and expressive of proper concern for the general public interest. (My viewpoint is no doubt affected by the fact that I was a participant in the rule-drafting endeavors.) Nevertheless, there are and continue to be problems in the conduct of lawyers where the position that the bar is willing to take is, in my opinion, different from that which the courts ought to take.<sup>8</sup>

I mention only three of these. One is the problem of candor to the court, specifically where a litigation lawyer encounters the fact that his client has committed perjury. Here, the courts hold that a lawyer has a duty to correct the resulting misapprehension, even though that requires blowing the whistle on the client.<sup>9</sup> Understandably, the lawyers shrink from such a duty. A second is the problem of refraining from assisting a client in fraud, specifically where a transaction lawyer discovers that the transaction the lawyer is documenting is tainted with fraud. Here, the law in effect requires the lawyer to blow the whistle on the client (the phrase in this context is “make a noisy withdrawal”), on pain of exposure to liability as an accomplice in the fraud. Here too, and also understandably, the lawyers shrink from the obligation to turn on their clients.<sup>10</sup>

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7 See Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992).

8 See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

9 See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986); *Committee on Professional Ethics and Conduct v. Crary*, 245 N.W.2d 298 (Iowa 1976).

10 See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993).

Another area concerns obtaining information from a criminal defense lawyer about the client. Here the bar wants to hold that a lawyer should never have to provide any information that would tend to incriminate the client. A subsidiary proposition is that prosecutors should not be permitted to interrogate a criminal defense lawyer, or subpoena the lawyer's records, except in limited circumstances and then only with prior judicial approval. Some courts have been amenable to the bar's position on these issues, in my opinion being inadequately attentive to the competing needs of law enforcement.<sup>11</sup> In any event, the matter is one on which there is disagreement between many segments of the bar and many courts.

It would appear that the primacy of the states in regulation of the bar is not in serious jeopardy as against the federal government. I certainly hope so. I also hope, however, that the state courts are attentive to efforts by their own bar associations to promote the bar's conception of the lawyer's proper role in relation to client conduct, in displacement of what many of us think is a better conception of that role.

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11 See, e.g., *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).