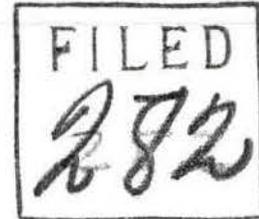


SOCIAL SECURITY: The Missouri Bar is an instrumentality
MISSOURI BAR: of the state as defined in Section
STATE EMPLOYEE: 105.300 (7) RSMo. It is a juristic
INSTRUMENTALITY: entity, legally separate and distinct
STATE INSTRUMENTALITY: from the state, whose employees are
JURISTIC ENTITY: not state employees.

Opinion No. 282

September 28, 1964



Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested the official opinion of this office on the following question:

"Is the Missouri Bar Integrated an instrumentality within the meaning of the social security law."

Sections 105.300 to 105.440, inclusive, RSMo, herein sometimes called the Act, were enacted in 1951 for the purpose of extending Social Security benefits to state employees and, under the conditions prescribed by the Act, to employees of political subdivisions and instrumentalities both of the state and of its political subdivisions. Section 105.300 defines various terms used in the Act. Paragraph 7 contains the following definition of instrumentality:

"'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

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The Missouri Bar was created by a rule of the Missouri Supreme Court. Rule 7 entitled "Establishing and Providing for the Government of the Missouri Bar" contains a number of detailed provisions relating to the creation and organization of the Bar. The Missouri Bar, so established by the Court, is integrated, so that all lawyers enrolled to practice in this state are automatically and by compulsion members of the Bar. Under Rule 6.01, with certain exceptions not here relevant, each person licensed to practice in Missouri is required to pay an annual enrollment fee, the major portion of which is paid to the Missouri Bar.

Integrated bars have been established in many states. In some, such Bars have been created by legislative enactment while, in others, the highest court of the state acted either independently of the legislature or at its request. However, we believe it immaterial whether the integration of the Bar is by statute or by the court acting independently thereof. In either case, the essential nature and purpose of the integrated Bar is the same.

Although an order or rule creating a state Bar is legislative in character (See Lathrop v. Donahue, 367 US 820, 1.c. 824), the courts have held, and we think properly so, that integration is nevertheless a judicial function and is exercised by the courts pursuant to their inherent power to regulate the bar of the state. Re Nebraska State Bar Association, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151. Although not all state bars have the same powers in all respects, they do have the common purpose and function of furthering the state's legitimate interest in improving the quality of professional services available to the people of the state. If the courts were not held to have such inherent power to integrate the bar as a means, inter alia, of regulating and elevating the standards of the legal profession, the result would be to deprive the court of an effective means of exercising its authority over the bar. It follows then that the integration of a state bar relates to matters which are peculiarly within the authority of the judiciary.

In Board of Commissioners of Mississippi State Bar v. Collins, 59 So. 2d 351, the Mississippi Supreme Court ruled the nature of the state bar in Mississippi as follows (59 So. 2d, 1.c. 355):

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"In view of its membership, its functions and the purposes of its creation, the State Bar, created by the act, possesses none of the attributes of a private corporation. And the State Bar act is in no sense a local or private act. It is general in its application and applies to all lawyers in the state who are actively engaged in the practice of law. The State Bar is in reality an agency of the state created in the exercise of the police power of the state for the purpose of regulating more effectively the practice of law and for the purpose of encouraging the study of improved methods of procedure and practice in the courts." [Emphasis added.]

Although in Mississippi the state bar was integrated by act of the legislature, this fact has no bearing upon the ultimate nature of the bar nor does it serve to distinguish the Missouri Bar from the Mississippi Bar. Once it is conceded, as we hold and the courts generally have held, that the courts have the inherent power to establish a state bar, it follows that the nature of the bar so established is no different from the nature of bars created by act of the legislature.

In an annotation in 114 A.L.R. 151, it is stated:

"While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

The specific question relating to the status of a state bar was posed in State Bar of Michigan v. City of Lansing, 361 Mich. 185, 105 NW2d 131, as follows, l.c. 135:

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"This appeal involves the question as to the status of plaintiff: Is it, as defendants seem to contend, actually a private organization made up of the members of the bar? Or is it, on the contrary, a governmental agency created for a specific purpose logically falling within the scope of the judiciary?"

In answering this question, the court concluded that the bar was a governmental agency created to assist in the performance of functions that pertain to the judiciary.

It follows from the foregoing that the Missouri Bar is not a mere voluntary private association of lawyers. Unless the integrated Bar were in fact public in nature and purpose, neither the legislature nor the court could validly create such an agency. In Lathrop v. Donahue, 367 US 820, above cited, the Supreme Court of the United States clearly held that the creation of a state bar was the exercise of a governmental function.

There is no all-inclusive definition of the term "instrumentality". See Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Company, 215 N.C. 491, 2 S.E.2d 592. In Falls City Brewing Company v. Reeves, 40 F. Supp. 35, 1.c. 39, in holding that a military post exchange was a governmental instrumentality and therefore tax exempt, the court stated:

"'Instrumentality' is defined by Webster as 'condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris, page 947, as 'anything used as a means of an agency; that which is instrumental; the quality or condition of being instrumental.'"

Pointing out that post exchanges are not purely voluntary organizations, the court held that they are set up, organized and operated pursuant to military authority. So, too, the Missouri Bar, having been set up, organized and operated pursuant to court authority for the more effective exercise of the judicial authority over the

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legal profession, the Bar is therefore an agency or instrumentality of the state, having those powers, purposes and functions which have been delegated and conferred upon it by the Supreme Court.

Your question involves the construction and application of Section 105.300 (7), defining the term "instrumentality" as used in the statute of which it is a part. Not all instrumentalities may be covered as such under the Act, not even all instrumentalities of a court. There can be no question but that the court may appoint a referee or a special commissioner to aid or assist the court in the performance of its judicial functions, and that such referee or commissioner is in fact a judicial instrumentality in the broad sense of the term. However, (as our discussion will make clear) such an instrumentality would not be within the definition contained in paragraph 7 of Section 105.300.

We note that Section 105.350, RSMo, authorizes an instrumentality of the state to submit a plan for approval by the state agency for extending Social Security benefits to its employees, and that such instrumentalities are authorized to enter into and ratify any such agreement upon its approval by such agency. Before any plan may be approved by the agency, it must first be found that the plan is in conformity with the requirements provided by the regulations of the state agency except that no plan may be approved unless, inter alia, it specifies the source or sources from which the funds necessary to make the payments required by Section 105.370 are to be derived and contains reasonable assurance that such source will be adequate for such purposes. In addition the plan must provide for methods of administration of the plan by the instrumentality as are found by the state agency to be necessary for the proper and efficient administration of the plan. In addition, reports must be made from time to time. Finally, the state agency must be authorized to terminate the plan of coverage if it finds there has been a failure to substantially comply with any provision thereof.

Section 105.370, above referred to, requires each instrumentality whose plan has been approved to pay to the trustee contributions in the amounts and at the rates

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specified in the agreement entered into by the state agency, and authorizes the instrumentality to impose upon its employees a contribution with respect to their wages and to deduct the amount thereof from wages when paid.

From the foregoing, it is evident that an instrumentality which does not have a governing body with authority to act on behalf of the instrumentality and submit a plan which would insure that funds will be available to pay both the employer and employee contributions, would not be an instrumentality within the definition of Section 105.300 (7). On the other hand, an instrumentality which does have such power and authority (as does the Missouri Bar) would ordinarily be an instrumentality of the kind contemplated by the legislature.

With these preliminary observations, we next consider the elements constituting an instrumentality which has authority to submit a plan to extend Social Security coverage to its employees within the meaning and purpose of the Act. The instrumentality must be a juristic entity which is legally separate and distinct from the state. What is a juristic entity? Webster defines juristic as "relating to, created by, or recognized in law." A juristic person is defined as "a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties." The word "entity", just as is true with respect to the word "instrumentality", has no all-inclusive definition. In Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A. 2d 697, 1.c. 698, it was said:

"So, too, 'entity' is a word with elastic application. It is defined as something which has reality and distinctness of being; but that reality and distinctness may be either in fact or thought. (Webster's New International Dictionary)"

It is the opinion of this office that the Missouri Bar is a juristic entity. It has reality and distinctness of being, separate and apart from its members. It was

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created by and is recognized in law. The Missouri Bar, as such, functions under the rules of the Supreme Court, and these rules constitute, in effect, its charter. It is an artificial public body separate and distinct from the individual attorneys who constitute its membership. It is described by the rules of the court as the official organization of all Missouri lawyers. It has perpetual existence, subject only to the will of its creator. That is equally true of a private not-for-profit corporation. It has a representative Board of Governors through which its affairs are managed. Within the scope of the powers and authority conferred upon it by court rule, and subject only to the power of referendum by its members under Rule 7.06, the Bar functions as an independent body, with power to contract and to employ necessary assistants and to provide for and fix their duties and compensation.

True, the Court might change the rules, but unless it does so, the Bar is not subject to the control of the Court. So, too, the Legislature might change statutes under which independent instrumentalities created by statute operate. However, that ultimate power does not make the instrumentality any the less independent. Any present determination respecting the status of an instrumentality can and must be made only on the basis of the existing statutes or rules.

Although in the absolute sense, no instrumentality can ever be completely separate and distinct from its creator, if for no other reason than that its powers may be modified or itself abolished, it is obvious that what the legislature intended was a realistic concept, and this is demonstrated by the use of the word "legally". We are in accord with the reasoning of Virginia Mason Hospital Association v. Larson, 9 Wash. 2d 284, 114 P. 2d. 976, 986 in which the Supreme Court of Washington held:

"We do not believe that lack of independence from other institutions is the test of whether an institution is a separate entity."

Thus, although a corporation in the absolute sense is not separate and distinct from its members and stockholders, no one would question that, within the scope of the powers

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conferred upon it by the state and by its charter, it is "legally" separate from such members and stockholders. Rule 7 operates to establish an entity with authority to act independently and separate from the court which created such instrumentality. This entity, the Missouri Bar, is legally separate and distinct from the state. It is no part of the apparatus of the state government.

Finally, paragraph 7 of Section 105.300 contains the requirement that the employees of the instrumentality must not by virtue of their relation to such juristic entity be employees of the state. Here, too, is involved the matter of legislative intention. The legislature has created a number of instrumentalities, such as state boards, commissions, and the like, with power to contract and otherwise having the characteristics of public quasi-corporations. However, as to most of such bodies at least, their employees are not only authorized by statute, but the legislature appropriates the funds out of which such employees are paid, and for such reason the employees of such instrumentalities are employees of the state "by virtue of their relation to such juristic entity". Not so with respect to the Missouri Bar. The legislature not only had no part in the creation of the Bar, it has enacted no statutes authorizing the employment of any employees by the Bar nor has it appropriated any money to be used for the payment of wages to such employees.

The clear legislative intent derived from a reading of the Act as a whole, and in particular, Section 105.340 is that a state employee is one whose employment is authorized by statute, who is paid out of state-appropriated funds, and whose required contributions are to be deducted from his state-paid wages by the trustee of the state (state treasurer), the same official who disburses state funds with the approval of the very state agency which administers the agreement. The Supreme Court itself has a number of employees, but the employment of these persons is authorized by law, and the legislature has appropriated funds to pay their compensation. This is a legislative power and not the exercise of any judicial function. We took note above of referees and special commissioners appointed from time to time pursuant to the inherent power of the court. These instrumentalities are properly within the power of the court to create but they do not become, by reason of the exercise of such power, state employees.

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Although, as we have held, the Court has the power to create a state bar as an instrumentality of the state, and has the power to require every enrolled attorney to pay a fee for Bar purposes, this does not mean that in so doing the Court thereby judicially creates the relationship of state employee as between the employees of its instrumentality and the state itself. Nothing in Rule 7 evidences such an intention. Clearly, the purpose of Rule 7 is to establish an agency or instrumentality which will operate as an independent entity within the framework of its court-made charter. The employees of the Missouri Bar become such only by authority of its elected Board of Governors which has sole and exclusive authority, completely independent of the legislature, over its employees and the compensation they are paid. All salaries are paid out of the Missouri Bar Fund. None of such employees are state employees.

CONCLUSION

It is the opinion of this office that the Missouri Bar is an instrumentality within the meaning of paragraph 7 of Section 105.300, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,


THOMAS F. EAGLETON
Attorney General