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*Attorneys*

## USE OF THE FIFTH AMENDMENT BY AN ATTORNEY AS GROUNDS FOR

## DISBARMENT

*Introduction*

A principle considered basic to man's human rights was embodied by the framers in the Federal Constitution and is contained in the Fifth Amendment.<sup>1</sup> This principle: the privilege against self-incrimination. Widespread attention has been directed to its invocation in recent years in grand jury investigations.<sup>2</sup> Further attention has been attracted by the frequent use of the privilege in congressional inquiries into espionage and membership in the communist party and affiliated organizations.

While the privilege has been in existence for several centuries, dating back to *Lilburn's* case<sup>3</sup> in the Star Chamber of England, many problems have evolved in determining the situations in which it can be legally invoked. Currently, the focus of the national spotlight has beamed on so-called "Fifth Amendment Lawyers," referring to attorneys who employ the constitutional privilege.

This heated controversy involves the question of whether an attorney who refuses to answer questions as to past or present membership in the communist party or other subversive organizations on the basis of the Fifth Amendment should be disbarred. Two opposite positions have become firmly established. There are, on one side, those who believe that such an attorney should be summarily disbarred. On the other side, there is a group which contends that no conclusive presumption should result from a statement by a lawyer that to answer might incriminate him. Fundamentally, the problem is concerned with a distinction between a person as an individual and a person as an attorney. Litigation on this precise subject is limited to a case recently decided in Florida.<sup>4</sup> The purpose of this discussion is to consider both positions and to propose the possible solutions.

*The Status of a Lawyer*

The practice of law is a profession which has been honored for

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<sup>1</sup> U.S. CONST. amend. V. It provides that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

<sup>2</sup> Note, 30 NOTRE DAME LAW. 284 (1955).

<sup>3</sup> 3 How. St. Tr. 1315 (1637).

<sup>4</sup> *Sheiner v. Florida*, 82 So. 2d 657 (Fla. 1955).

many years as one of the noblest vocations of human endeavor. Its earliest beginning dates back to the Greek and Roman civilizations. Traditionally, the number of persons who are admitted to the legal practice has been limited to those persons mentally and morally qualified. The practice of law is not available to anyone who wishes to engage in it,<sup>5</sup> nor is it a natural right or one guaranteed by the Constitution. The admission to the bar of any particular state is not a privilege or an immunity within the constitutional meaning of those terms.<sup>6</sup> It can be appropriately stated that:

Practice of the law is an impersonal name applied to the mechanics of administering justice through the medium of judges and lawyers.

The administration of justice is a service rendered by the State to the public and exacts of those who engage in it the highest degree of confidence and good faith.<sup>7</sup>

Actually, the practice of law can be likened to a privilege or a franchise granted by the state to those persons possessing high moral characteristics. The state has the interest of all its citizens at heart when it considers the admission of a person to its bar. The service performed by every attorney vitally affects the public. The conduct of all lawyers is controlled by the courts of the states and nation. Hence, the role of courts and judges is marked by a high degree of responsibility. From time immemorial, the backbone of civilization has been the legal profession, constantly keeping the warring interests of society at bay.

Throughout the years, the attorney's upright character, including fidelity to country and integrity in dealing with clients,<sup>8</sup> has established a trust and confidence vitally necessary to any democracy.<sup>9</sup> The contribution of a lawyer to the politics of a nation is correspondingly great.<sup>10</sup> Advice must be given to people concerning all the complexities and frailties of human nature. By such an intimate relationship, resembling that of the doctor or the clergyman, an attorney exerts an influence over the minds of his clients and the public which is immeasurable in material values. Thus, his political philosophy should conform to the Constitution which he has sworn to uphold.

#### *The Case for Disbarment*

Adherents of the position that abrupt disbarment of an attorney should result from his refusal to answer lawfully posed questions concerning espionage or membership in the communist party on

<sup>5</sup> *Henington v. State Bd. of Bar Examiners*, 291 P.2d 1108, 1110 (N.M. 1956).

<sup>6</sup> *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

<sup>7</sup> *Lambdin v. State*, 150 Fla. 814; 9 So. 2d 192, 193 (1942).

<sup>8</sup> *Schwartz v. Board of Bar Examiners*, 291 P.2d 607, 609-10 (N.M. 1955).

<sup>9</sup> *In re Casey*, 359 Ill. 496, 195 N.E. 39, 41 (1935).

<sup>10</sup> Telegram from Paul Butler, National Chairman of the Democratic Party, to the Notre Dame Politics Institute, February 21, 1956.

the basis of the Fifth Amendment rely strongly on the oath which each attorney takes upon his admission to the bar.<sup>11</sup> Any taint of a political philosophy contrary to the Constitution demands an explanation. Maintaining this position is the American Bar Association.<sup>12</sup>

Too much stress cannot be placed on the responsibility of the position of the attorney in relation to the public. His struggle for admission to the bar is long and arduous. It is only after satisfying the court that his moral character and fitness are beyond reproach that he will be certified as capable to practice law and worthy of the trust and confidence placed in him by the public. Mr. Justice Cardozo has stated that:

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. . . . Whenever the condition is broken the privilege is lost.<sup>13</sup>

Disbarment is not punishment for a crime<sup>14</sup> nor is it a criminal proceeding.<sup>15</sup> It is merely a further test of character fitness, and if it is found that the attorney is lacking the necessary qualifications to act properly as an officer of the court and to serve the public, it is the duty of the court to remove him from the roll of attorneys.

The communist party in the United States is no longer compatible with loyal citizenship. It advocates the overthrow of our constitutional government by force.<sup>16</sup> As was stated in *Martin v. Law Society of British Columbia*,<sup>17</sup> ". . . the Marxist philosophy of law and government, in its essence, is so inimical in theory and practice to our constitutional system and free society, that a person professing them is *eo ipso*, not a fit and proper person to practice

<sup>11</sup> E.g., SUPREME COURT OF OHIO RULES OF PRACTICE XIV, § 15 (1952), which states ". . . I will support the Constitution of the United States and the Constitution of the State of Ohio. . . ."

<sup>12</sup> 39 A.B.A.J. 1084 (1953). This position was re-affirmed in the report of the American Bar Association's Special Committee on Communistic Tactics, Strategy and Objectives, February, 1956.

<sup>13</sup> *In re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783 (1917), *cert. denied*, 246 U.S. 661 (1918).

<sup>14</sup> *Ibid.* See also Note, 30 NOTRE DAME LAW. 273, 283 (1955).

<sup>15</sup> *Matter of Randall*, 93 Mass. (11 Allen) 473, 480 (1865).

<sup>16</sup> *In American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), Mr. Justice Jackson, dissenting in part and concurring in part, said at 424: ". . . Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."

<sup>17</sup> 3 D.L.R. 173 (1950).

law. . . ."<sup>18</sup> On the basis of good citizenship alone, it would seem that a lawyer should realize that he must speak truthfully and openly. The responsibility and importance of his profession, borne out by Shakespeare's comment in *Henry VI*, "the first thing we do, let's kill all the lawyers,"<sup>19</sup> should provide sufficient incentive. The freedom of coming generations depends on it.

Logical reasoning seems to dictate that if admission to the bar is denied because of a refusal to answer questions concerning communistic affiliations, disbarment should also result. While pointing out the importance of knowing where everyone stands in his political beliefs, the court in the case of *In re Anastaplo*<sup>20</sup> also emphasized the incompatibility of membership in the communist party with the oath to support the federal and state constitutions. The contention of an abridgment to the right of free speech was dismissed when the court said that by seeking the privilege of admission to the bar, the petitioner waived his constitutional right to free speech. A conscientious objector has been dealt with in a similar fashion.<sup>21</sup>

A close analogy can be drawn between disbarment of attorneys and the dismissal of school teachers for refusing, on the ground of the Fifth Amendment, to answer questions pertaining to subversive activities. Statutory provisions in California prohibit the advocacy or teaching of communistic principles to pupils for the purpose of undermining their belief in the government of the United States.<sup>22</sup> Corresponding to the position of an attorney, a teacher is licensed by the state after meeting special qualifications of character and mental fitness. While not referring to the legal profession, the court in *Board of Education v. Wilkinson*<sup>23</sup> stated:

A teacher's employment in the public schools is a privilege, not a right. A condition implicit in that privilege is loyalty to the government under which the school system functions. It is the duty of every teacher to answer proper questions in relation to his fitness to teach our youth when put to him by a lawfully constituted body authorized to propound such questions.<sup>24</sup>

The reasons for demanding that a teacher should answer are strikingly similar to those proposed by the advocates of disbarment of attorneys. A teacher is placed in an even more advanta-

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<sup>18</sup> *Id.* at 176.

<sup>19</sup> *Henry VI*, Part II, Act iv, sc. 2, l. 86.

<sup>20</sup> 3 Ill. 2d 471, 121 N.E.2d 826 (1954), *cert. denied*, 348 U.S. 946 (1955).

<sup>21</sup> *In re Summers*, 325 U.S. 561 (1945).

<sup>22</sup> CAL. EDUC. CODE ANN. § 8275 (Deering 1952).

<sup>23</sup> 125 Cal. App. 2d 100, 270 P.2d 82 (1954). See also *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E.2d 373 (1954), *appeal dismissed per curiam*, 348 U.S. 933 (1955).

<sup>24</sup> 270 P.2d at 85.

geous position for spreading the communist doctrine than an attorney. Impressionable young minds can very easily be swayed by the peculiar opportunity presented.<sup>25</sup> The legal profession and its numbers thrive on the confidence which is placed in them by the public. A similar condition exists with respect to the school system and teachers.<sup>26</sup>

Similar consideration can be accorded to municipal employees. A statement of Mr. Justice Holmes is appropriate. In *McAuliffe v. City of New Bedford*,<sup>27</sup> where the petitioner had been removed from his position as a policeman because he actively indulged in politics, Justice Holmes said: "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>28</sup> The privilege against self-incrimination as applied to policemen requires that a distinction be made between policemen as such and as individuals. A voluntary choice is available. Under the provisions of the privilege, a refusal to answer questions is allowed. However, the exercise of the privilege cannot be justified in light of the duty of a policeman.<sup>29</sup>

The relation of the attorney to the privilege against self-incrimination is comparable to that of the teacher and the policeman. Besides being a citizen, an attorney is an officer of the court. His responsibility in that position demands that privilege must bow to duty. The oath to support the Constitution places a burden on the attorney borne by no other profession or occupation.

The case of *Sheiner v. Florida*<sup>30</sup> has received considerable attention as the first case squarely deciding the question of disbarment. The effect of this decision may not be as strong when one considers the court's statement, "the real controversy here is whether or not due process was accorded appellant in taking from him the privilege to practice law."<sup>31</sup> The emphasis on due process seems to reduce the force which the decision might otherwise command. The true effect of the decision remains to be observed.

#### *The Case Against Disbarment*

Conversely, there exists a segment of the legal profession — both among practicing lawyers and students of the law — which

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<sup>25</sup> *Faxon v. School Comm. of Boston*, 331 Mass. 531, 120 N.E.2d 772, 774 (1954).

<sup>26</sup> *Ibid.* "The school committee could find that . . . if the petitioner were allowed to continue teaching . . . that this would undermine public confidence and react unfavorably upon the school system."

<sup>27</sup> 155 Mass. 216, 29 N.E. 517 (1892).

<sup>28</sup> *Id.* at 517.

<sup>29</sup> *Christal v. Police Comm. of San Francisco*, 33 Cal. App. 2d 564, 92 P.2d 416, 419 (1939).

<sup>30</sup> 82 So. 2d 657 (Fla. 1955).

<sup>31</sup> *Id.* at 660.

vehemently opposes the conclusion that invocation of the Fifth Amendment by an attorney should result in immediate disbarment. To them, it would seem that adherents of the summary disbarment position altogether fail to understand the true status of an attorney. While the practice of law is admittedly a privilege and it burdens the lawyer with a serious responsibility for trustworthiness, gaining this privilege is the culmination of years of arduous work. It does not appear reasonable that a man's career and livelihood should be destroyed without an adequate hearing. Prevention of arbitrary action by the state is the primary purpose of the guaranty of due process.<sup>32</sup>

A realization of the scope of the privilege against self-incrimination guaranteed by the Fifth Amendment is indispensable for a correct interpretation of its application. The privilege protects the attorney from exposures of direct criminality and exposures which may provide an indirect possibility of incrimination.<sup>33</sup> It is within the discretion of the judge whether or not the witness may refuse to answer.<sup>34</sup> In summary, it protects the innocent and shelters the guilty.<sup>35</sup> When the privilege is employed, however, solely for the purpose of hindering or impeding the questioning and the fair administration of justice, its use will not be allowed.<sup>36</sup>

In the case of *Sheiner v. Florida*,<sup>37</sup> serious stress was placed on the amount of evidence adduced in the lower court which had pronounced the disbarment. While conceding the fact that a lawyer schooled in the teachings of American democracy could not become a member of the communist party without forfeiting his privilege to practice law, the court reasoned that:

To deprive one of the privilege to practice law should never be done by "faceless informers." . . . Depriving one of the right to practice law is the superlative stain that may be stamped on his character and when a square issue on that point is made by the pleadings, the state should come forward with proof adequate to support the charge.<sup>38</sup>

Whenever a witness refuses to answer a question, an inference is raised. But if the privilege against self-incrimination protects the innocent as well as the guilty, the invocation of the privilege does not provide the basis for any inference of criminal conduct.<sup>39</sup>

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<sup>32</sup> *Twining v. New Jersey*, 211 U.S. 78, 101 (1908).

<sup>33</sup> *United States v. Burr*, 25 Fed. Cas. 38, No. 14,692e (D.Va. 1807). If the answer might form a link in a chain of testimony, the witness may refuse to answer.

<sup>34</sup> *Id.* at 40.

<sup>35</sup> *Twining v. New Jersey*, 211 U.S. 78, 91 (1908).

<sup>36</sup> *In re Levy*, 255 N.Y. 223, 174 N.E. 461 (1931).

<sup>37</sup> 82 So. 2d 657 (Fla. 1955).

<sup>38</sup> *Id.* at 661.

<sup>39</sup> *United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128 (2d Cir. 1954).

Therefore, reason dictates that such a valuable privilege should be incapable of being withdrawn on the basis of inference alone.

When the force behind the constitutional privilege is recognized, it seems that the exercise of the privilege stands above the duties of any profession. Immunity statutes have provided a large amount of the litigation concerning the Fifth Amendment. When the statute is applied, the witness can testify without fear of further prosecution, even in such proceedings as would deny the right to practice a profession such as architecture.<sup>40</sup> The basis of this theory is that the immunity is co-extensive with the privilege. Refusal to answer in disbarment proceedings based on unprofessional conduct has been sustained.<sup>41</sup>

The argument that there is a distinction between an attorney as such and an attorney as an individual appears fallacious. The sole difference lies in the fact that the attorney has taken an oath to support the Constitution. However, individuals as well as attorneys are bound to abide by its provisions. It has been stated that:

To say that one has an absolute right to a privilege, but if he exercise it he will be punished, is to limit his enjoyment of that right, and . . . we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman, is either legally or morally guilty of a wrong should he claim the right.<sup>42</sup>

In order that the traditional liberty of all citizens may be guaranteed, it is reasoned, the lawyer must be able to employ his constitutional privileges. The very vitality of the bar depends upon it.

### *Conclusion*

Every patriotic, deep-thinking lawyer in the United States today is anxiously concerned about the maintenance of our American heritage. Upon it the future history of our nation must depend. No more certain fact can be asserted. The common enemy is Communism and its conspiracy to destroy our constitutional freedoms. Its followers are wise, and cannot be underestimated. Prevention of their goal is our goal. The question remains: how may the integrity of the bar be preserved and the over-all goal accomplished without the sacrifice of constitutional rights?

Firm adherence to the principles of the Constitution should assure the desired goal. Only by constant application, without allowing the Bill of Rights to become the "watered stock" of our nation, can we hope to stem the determined bid of subversive influences from destroying our governmental system.

Exercise of the privilege of self-incrimination by an attorney will

<sup>40</sup> *Florida State Bd. of Architecture v. Seymour*, 62 So. 2d 1 (Fla. 1952).

<sup>41</sup> *In re Grae*, 282 N.Y. 428, 26 N.E.2d 963 (1940). The court said the invoking of the privilege was not ground for disbarment unless it was accompanied by "contumacious conduct" on the part of the attorney.

<sup>42</sup> *In re Holland*, 377 Ill. 346, 36 N.E.2d 543, 548 (1941).



continue to be clouded with uncertainty until action is taken by the several states. Regulatory legislation seems objectionable for two reasons: first, the possibility of unconstitutionality; and second, the difficulty of drafting such legislation because of the abstractness of the qualities of "character and fitness." The alternative must be more definitive regulation by the highest courts of the several states. Since the courts have the power to discipline an attorney and are responsible for his admission initially, it would seem that the above objections would be overcome through this method and a badly-needed definiteness of the law in this area achieved.

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