Montana Law Review

Volume 28
Issue 2 *Spring 1967*

Article 5

1-1-1967

Constitutional Law—Fifth Amendment Privilege Extended to Lawyers in Disciplinary Proceedings (Spevack v. Klein, 87 S. Ct. 625, 1967)

Lawrence F. Daly
University of Montana School of Law

RECENT DECISIONS

CONSTITUTIONAL LAW—FIFTH AMENDMENT PRIVILEGE EXTENDED TO LAWYERS IN DISCIPLINARY PROCEEDINGS.—Petitioner, a member of the New York Bar, refused to testify or to produce financial records at a judicial inquiry into his professional misconduct. The Appellate Division of the New York Supreme Court ordered petitioner disbarred. Its decision recognized the petitioner's right against self-incrimination, but ruled that by asserting that right the petitioner forfeited his privilege of remaining a member of the bar. The New York Court of Appeals affirmed the order. The United States Supreme Court granted certiorari. *Held,* that the self-incrimination clause of the Fifth Amendment has been absorbed in the Fourteenth Amendment, and extends its protection to lawyers in disciplinary proceedings as well as to other individuals. *Spevack v. Klein,* 87 S.Ct. 625 (1967).

THE PRIVILEGE TO REMAIN SILENT

The federal privilege[1] against self-incrimination is guaranteed by the Fifth Amendment.[2] The purpose of the privilege is to protect a witness from compulsory disclosure of criminal conduct.[3] The privilege may be pleaded in any federal proceeding, whether civil or criminal, whenever the witness feels that to testify would subject him to future criminal prosecution.[4] If the privilege is invoked in a criminal prosecution, no inferences of guilt may be drawn.[5] However, civil cases traditionally allow an inference that the evidence withheld would be unfavorable to the party asserting the privilege.[6]

The 1964 Supreme Court decision in *Malloy v. Hogan*[7] extended the Fifth Amendment right against self-incrimination to state proceedings by virtue of the Fourteenth Amendment. Prior to that case, the right was not available in state actions except where provided by state constitutional provisions.[8]

[1]When used in reference to constitutional guarantees, the commonly used term "privilege" is virtually synonymous with "right."

[2]U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[3]Ikeda v. Curtis, 43 Wash.2d 449, 261 P.2d 684, 689-90 (1953).

[4]*Ibid.;* Counselman v. Hitchcock, 142 U.S. 547 (1892); Karel v. Conlan, 155 Wis. 221, 144 N.W. 266, 270-71 (1913); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

[5]*Ikeda v. Curtis, supra* note 3, at 690; Ratner, *Consequences Of Exercising The Privilege Against Self-Incrimination,* 24 U. CHI. L. REV. 472 (1957).

[6]United States v. One 1948 Plymouth Sedan, 87 F.Supp. 967 (D.N.D. 1950); 8 WIGMORE, EVIDENCE § 2272, at 161 (Supp. 1959).

[7]378 U.S. 1 (1964).

[8]See Ratner, *supra* note 5, at 472 n.2; see, *e.g.* MONT. CONST. art. III, § 18: "No person shall be compelled to testify against himself . . . ." Some states varied the privilege by permitting comment by the prosecution and the raising of inferences from the exercise of the privilege in criminal cases. MCCORMICK, EVIDENCE § 132, at 276-77 (1954). However, this practice was prohibited by Griffin v. California, 380 U.S. 609, 610-15 (1965).

The right to remain silent may also be inferred from the free speech guarantee of the First Amendment.[9] This right is not absolute, however, and is subject to limitation by judicial process, grand jury proceedings, congressional investigations, and other proceedings involving the public interest.[10] Further, there seems to be no limitation upon the inferences which may be drawn from its being invoked,[11] provided that those inferences are reasonable.[12] This First Amendment privilege of free speech is protected in state actions by the Fourteenth Amendmnt.[13] Prior to *Malloy v. Hogan*,[14] therefore, the right to remain silent in state proceedings could be reviewed by the United States Supreme Court only with reference to the First Amendment guarantee.

THE PRIVILEGE TO PRACTICE LAW

Traditionally, the practice of law has been considered a privilege to be granted or withheld according to regulations established by the individual states.[15] Perhaps the most common requirement of the states is that a member of the bar possess good moral character.[16] An evaluation of a person's moral character and fitness to practice law is most likely to occur during either admission or disbarment proceedings. The admission proceeding determines whether the privilege to practice law is to be granted; and the disbarment proceeding determines whether the privilege is to be withdrawn. While the states may interpret their own conditions for membership in state bar associations, the state courts may not arbitrarily deny the applicant or the attorney the protection of the due process or equal protection clauses of the Fourteenth Amendment.[17]

THE DUAL STATUS THEORY

There exists, therefore, on the one hand the special privilege to practice law, and on the other, the right to remain silent. The Supreme Court has considered a number of cases where these two "privileges" have clashed during either admission or disbarment proceedings.[18] In these cases, the representatives of the state advocating denial of mem-

[9]U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . ."

[10]*Cf.* Uphaus v. Wyman, 360 U.S. 72 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[11]*Ibid.*

[12]If unreasonable inferences were drawn, the due process clause of the Fourteenth Amendment would be violated.

[13]Gitlow v. New York, 268 U.S. 652 (1925); Saia v. New York, 334 U.S. 558 (1948).

[14]*Supra* note 7.

[15]*In re* Goodrich, 98 N.E.2d 125, 128 (S.D. 1959).

[16]Brown & Fassett, *Loyalty Tests For Admission To The Bar*, 20 U. CHI. L. REV. 480 n.1 (1953).

[17]Dent v. West Virginia, 129 U.S. 114 (1889); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

[18]The problems within the scope of this article do not require any distinctions between admission and disbarment proceedings beyond those indicated in the text. Both factions in the present United States Supreme Court have stated that the same basic principles apply in both proceedings. See generally both the majority and

bership in the state bar did so on the "dual status" theory.[19] Advocates of this theory admit that the lawyer, in his status as a citizen, is entitled to certain constitutional righs. However, they maintain that in his status as a member of the bar, the lawyer has dedicated his life to the administration of justice as an officer of the court. The privilege of practicing law carries with it the obligation to co-operate with the courts. Therefore, they reason, any refusal to co-operate, such as invoking the privilege against self-incrimination, is a violation of that special duty which warrants disciplinary action.

The Supreme Court first considered the "dual status" theory in two 1961 cases[20] dealing with refusals by two states to admit certain applicants to their state bars. The denials of admission were based on the theory that the applicants had violated their duty to co-operate by refusing to answer certain questions posed by the bar committees. In refusing to answer, the petitioners in these cases relied upon the free speech guarantee of the First Amendment. In affirming the states' actions, the Supreme Court held that the Fourteenth Amendment which extends freedom of speech to state actions does not prevent a state from refusing to admit to its bar a person who refuses to provide unprivileged answers to questions having substantial relevance to his qualifications. In both cases the Court ruled that the petitioner's First Amendment rights were outweighed by the governmental interests involved—namely, the state's interest in having lawyers who are devoted to the law in its broadest sense.

In both of these decisions, Justices Black, Douglas, Warren, and Brennan dissented. In writing for the minority, Black took issue with the majority's "balancing test" in connection with the First Amendment guarantees. That approach, he warned, meant that the freedoms of speech, press, assembly, and petition can be repressed whenever there is sufficient governmental interest in so doing.

In a companion case, *Cohen v. Hurley*,[21] the Supreme Court accepted the "dual status" theory in a disbarment proceeding. In that case, a

---

dissenting opinions in both the instant case and Cohen v. Hurley, 366 U.S. 117 (1961). It is well to keep in mind, however, that one primary distinction does exist. In an admission proceeding the burden of proof is on the applicant to show proper qualifications. In a disbarment proceeding, the burden of showing that the attorney has failed to maintain the proper qualifications is on his accuser. *In re* Wells, 174 Cal. 467, 163 Pac. 657 (1917); see also Note, 65 YALE L.J. 873 (1956).

[19]The term "dual status" seems to have been first applied in this context by the New York Supreme Court in *In re* Ellis, 258 App. Div. 558, 17 N.Y.S.2d 800, *rev'd* 282 N.Y. 435, 26 N.E.2d 967 (1940).

[20]Konigsberg v. State Bar, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961). The Konigsberg decision was a sequel to Konigsberg v. State Bar, 353 U.S. 252 (1957), in which the Supreme Court reversed the state's initial refusal of the application. This reversal was on the grounds that despite the applicant's refusal to testify, he had introduced sufficient additional evidence to make out a prima facie case of good moral character. The first case did not consider the question of whether the state could treat the applicant's refusal to testify as a ground for exclusion because such refusal had thwarted a full investigation into his qualifications. *Konigsberg v. State Bar, supra* at 43.

[21]*Supra* note 18.

New York court had ordered the petitioner disbarred for asserting his state[22] privilege against self-incrimination and thereby refusing to cooperate with the court in its efforts to expose professional misconduct.[23] The petitioner sought relief in the Supreme Court, charging that such state activity violated the due process requirement of the Fourteenth Amendment. The high court rejected this contention, holding that because of the special duty owed by an attorney to the courts, such refusal to testify might properly furnish grounds for discipline.[24]

Again Justices Black, Douglas, Warren, and Brennan dissented. In addition to reiterating the argument against the "balancing away" of constitutional rights, the dissenters contended that the federal privilege against self-incrimination extends to witnesses in state proceedings by virtue of the Fourteenth Amendment. Under this view, a state may not penalize—in this case disbar—any person for invoking his constitutional privilege. The dissenters agreed that this privilege belongs to all citizens, and may not be withheld because a person has chosen to dedicate his life to the legal profession. However, the rule of the majority was that the status of an attorney, as an officer of the court, demanded that he forfeit some of the guarantees provided by the Constitution lest he suffer disciplinary action.

PUBLIC EMPLOYEES AND THE RIGHT TO SILENCE

Although the Supreme Court has been called upon to decide only a few cases concerning use of the right to silence by lawyers, the unique position of a lawyer as an officer of the court has led the courts to draw an analogy between the lawyer and public employees. To understand the entire rationale behind the present state of the law, it is necessary to review the series of decisions involving public employees being disciplined for use of the right to remain silent under various circumstances.

The first important case in this series was the 1956 decision in *Slochower v. Board of Higher Education*.[25] The petitioner in this case was a New York college teacher who had been discharged for invoking the Fifth Amendment before a legislative committee. The New York Court of Appeals held that the state had the right to consider assertion of the privilege as equivalent to resignation. The United States Supreme Court

[22]N.Y. CONST. art. I, § 6: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

[23]For the series of cases developing the "dual status" theory in New York courts, see *In re* Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907); *In re* Rouss, 221 N.Y. 81, 116 N.E. 782 (1917); *In re Becker*, 229 App. Div. 62, 241 N.Y. Supp. 369 (1930); *In re* Schneidkraut, 231 App. Div. 109, 246 N.Y. Supp. 505 (1930); *In re* Levy, 255 N.Y. 223, 174 N.E. 461 (1931); *In re Ellis, supra* note 19; *In re* Grae, 258 App. Div. 576, 17 N.Y.S.2d 822, *rev'd* 282 N.Y. 428, 26 N.E.2d 963 (1940); *In re* Cohen, 7 N.Y.2d 488, 166 N.E.2d 672, *aff'd*, 366 U.S. 117 (1961).

[24]In approving the principles advanced by the majority opinions of the *Konigsberg* and *Anastaplo* cases, *supra* note 20, the Cohen court stated: "The fact that such refusal was here made a ground for disbarment, rather than for denial of admission to the bar, as in Konigsberg and Anastaplo, is not of constitutional moment." *Cohen v. Hurley, supra* note 18, at 123.

[25]350 U.S. 551 (1956).

reversed this decision, holding that due process had been violated since the dismissal had been predicated entirely upon events occurring before a federal committee whose inquiry was not directed toward determining petitioner's fitness for his particular job. Thus the Court made the "type of inquiry" the deciding factor, and implied that if the petitioner had invoked the privilege at an inquiry designed to ascertain his fitness to continue teaching, with questions relevant to that issue, the outcome might have been different.[26]

Two years later the Supreme Court ruled in two more cases concerning public employees. *Beilan v. Board of Education*[27] involved another school teacher, but this time the refusal to answer was made to questions posed by the school superintendent in an investigation into petitioner's fitness and suitability to teach. This lack of candor was deemed "insubordination" and "incompetency" by the school board, sufficient to sustain his discharge.[28] The Supreme Court held that the relevancy of the questions posed by the superintendent with a specific intent to investigate the petitioner's qualifications raised a duty on the part of the petitioner to answer. Thus, the Court affirmed the "type of inquiry" distinction suggested in *Slochower*,[29] and coupled with it a theory that, as a public school teacher, the petitioner had certain obligations to co-operate with his employer.

In *Lerner v. Casey*,[30] a New York subway conductor had been discharged for refusal to answer questions put to him by his employer concerning his membership in the Communist Party.[31] In affirming this action, the Supreme Court emphasized that the questions were asked by a representative of the state conducting an inquiry into the fitness of its employee. Again the court affirmed the "type of inquiry" distinction.

The *Beilan* and *Lerner* cases prompted dissents by Justices Black, Douglas, Warren, and Brennan. While Warren disagreed on factual grounds,[32] Black joined Douglas in protesting that the principles of de-

[26] *Id.* at 558-59.

[27] 357 U.S. 399 (1958).

[28] The petitioner was discharged under the terms of New York City Charter § 903 which provides:

> If any . . . employee of the city shall, after lawful notice or process, . . . refuse to testify or answer any questions regarding. . . official conduct of any officer or employee of the city. . . on the ground that his answer would tend to incriminate him, . . . his term or tenure of office or employment shall terminate. . . .

[29] *Supra* note 25.

[30] 357 U.S. 468 (1958).

[31] The New York Security Risk Law (1951) specified certain state agencies as "security agencies." Employees of such designated agencies were subject to dismissal if reasonable evidence was found to exist causing doubt as to their trustworthiness and reliability. See generally Laws N.Y. 1951, c. 233 as amended, Laws N.Y. 1954, c. 105.

[32] Mr. Justice Warren felt that the basis for Beilan's dismissal was other than that stated by the court. Namely, his refusal to testify before the House Sub-Committee on Un-American Activities. Under this view Warren felt that the decision in *Slochower, supra* note 25, should control. *Beilan v. Board of Education, supra* note 27, at 411.

mocracy allow no inference of wrongdoing to flow from the assertion of any constitutional right.[33]

A shift in the position of the majority was evident when the Court was called upon to rule in *Nelson v. County of Los Angeles*.[34] In this case a county employee had been dismissed for refusal to testify before a subcommittee of the House Un-American Activities Committee. In affirming dismissal, the Supreme Court seemed to abandon the "type of inquiry" doctrine, and found support for its decision in the special duty created for public employees by statute.[35] The individual's right to remain silent was found to be subordinate to the state's legitimate interest in securing information.

Again the reasoning of the majority failed to convince Justices Black, Douglas, and Brennan.[36] In dissenting, Brennan sought to return to the "type of inquiry" test, and on that basis felt that *Slochower*[37] controlled. Black again insisted that constitutional guarantees applicable to the states by the Fourteenth Amendment are not subject to modification by state statute or practice, regardless of the persons involved.

At this point the Supreme Court had arrived at parallel conclusions in the areas of public employees and lawyers. Both were subject to the "dual status" theory by virtue of the nature of their chosen profession. While as citizens they were entitled to all the guarantees of the Constitution, as public servants or officers of the court, they had taken on special duties and obligations which were held paramount to their constitutional rights.

RECENT DEVELOPMENTS

The consistent agreement of the dissenters in cases involving both lawyers and public employees gave warning of things to come. With the arrival of Mr. Justice Goldberg on the bench,[38] Justices Black and his associates[39] found a supporter of their view of the Fifth Amendment. Thus, in *Malloy v. Hogan*,[40] Goldberg joined Black, Douglas, Warren and Brennan in forming a new majority which overruled an entire series of cases,[41] and held that the Fifth Amendment privilege against self-incrim-

[33]Mr. Justice Brennan insisted that the state had failed to carry its burden of proof as required in this type of case. *Beilan v. Board of Education, supra* note 27, at 417.

[34]362 U.S. 1 (1960).

[35]CAL. GOV'T CODE § 1028.1 provides: "It shall be the duty of any public employee who may be subpoenaed or ordered by. . . a duly authorized committee of the Congress of the United States. . . to appear. . . and to answer under oath a question or questions. . . ."

[36]Mr. Justice Warren did not take part in the decision.

[37]*Supra* note 25.

[38]On October 1, 1962, Mr. Justice Goldberg succeeded the retiring Felix Frankfurter.

[39]Justices Douglas, Warren, and Brennan.

[40]*Supra* note 7.

[41]Twining v. New Jersey, 211 U.S. 78 (1908); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Knapp v. Schweitzer, 357 U.S. 371 (1958).

ination is a basic right which is extended to a witness in a state court by the Fourteenth Amendment.

When next the Court was called upon to rule in the area of public employees and lawyers invoking the Fifth Amendment, Mr. Goldberg was no longer a member of the Court.[42] In his stead came Mr. Justice Fortas, who chose to vote with Justices Black, Douglas, Warren, and Brennan in the most recent cases.

In *Garrity v. State of New Jersey*,[43] the Supreme Court was asked to confirm the conviction of police officers who had been found guilty of conspiracy to obstruct justice. The convictions were based upon confessions made by the petitioners after they were given the choice of either incriminating themselves or being discharged from their jobs under a New Jersey statute which compelled the dismissal of public employees who invoked the privilege against self-incrimination.[44] The Court reversed the convictions, holding that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."[45] The majority opinion[46] declared that the Fifth Amendment privilege is one to which all citizens are entitled, without threat of punishment being inflicted for its use. The threat of loss of employment was considered sufficient "coercion" to make the confessions involuntary, and inadmissible under the terms of the Fourteenth Amendment.

The decision in the *Spevack*[47] case immediately followed the *Garrity* decision, and relied upon many of the same principles. In this 5 - 4 decision,[48] Mr. Justice Douglas, in writing for the majority, recognized that *Malloy v. Hogan*[49] had raised questions concerning the validity of the position taken by *Cohen v. Hurley*.[50] Since the issues raised by *Spevack* were indistinguishable from those in *Cohen*, the Court was faced with either continuing the doctrine of the earlier case, or taking the position advanced by the dissents in *Cohen*. The Court chose the latter, concluding that *Cohen v. Hurley* should be overruled, that the self-incrimination clause of the Fifth Amendment had been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be diluted by imposing the dishonor of disbarment

[42]Mr. Justice Goldberg resigned from the bench in July, 1965 and was replaced by Mr. Justice Fortas in October, 1965.

[43]87 S. Ct. 616 (1967).

[44]N.J. REV. STAT. § 2 A: 81-17.1 (Supp. 1965):
> Any person holding. . . appointive public office, position or employment. . . who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is the defendant. . . shall be removed therefrom or shall thereby forfeit his office, position or employment. . . .

[45]*Garrity v. State of New Jersey, supra* note 43, at 620.

[46]Written by Mr. Justice Douglas.

[47]Instant case.

[48]Justices Harlan, Clark, Stewart, and White dissented. These same four had dissented in *Garrity v. State of New Jersey, supra* note 43.

[49]*Supra* note 7.

[50]*Supra* note 18.

and the deprivation of a livelihood as a price for asserting it.[51] Henceforth, a person invoking his right to remain silent shall not suffer any sanction which makes assertion of that right "costly."[52]

CONCLUSION

Although the position taken by the new majority of the Court is clear, perhaps it would be unwise to presume that such sweeping statements will control future decisions in this area. Justices Black, Douglas, Warren, and Brennan have advocated a consistent philosophy throughout; and the majority-turned-minority represented by Harlan, Clark, Stewart, and White seem equally set in their views. The future appears to be in the hands of the newest member of the bench, Mr. Justice Fortas. In this regard it is interesting to note that in the *Spevack* decision, although Fortas voted for reversal, his specially concurring opinion[53] reveals that he does not agree with the broad statements of the majority opinion. The point of his distinction is that the lawyer's right to remain silent is different from "that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties."[54] Thus, while rejecting any "dual status" theory arising out of the nature of the lawyer's position as an officer of the court, he would apparently accept such a theory, coupled with the "type of inquiry" test adopted by the *Slochower*,[55] *Beilan*,[56] and *Lerner*[57] decisions, in cases where public employees are concerned. If the policemen in the *Garrity*[58] case had maintained their silence, and been discharged for it, Mr. Justice Fortas would have upheld those dismissals. It was only the fact that the "coerced" confessions were later used in criminal prosecutions that compelled Justice Fortas to vote for the majority.[59]

With the opinions of the Court members so delicately balanced, any prediction of the result of future litigation in this area should be done with special awareness of the factual distinctions which have been made by the individual justices in the past.

LAWRENCE F. DALY.

[51] Instant case at 630.
[52] Instant case at 628, citing Griffin v. State of California, 380 U.S. 609, 614 (1965).
[53] Instant case at 630.
[54] *Ibid.*
[55] *Supra* note 25.
[56] *Supra* note 27.
[57] *Supra* note 30.
[58] *Supra* note 43.
[59] Instant case at 630.