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Constitutional Law: Disbarrment of Attorney Who Invoked Self-Incrimination Privilege Held Unconstitutional

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applies mechanistic rules. The problem now is to develop the new standard so that it is not only just but that it is also efficient.

LESLIE WAYNE BURKE

EDITOR'S NOTE: In a four-three decision on rehearing, the court has since reversed its holding, but indicated that *lex loci delicti*, although of primary importance, is not the only consideration upon which choice of law will be determined. No. 35,203, July 26, 1967.

CONSTITUTIONAL LAW: DISBARMENT OF ATTORNEY WHO INVOKED SELF-INCRIMINATION PRIVILEGE HELD UNCONSTITUTIONAL

Spevack v. Klein, 87 Sup. Ct. 625 (1967)

In a proceeding to discipline a New York attorney for professional misconduct, the attorney-petitioner refused to honor a subpoena duces tecum served on him to produce financial records. The petitioner's sole defense at this proceeding was that his testimony and production of records would tend to incriminate him. The New York Court of Appeals affirmed petitioner's disbarment, holding that the constitutional privilege against self-incrimination was not available.[1] On certiorari, the United States Supreme Court HELD, refusal of petitioner to produce records or testify on the basis that his testimony would tend to incriminate him was an unconstitutional ground for disbarment. Judgment reversed, Justices Harlan, Clark, Stewart, and White dissenting, Mr. Justice Fortas concurring separately.

In ordering petitioner disbarred, the appellate division's decision was based on *Cohen v. Hurley*,[2] where an attorney was also disbarred for refusing to testify. The *Cohen* decision held that the self-incrimination clause of the fifth amendment was not applicable to the states through the fourteenth amendment. Three years after *Cohen*, the Supreme Court in *Malloy v. Hogan*[3] held that the self-incrimination clause of the fifth amendment was applicable to the states. Adhering to that decision, the Supreme Court in the instant case overruled *Cohen* thus extending protection against self-incrimination to attorneys.

Mr. Justice Harlan in dissenting argued that the disbarment was constitutionally permissible. Relying heavily on *Orloff v. Willoughby*,[4] the dissent asserts that the petitioner can invoke the privilege against self-incrimination, but that in so doing he may be denied the *privilege* of practicing law. In *Orloff*, the Court affirmed the denial

1. Klein v. Spevack, 16 N.Y.2d 1048, 213 N.E.2d 457, 266 N.Y.S.2d 126 (1965).
2. 366 U.S. 117 (1961).
3. 378 U.S. 1 (1964).
4. 345 U.S. 83 (1953).

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of an officer's commission to a serviceman who refused to answer loyalty questions. The salient difference between a serviceman denied a commission and an attorney denied his professional standing undermines the efficacy of this analogy. The "fulcrum" of the self-incrimination cases, according to the dissent, is *Slochower v. Board of Higher Eduation.*[5] The Supreme Court, in reversing a professor's dismissal for refusal to answer questions, found that the questions presented were unrelated to college functions and therefore irrelevant. In *Nelson v. County of Los Angeles,*[6] on the other hand, a county employee's dismissal was affirmed because the questions asked were relevant to his employment. Accordingly, the dissent argues that a state "may in the course of a bona fide assessment of an employee's fitness for public employment require that the employee disclose information reasonably related to his fitness, and may order his discharge if he declines."[7]

Courts have traditionally exercised summary jurisdiction over members of the bar,[8] and may validly require of lawyers minimum standards of ethical conduct as long as such standards have a rational connection with professional fitness.[9] Though courts have this broad authority, a person cannot be excluded from the practice of law in a manner that contravenes the due process or equal protection clauses.[10] In disciplinary proceedings, the attorney is entitled to notice of the grounds of the complaint and an ample opportunity to be heard.[11] He must be allowed the opportunity to confront his accusers, cross-examine them, and refute their accusations.[12]

Until the *Spevack* case, the privilege against self-incrimination as applied to attorneys in licensing and disciplinary proceedings, was but a watered-down procedural guarantee. It was diluted through utilization of a balancing test; in essence, the attorney's right to withhold information was balanced against the public's concern with maintaining high ethical standards among those who occupy a position of public trust.[13] This depreciation of fifth amendment protection was reiterated in *Konigsberg v. State Bar.*[14] Affirming the appellant's denial of admission to the bar, the Court held that an attorney could

5. 350 U.S. 551 (1956).
6. 362 U.S. 1 (1960).
7. 87 Sup. Ct. 625, 635 (1967).
8. *Ex parte* Wall, 107 U.S. 265, 274 (1882).
9. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).
10. *Id.* at 238.
11. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871).
12. Willner v. Committee on Character, 373 U.S. 96 (1963).
13. *In re* Anastoplo, 366 U.S. 82, 95 (1961); Cohen v. Hurley, 366 U.S. 117, 123 (1961); *accord,* Shapiro v. United States, 335 U.S. 1, 32 (1948).
14. 366 U.S. 36 (1961).

not refuse to answer questions if such questions had a "substantial relevance to his qualifications."[15] This encroachment on an attorney's fifth amendment rights has been explained in terms of subtle coercion: the attorney holds the key to his admission and practice in his own hands.[16]

The dissenting Justices seemingly interpret the instant holding as an abrogation of the government's right to dismiss an employee who invokes the privilege against self-incrimination. Failing to acknowledge a meaningful difference between public employees and attorneys, the dissent demands a uniform application of constitutional standards to both attorneys and public employees. By ignoring the dissenting opinion's demand, the majority holds that attorneys, as distinguished from public employees, are in a "semi-public" position.[17] This dichotomy is manifested by the existence of two constitutional standards. A governmental employee may be dismissed for refusing to answer questions that are relevant to his employment,[18] whereas an attorney, under the instant holding, cannot be dismissed under similar circumstances.[19]

This self-incrimination double standard is justified. In a concurring opinion, Mr. Justice Fortas approvingly contrasted the difference "between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties."[20] An employee of the government is not necessarily restricted to governmental work and may thus perform similarly rewarding tasks in areas of private employment. An attorney, on the other hand, exerts valuable time and expense in preparing for his profession. As a licensee of the state, he must satisfactorily comply with its established criteria for admission and practice. To jeopardize an attorney's standing at the bar by diminishing his fifth amendment rights is an unreasonable abuse of the power delegated to the licensor or disciplinary body. Referring to this exigency, Mr. Justice Black, dissenting in *In re Anastoplo,*[21] stated: "To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrate it."[22]

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15. *Id.* at 44.
16. *In re* Anastoplo, 366 U.S. 82, 97 (1961).
17. *In re* Summers, 325 U.S. 561, 578 (1945).
18. Nelson v. County of Los Angeles, 362 U.S. 1 (1960).
19. The court specifically deferred any consideration of the problem that would arise if an attorney were disbarred for refusal to produce records he was lawfully and properly required to keep by state law. 87 Sup. Ct. 625, 629 (1967). See Mr. Justice Fortas, concurring at 630.
20. *Id.* at 630.
21. 366 U.S. 82, 97 (1961).
22. *Id.* at 115-16.