Louisiana Law Review

Volume 27 | Number 4
June 1967

Constitutional Law - Fifth Amendment Privilege Against Self-Incrimination - Disbarment Proceedings

Thomas R. Blum

case, had the court treated the wife as the husband's procedural representative, rather than recognizing that she had, in her own right, a right of action for community claims.

Billy J. Tauzin

CONSTITUTIONAL LAW — FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION — DISBARMENT PROCEEDINGS

Petitioner, a member of the New York bar, refused to produce certain financial records or to testify in a proceeding against him for professional misconduct, on the grounds that the records and testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered petitioner disbarred, the Court of Appeals affirmed. The United States Supreme Court *held* that since *Malloy v. Hogan*[1] proscribes the imposition of any penalty for the assertion of the privilege and since the threat of disbarment was a powerful form of compulsion which made the assertion costly, an attorney's invocation of the privilege against self-incrimination could not serve as a basis for his disbarment, *Spevack v. Klein*, 385 U.S. 511 (1967).

The Court explicitly overruled *Cohen v. Hurley*,[2] decided by a 5-4 majority six years ago. In that case, the Court held that the lawyer was under a duty to the Court and the public to cooperate in investigations concerning his qualifications as an attorney. Though he had the right to assert the privilege, as long as disbarment was not based on this assertion but on breach of his duty to cooperate with the investigating committee, it was a proper disciplinary measure. The state's interest in maintaining the standards of the legal profession was considered greater than the individual lawyer's unfettered right to exercise the fifth amendment privilege. Therefore a "dual status" was imposed upon the attorney, whereby his right to claim the privilege as any other citizen was subordinate to his special duty to the state to answer questions concerning his qualifications to continue the practice of law.[3]

1. 378 U.S. 1 (1964).
2. 366 U.S. 117 (1961).
3. See also *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

In rejecting the "dual status" theory[4] of *Cohen* as applied to disbarment proceedings, the Court casts doubt on the validity of a refusal to admit an applicant to the bar on similar grounds. In *Konigsberg v. State Bar of California*,[5] petitioner was denied admittance to the bar for refusing to answer questions concerning communist affiliations. Since the question had substantial relevance to his qualifications, the denial was not considered arbitrary. Although petitioner in *Konigsberg* did not invoke the privilege against self-incrimination, but instead rested his objection to the questions on first amendment grounds of freedom of association, the fact remains that the Court allowed a state to deny admission to the bar for refusal to answer questions having substantial relevance to the applicant's qualifications. This reasoning seemingly would apply to assertion of the fifth amendment privilege as well as that of the first amendment. However, following the rationale of the instant case, it seems logical that an applicant could not now be refused admission to the bar for claiming his fifth amendment privilege since this would indeed make assertion of the privilege costly.

The result in the instant case was not compelled by applying the federal standard of the fifth amendment right against self-incrimination to the states.[6] In *Orloff v. Willoughby*,[7] a doctor was denied a commission in the army for refusing to answer questions concerning his communist affiliation on the grounds that such answers would tend to incriminate him. The court upheld this action, reasoning that by refusing to answer, the petitioner prevented the commissioning authority from determining facts bearing on his qualifications to serve as an officer. Similarly, in *Kimm v. Rosenberg*,[8] the Court refused to suspend a deportation order since, by refusing to answer, petitioner failed to discharge the statutory burden of proving that he was not a communist. Both these cases involve application of the so-called federal standard and make assertion of the privilege costly. Since, under the federal standard, assertion of the fifth amendment privilege has been made "costly" in the past, the Court had solid ground to affirm the disbarment of petitioner in the instant case had it chosen to do so.

4. For a discussion and criticism of this dual status theory, as applied to attorneys, see Comment, 56 NW. U.L. REV. 644 (1962).

5. 366 U.S. 37 (1961).

6. The federal standard governing assertion of the privilege against self-incrimination was held to apply to the states in Malloy v. Hogan, 366 U.S. 117 (1961).

7. 345 U.S. 83 (1953).

8. 363 U.S. 405 (1960).

However, the court relied on language in *Malloy v. Hogan*[9] and *Griffin v. California*[10] and proscribed any sanction which makes assertion of the privilege "costly." But any sanction tending to discourage assertion of the privilege would make such assertion costly, so this ruling could conceivably be interpreted to bestow on the assertion of the privilege a sanctity which would hinder the proper function of the state or federal government in the maintenance of qualified public servants.[11] Thus, it would be best to limit the rationale of the instant case to proceedings involving attorneys, and leave an employee's duty to the state unaffected.[12]

However, can an attorney be distinguished from an employee of the state with regard to his right to claim the privilege against self-incrimination? It is submitted that this distinction may very well be made.[13] Two factors indicate that the attorney's duty should not be as great as that of the state employee. In the first place, their source of compensation is different. Though an officer of the court, an attorney receives his remuneration from his client. He is not an employee of the state but is merely a licensee; clearly the duty owed by the licensee to his licensor is not as great as that owed by an employee to an employer who pays his wages.[14] Secondly, dismissal of a state employee is, for the most part, a matter of administrative discretion, whereas an attorney can be disbarred only after a formal judicial hearing with attendant due process safeguards.[15]

---

9. 378 U.S. 1 (1964).

10. 380 U.S. 609 (1965).

11. See Nelson v. Los Angeles County, 362 U.S. 1 (1960); Beilan v. Board of Public Education, 375 U.S. 399 (1958); (dual status applied to school teachers in both cases); Lerner v. Casey, 357 U.S. 468 (1958) (applied to subway conductor), See also Comment, 47 CORNELL L.Q. 255 (1961).

12. Justice Douglas states that the Court does not pass on whether a policeman who invokes the privilege could be discharged (385 U.S. at 516 n.3), but, as indicated, a strict reading of the language used by the court seems to require such a conclusion. However, if the Court does limit the holding of this case to attorneys, it is submitted that it has valid grounds to do so. See notes 13-19 *infra* and accompanying text.

13. Justice Fortas, concurring, draws this distinction. Because of this it would seem that the majority would change were the Court presented with a case involving a state employee's assertion of the privilege.

14. This is the position taken by Justice Fortas, 385 U.S. at 520: "But a lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. His responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as a part of its licensing procedures. The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights."

15. In Louisiana, an attorney can be disbarred only after a committee appointed by the Supreme Court has borne the burden of proving the charges against him.

In a criminal proceeding, no inference may be drawn from a defendant's invocation of the privilege against self-incrimination.[16] Disbarment proceedings, although quasi-criminal in nature, have traditionally been considered civil, rather than criminal.[17] In a civil proceeding, no inference will be drawn from a party's assertion of the privilege where that party did not have the burden of proof until the party bearing the burden of proof had established a prima facie case.[18] Since there is a traditional reluctance to disbar attorneys[19] and since the accuser must bear the burden of proving the misconduct charged, it follows that an attorney's invocation of the privilege alone could not discharge the accuser's burden and therefore could not serve as a basis for disbarment.[20] For these reasons, and because it appears anomalous to make the exercise of a constitutional right misconduct justifying disbarment, it is submitted that the rule in the instant case as it applies to disbarment proceedings is welcome.[21]

As indicated above, however, the ruling of the instant case would seem to affect proceedings for admission to the bar also. This result is not as desirable, for the applicant, when questioned concerning his qualifications for admission, does not face a "loss of professional standing, professional reputation, and of livelihood"[22] but instead is faced with denial of one particular means

In re Fallon, 204 La. 955, 16 So.2d 532 (1944). See also *In re* Steiner, 199 La. 500, 6 So. 2d 641 (1942); Louisiana State Bar Assn. v. Wheeler, 243 La. 618, 145 So. 2d 774 (1962). In addition, the evidence introduced must be "lawful," *In re* Reed, 203 La. 1008, 14 So. 2d 641 (1943), and evidence of both the act and the accused attorney's motive for its commission must be clear and convincing. *In re* Weber, 202 La. 1037, 13 So. 2d 341 (1943). See also 7 C.J.S. *Attorney and Client* § 33, at 787 (1937).

16. Griffin v. California, 380 U.S. 609 (1965), Wilson v. U.S., 149 U.S. 60 (1892). See also McCORMICK, EVIDENCE § 132, at 276-277 (1954).

17. See 7 C.J.S. *Attorney and Client* § 28, at 771 (1937).

18. See Comment, 57 NW. U.L. REV. 644, 648 (1962), and authorities cited there.

19. See *Ex parte* Wall, 107 U.S. 265 (1882).

20. In fact, the Supreme Court in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957) and Konigsberg v. State Bar of California, 353 U.S. 252 (1957) indicated that a good faith claim of a constitutional privilege (be it federal or state) could not raise an inference of bad moral character or professional misconduct. See also Slochower v. Board of Higher Education, 350 U.S. 551 (1956). This conclusion has also been reached by several state supreme courts. See e.g., Sheiner v. State, 82 So. 2d 657 (Fla. 1955); *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).

21. Admittedly, this holding would cast doubt on the constitutional validity of state statutes should there be any requiring the accused attorney in a disbarment proceeding to bear the burden of proving his fitness, but this would appear to be a just result for an attorney should be deprived of his profession only on strong evidence of professional misconduct and not on an inability to prove that no misconduct had taken place.

22. 385 U.S. at 516.

of livelihood. Although this undoubtedly is a sanction making assertion of the privilege costly, since the applicant must bear the burden of proving his fitness and by refusing to answer questions regarding that fitness he could thwart any inquiry into his qualifications, it seems that the rule of the instant case is unsatisfactory if applied to admission proceedings. Instead, it is submitted that the court adhere to the evidentiary weight test whereby all the evidence, including the assertion of the privilege, is considered in deciding whether the applicant has discharged his duty to prove his suitability to practice law.[23]

Finally, although the rule of the instant case may be desirable for removing the fetters from a lawyer's exercise of the privilege, it does present difficulty for the state investigating charges against an attorney where only the attorney or his records could provide the needed information. This difficulty can perhaps be overcome by requiring the attorney to keep certain records which bear on his practice of law. These records would then become "required" and under *Shapiro v. United States*,[24] would be outside the protection afforded by the fifth amendment privilege against self-incrimination.[25] It is doubtful that granting the attorney (or applicant) immunity[26] from criminal prosecution if he gives the required testimony, so protecting him from both state and federal prosecution based on the testimony given,[27] would accomplish the desired result. An immunity statute must be as broad as the privilege it replaces and so must remove those sanctions whose imposition was protected by the privilege.[28] Traditionally, the witness compelled to relin-

23. See Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957) and Konigsberg v. State Bar of California, 353 U.S. 252 (1957), where the Court found that there was insufficient evidence to overcome applicant's proof of fitness, so making denial of admission unreasonable. *But see* Barsky v. Board of Regents, 347 U.S. 442 (1954), where suspension of petitioner's medical license was held to be in accord with the evidence.

24. 335 U.S. 1 (1948).

25. The plurality does not reach the question of the required records doctrine in this case since it was not properly presented, nor do the Justices indicate what their opinion on this doctrine would have been had the issue been presented. However, Justice Fortas, in his concurring opinion, states that he would have affirmed disbarment had Spevack failed to produce required records, but agrees that the issue was not properly presented. For a critique of the scope of the required records doctrine, see Comment, 65 COLUM. L. REV. 681 (1965).

26. In the instant case such immunity could have been extended to the petitioner under NEW YORK PENAL LAW § 2447, but it appears that the investigating committee chose not to do so. *But see* note 28 *infra* and accompanying text.

27. See Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

28. See United States v. Ulmann, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896). For a good discussion of the interplay between immunity statutes and the privilege against self-incrimination, see Sobel, *The Privilege Against Self-Incrimination "Federalized,"* 31 BROOKLYN L. REV. 1 (1964).

quish the privilege was protected from the imposition of penal sanctions whereas remedial sanctions could follow from the compelled testimony.[29] Since disbarment was not imposed to penalize the attorney but to protect the public from official ministrations of persons unfit to practice law,[30] and so could be termed a remedial sanction, the attorney might be required to testify provided no penal sanction would result from the testimony. But the instant case makes it unlikely that disbarment will be considered a remedial sanction in the future.[31] The "required records" doctrine, however, may furnish a means whereby the state can maintain the high standards of the legal profession while preserving to the lawyer his constitutional right to assert the privilege against self-incrimination.

Thomas R. Blum

---

29. See Comment, 70 HARV. L. REV. 1454, 1464 (1957). Remedial sanctions are those imposed to protect a continuing and substantial public interest. Penal sanctions are imposed to punish an individual for past conduct. So in Hale v. Henkel, 201 U.S. 43 (1906) public disgrace was not considered to be a penal sanction nor was loss of job so considered in Pfitzinger v. United States Civil Serv-Com'mn, 96 F. Supp. 1 (D. N.J.), *aff'd per curiam*, 192 F.2d 934 (3d Cir. 1951), nor were treble damages so considered in Amato v. Parker, 157 F.2d 719 (10th Cir. 1946), *cert. denied*, 329 U.S. 812 (1947).

But see Comment, 72 YALE L.J. 1568, 1586 (1963), where it is urged that the scope of penal sanctions be broadened to include all sanctions which may work a severe deprivation on the person compelled to testify. So if a sanction is imposed for a deliberate or negligent disregard of establish standards, that writer urges that the sanction be deemed penal. But if the sanction is levied for failure to meet those standards because of incompetence or inability he suggests that it be then deemed remedial. Clearly, application of such a standard would prevent disbarment which rests on testimony compelled by conferring immunity.

30. *Ex parte* Wall, 107 U.S. 265 (1882); Hertz v. United States, 18 F.2d 52 (8th Cir. 1927); *In re* Cohen, 9 A.D.2d 436, 195 N.Y.S.2d 990 (1959).

31. Justice White, in his dissent, 385 U.S. at 530, points out that Garrity v. State of New Jersey, 385 U.S. 493 (1967) would prohibit the use of testimony procured under threat of disbarment in a subsequent criminal proceeding and so votes to affirm petitioner's disbarment in the instant case. Justice Harlan also seems to espouse this view in his dissent. 385 U.S. at 520. So it would seem that four Justices of the Supreme Court (since Justices Stewart and Clark joined in Justice Harlan's dissenting opinion) are of the opinion that disbarment would be a remedial, not a penal, sanction and so could be imposed without constitutional repercussions.

The plurality, on the other hand, ignores this question completely, concentrating on protecting the attorney's assertion of the privilege from any sanction which makes such assertion costly. The whole tenor of its argument, however, is that disbarment is such a sanction to be protected by the privilege. And, logically, since it is protected by the privilege, it must be so protected by an immunity statute.