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NOTES

ATTORNEYS—SELF-INCRIMINATION—The Attorney's Privilege Against Self-Incrimination in a Disbarment Proceeding

A state court has jurisdiction to deal with the alleged misconduct of attorneys practicing before it either explicitly by statute[1] or by virtue of its power to control the conduct of its own affairs.[2] Indeed, it can suspend or disbar an attorney who fails to maintain the standard of conduct established for members of the legal profession.[3] One aspect of such a standard is that an attorney is bound not to obstruct the administration of justice, a duty which imposes upon him an affirmative obligation to cooperate with the courts.[4] The question frequently arises whether, in order to satisfy the requisite standard of cooperation, an attorney must forfeit his privilege against self-incrimination.[5] Courts have consistently held that an attorney cannot be disbarred for having asserted the privilege in a previous criminal trial or grand jury proceeding,[6] but differences of opinion have arisen when an attorney has invoked the privilege during a judicial inquiry into alleged unprofessional activities of members of the bar.[7] In *Cohen v. Hurley*,[8] the United States Supreme Court upheld the constitutionality of an attorney's disbarment on the ground that, in the course of such an investigation,

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1. *E.g.*, N.Y. JUDICIARY LAW § 90(2):
> The supreme court shall have power and control over attorneys . . . and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice . . . any attorney . . . who is guilty of professional misconduct, malpractice, fraud, . . . or any conduct prejudicial to the administration of justice . . . .

2. *Ex parte* Bradley, 74 U.S. (7 Wall.) 364 (1868); *Ex parte* Thompson, 228 Ala. 113, 152 So. 229 (1933); *In re* Clifton, 115 Fla. 168, 155 So. 324 (1934); West v. Field, 181 Ga. 152, 181 S.E. 661 (1935); Bar Ass'n v. Casey, 211 Mass. 187, 97 N.E. 751 (1912); Norfolk Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E. 282 (1934).

3. People *ex rel.* Chicago Bar Ass'n v. Baker, 311 Ill. 66, 142 N.E. 554 (1924); Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131 (1849); State *ex rel.* Attorney Gen. v. Breckenridge, 126 Okla. 86, 258 Pac. 744 (1927).

4. Gould v. State, 99 Fla. 662, 127 So. 309 (1930); *In re* Mosher, 24 Okla. 61, 102 Pac. 705 (1909); State v. Mannix, 133 Ore. 329, 288 Pac. 507 (1930); *In re* O'Brien, 95 Vt. 167, 113 Atl. 527 (1922).

5. This privilege is not only included in the fifth amendment to the United States Constitution, but it is also in the constitutions of all but two of the states. In these two states, Iowa and New Jersey, it has been adopted by case law. See 8 WIGMORE, EVIDENCE 318-29 (McNaughton rev. 1961).

6. In the Matter of Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907); Sheiner v. State, 82 So. 2d 657 (Fla. 1955); *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); People *ex rel.* Taylor v. Forbes, 143 N.Y. 219, 38 N.E. 303 (1894).

7. *Compare* Cohen v. Hurley, 7 N.Y.2d 488, 199 N.Y.S.2d 658, 166 N.E.2d 672 (1960), *aff'd*, 366 U.S. 117 (1961), *and* In the Matter of Vaughn, 189 Cal. 491, 209 Pac. 353 (1922), *with* Sheiner v. State, 82 So. 2d 657 (Fla. 1955). See also People *ex rel.* Colorado Bar Ass'n v. Webster, 28 Colo. 223, 64 Pac. 207 (1901).

8. 366 U.S. 117 (1961).

the attorney had breached his duty to cooperate with the courts by invoking the privilege contained in the New York Constitution.[9] The dissenters in *Cohen* stated that if the states were governed by the fifth amendment,[10] state courts could not disbar an attorney merely because he had invoked the privilege.[11] Subsequently, the Court held in *Malloy v. Hogan*[12] that the fifth amendment privilege against self-incrimination was enforceable against the states through the due process clause of the fourteenth amendment,[13] and, in *Griffin v. California*,[14] it held that no inference of guilt could be drawn merely because a person has invoked the privilege. The question now arises whether, in light of those decisions, *Cohen v. Hurley* is still good law. A New York court recently stated that the *Cohen* decision is in no way impaired by *Malloy*,[15] a conclusion which warrants examination.

While no Supreme Court cases have dealt directly with an attorney's assertion of his fifth amendment privilege against self-incrimination, the cases dealing with the assertion of the privilege by public employees are apposite, since attorneys are generally regarded as officers of the court,[16] subject to its control as if they were

9. N.Y. CONST. art. I, § 6. The case was appealed to the Supreme Court in order to determine whether the New York courts' interpretation of the state constitution violated the "due process" clause of the fourteenth amendment to the United States Constitution.

10. The relevant provision of the fifth amendment is as follows: "nor shall any person . . . be compelled in any criminal case to be a witness against himself, . . ." The construction of this clause by the federal courts constituted the so-called "federal privilege" which before Malloy v. Hogan, 378 U.S. 1 (1964), was enforced only against the federal government.

11. Cohen v. Hurley, 366 U.S. 117, 154 (1961).

12. 378 U.S. 1 (1964).

13. The Court held that a conviction for contempt where the petitioner had refused to answer questions in a state gambling investigation concerning the circumstances of an earlier gambling arrest was a violation of the "due process" clause, and hence illegal state action. Although the holding that this activity violated the "due process" clause would not necessarily mean that any conduct which violates the "federal privilege" also violates the "due process" clause, it is clear that the Court intended *Malloy* to have this effect. According to Mr. Justice Brennan's doctrine of "selective incorporation," once any part of a right guaranteed in the Bill of Rights is included within the "due process" clause, the entire right is included. In other words, the federal and state governments are now subject to the same restrictions. See *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *Cohen v. Hurley*, 366 U.S. 117 (1961) (Brennan, J., dissenting).

14. 380 U.S. 609 (1965).

15. Matter of Spevack, 24 App. Div. 2d 653, *aff'd*, 16 N.Y.2d 1048, 266 N.Y.S.2d 126 (1965), *cert. granted*, 383 U.S. 942 (1966). The *Griffin* case was not mentioned in either of the New York courts' opinions.

16. Powell v. Alabama, 287 U.S. 45, 73 (1932); *In re* Durant, 80 Conn. 140, 67 Atl. 497 (1907); Gould v. State, 99 Fla. 662, 127 So. 309 (1930); People *ex rel.* Attorney Gen. v. Beatie, 137 Ill. 553, 27 N.E. 1096 (1891); Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960); In the Matter of Keenan, 287 Mass. 577, 192 N.E. 65 (1934); Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694 (Ct. Err. & App. 1902).

its employees.[17] In *Slochower v. Board of Higher Education*,[18] the Court held that the discharge of a public employee based on inferences of guilt[19] drawn from his assertion of his fifth amendment privilege against self-incrimination was a denial of due process.[20] The Court indicated, however, that there are circumstances in which a public employee may properly be discharged for refusing to answer questions, namely when the inquiry is directed toward his qualifications for employment.[21] Although this case involved a state employee, the privilege was asserted during the course of a federal inquiry. Hence, the *Slochower* decision was an interpretation of the federal privilege against self-incrimination. Two later cases upheld a state's right to discharge a civil servant who invokes the privilege with respect to questions relating to his qualifications. In both *Lerner v. Casey*[22] and *Beilan v. Board of Public Education*,[23] the Court distinguished between an investigation of an employee's qualifications and a general legislative investigation.[24] However, in *Nelson v. Los Angeles County*,[25] the Court apparently discarded this "type of inquiry" distinction by upholding the dismissal of an employee whose refusal to answer before the House Un-American Activities Committee was based on the privilege against self-incrimination. The *Nelson* Court based its decision on the finding that the employee had violated his statutory duty of cooperation.[26]

17. *Ex parte* Bradley, 74 U.S. (7 Wall) 364 (1868); *Ex parte* Thompson, 228 Ala. 113, 152 So. 229 (1933); *In re* Clifton, 115 Fla. 168, 155 So. 324 (1934); West v. Field, 181 Ga. 152, 181 S.E. 661 (1935); Bar Ass'n v. Casey, 211 Mass. 187, 97 N.E. 751 (1912); Norfolk & Plymouth Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E. 282 (1934).

18. 350 U.S. 551 (1956).

19. The inference was implicit in the state statute pursuant to which the employee was discharged. See N.Y.C. 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. . . .

20. The Court rejected the Board of Education's contention that the assertion of the privilege necessarily indicates an unfitness to teach in so far as the person invoking the privilege must be either: (1) guilty of the offense for which he seeks protection; or (2) perjuring himself by misusing the privilege. 350 U.S. at 556-58 (1956).

21. 350 U.S. at 559 (1956).

22. 357 U.S. 468 (1958).

23. 357 U.S. 399 (1958).

24. Mr. Chief Justice Warren's dissenting opinion in *Beilan* emphasizes the fact that the court does so distinguish. The majority had upheld the discharge since it viewed the inquiry as one which went to the petitioner's qualifications. Warren was unable to agree with this factual determination; he believed that the dismissal probably resulted from the petitioner's previous assertion of the privilege before the House Un-American Activities Committee. Since Warren believed that the relevant investigation was not an investigation into the petitioner's qualifications, he was unable to uphold the discharge. 357 U.S. at 411 (1958).

25. 362 U.S. 1 (1960).

26. CAL. GOV'T CODE § 1028.1:

> It shall be the duty of any public employee who may be subpoenaed or ordered by the governing body of the state or local agency by which such employee is employed, . . . or committee or subcommittee thereof, or by a duly authorized

Nelson, like *Slochower*, involved a federal investigation and hence it also was an interpretation of the federal privilege. In applying the privilege against self-incrimination to the states, *Malloy* did not create new dimensions to the privilege—it merely held the states to the federal standards. Thus, just as an employee can be discharged for invoking the privilege against self-incrimination in a federal investigation if the investigation goes to his qualifications or if, by asserting the privilege, the employee violates a duty of cooperation, so the employee may be discharged for invoking the privilege in a state investigation under the same circumstances. Thus, *Malloy* does not erect any additional barriers to a state court's right to compel an attorney's cooperation so long as the judicial inquiries stay within the exceptions articulated in *Slochower* and *Nelson*.[27]

A second group of relevant cases are those in which the attorney's duty of cooperation with investigating bodies, particularly those delving into his qualifications, has clashed with his first amendment privileges. In *Konigsberg v. State Bar*[28] and *In re Anastaplo*,[29] attorneys were denied admission to the bar for refusing to answer questions before committees of bar examiners.[30] The applicants based their refusals to answer on their rights of free speech and free association, protected from state interference by the first and fourteenth amendments,[31] but in both cases the denial of admission to

committee of the Congress of the United States or of the Legislature of this State . . . to appear . . . and to answer under oath a question or questions . . . [relating to his advocacy or knowledge of activities of any organization advocating the overthrow of the Government of the United States].

The Court held that this statute did not implicitly require the drawing of inferences of guilt, since rather than directly prohibiting assertion of the privilege, it merely imposed a positive duty to cooperate. This seemingly tenuous distinction between the statute in the principal case and the statute in *Slochower* (see note 19 *supra*) may in effect reduce *Slochower* to its particular facts:

1) It was not a direct inquiry into the employee's qualifications.
2) The employee was not aware that he would be discharged for asserting the privilege.
3) The employee was dismissed without a hearing.
4) The employee had previously answered the same questions before a state committee.

27. However, it must be noted that the efficacy of the doctrine established in *Lerner*, *Beilan* and *Nelson* is doubtful because the dissenters in these cases have become the majority in subsequent self-incrimination cases. See, *e.g.*, Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965). Furthermore, *Nelson* was an affirmance by an equally divided Court; the Chief Justice did not participate in the decision.

28. 366 U.S. 36 (1961).

29. 366 U.S. 82 (1961). Again, it should be noted that in both cases, strong dissents were filed by the members of the "new majority." See note 27 *supra*.

30. In both instances, the purpose underlying the committees' inquiries was to examine the qualifications of applicants for admission to the bar.

31. U.S. CONST. amend. I: "Congress shall make no law abridging the freedom of speech. . . ." This provision has been held to apply to the states through the "due process" clause of the fourteenth amendment. De Jonge v. Oregon, 299 U.S. 353 (1937).

the bar was affirmed. The Court noted that these rights are not absolute, but rather, may be balanced against competing government interests.[32] In each of these cases, the Court held that the interest of the state in controlling membership of the bar outweighed the encroachment of the applicants' rights of free speech and association. However, although the state interest outweighs the applicants' first amendment rights, it does not necessarily follow that this interest will also outweigh the privilege against self-incrimination, for the Court has never acknowledged that it is willing to balance the privilege against self-incrimination.

While the Court is not willing to openly balance the fifth amendment privilege, it is willing to distinguish certain factual situations in which the privilege cannot be invoked. In *United States v. Kahriger*,[33] the Court upheld provisions of the Gambler's Registration Act,[34] which provided that all persons engaged in the business of accepting wagers must register their names and places of business with the Internal Revenue Bureau. In *Shapiro v. United States*,[35] the Court stated that certain records which are required by law to be maintained acquire "public aspects" and could not be protected by the privilege, since the privilege cannot be raised when "there is a sufficient relation between the activity sought to be regulated and the public concern . . . ."[36] The effect of these two cases is to deprive an individual of his privilege against self-incrimination when the interests of the state are sufficiently forceful. The privilege also seems to have been subject to this type of implicit balancing in *Nelson* and *Lerner*, where the right to invoke the privilege was impaired by the imposition of disabilities on those asserting it, since this encumbrancing of the privilege seems to have been a direct result of the competing state interest. Again, there seems to have been an implicit balancing in *Orloff v. Willoughby*,[37] where a prospective army officer was denied a commission because, in reliance on his privilege against self-incrimination, he failed to answer questions concerning his loyalty. The Court noted that the inquiry with which he refused to cooperate was pertinent to his job qualifications and that there was a compelling government interest in the regulating of his vocation. Since the facts of *Orloff* are analogous to those in *Cohen*, *Orloff* would seem to be controlling, for certainly the states have a considerable interest in regulating the composition of the bar.

32. NAACP v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); United States v. Rumely, 345 U.S. 41 (1953).

33. 345 U.S. 22 (1953).

34. 65 Stat. 530 (1951) (now INT. REV. CODE OF 1954, §§ 4401(c), 4411-12).

35. 335 U.S. 1 (1948).

36. *Id.* at 32.

37. 345 U.S. 83 (1953).

While this result may seem harsh, the same practice is followed in any licensing procedure—an applicant is in effect compelled to provide information establishing his qualifications. Surely it could not be argued that an applicant, knowing that his answers would reveal that he is unqualified, may refuse to answer and yet demand that his license be granted. Since there is no constitutional right to retain a license,[38] an investigation into whether a licensee has maintained his qualifications seems constitutionally indistinguishable from an investigation as to qualifications at the time of application.[39] There seems to be no reason, therefore, why the duty to cooperate with an investigation into an attorney's qualifications could not be made an obligation which he must satisfy in order to retain his membership in the bar.

In at least one instance, however, the privilege against self-incrimination will not be balanced: when the answers which the questions elicit may reveal information which could be used in convicting the attorney of a crime.[40] The Court has made it quite clear that a state cannot constitutionally force a person, by placing him under a threat of contempt, to answer questions which may lead to his being convicted of a crime unless he is given complete immunity from prosecution.[41] Whether a state can force an attorney to testify by granting him immunity from criminal prosecution and then use the information obtained to disbar him depends on the characterization of disbarment, since the privilege is available only when used for protection from criminal prosecutions, or proceedings which could result in a penalty or forfeiture.[42] Obviously disbarment is not a criminal proceeding. Furthermore, although the Supreme Court has never addressed itself to the question whether disbarment is a penalty, it is unlikely that it would reach this result since it has always regarded as the primary purpose of a disbarment proceeding the protection of the public from persons unfit to practice law, rather than the punishment of the attorney.[43] While it

38. Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1882); Union Passenger Ry. v. Philadelphia, 101 U.S. 528 (1880); Doyle v. Continental Ins. Co., 94 U.S. 535 (1877), *overruled on other grounds sub nom.* Terral v. Burke Constr. Co., 257 U.S. 529, 533 (1922).

39. See Cohen v. Hurley, 366 U.S. 117, 123 (1961).

40. In Matter of Spevack, 24 App. Div. 2d 653, *aff'd*, 16 N.Y.2d 1048, 266 N.Y.S.2d 126 (1965), *cert. granted*, 383 U.S. 942 (1966), there is a possibility that the attorney could be convicted of solicitation under N.Y. PENAL LAW § 270-a which provides:

> It shall be unlawful for any person . . . to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services.

41. Stevens v. Marks, 383 U.S. 234 (1966).

42. Boyd v. United States, 116 U.S. 616, 633 (1886).

43. *Ex parte* Wall, 107 U.S. 265 (1882). The same is true of most state courts. *Ex parte* Thompson, 28 Ala. 113, 152 So. 229 (1933); *In re* Stone, 77 Ariz. 115, 267 P.2d 892 (1954); In the Matter of Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940); Gould v. State, 99 Fla. 662, 127 So. 309 (1930); *In re* Kerl, 32 Idaho 737, 188 Pac. 40 (1920);

could be argued that the seriousness of disbarment renders it penal, the Court has held that deportation, which involves an even more significant deprivation, is not a penalty, and, consequently, that inferences of guilt may be drawn from respondents' refusal to testify, even though the privilege against self-incrimination has been asserted.[44] Since it thus appears that disbarment should not be characterized as a penalty, states may attain the same control exercised in *Cohen*, namely forcing an attorney to testify against himself in a disbarment proceeding, by granting him immunity from criminal prosecution.[45] If the attorney answers the questions, the information can be used against him for disbarment. If he claims the privilege and refuses to answer, inferences of guilt which may lead to his disbarment may constitutionally be drawn from his silence.

Thus, it would appear that despite *Malloy's* enforcement of the fifth amendment privilege against the states, an attorney refusing to testify at an inquiry into his alleged misconduct by asserting the privilege against self-incrimination may constitutionally be disbarred if the alleged misconduct is not criminal. If the alleged misconduct is criminal in nature, however, the attorney may be disbarred only if he had been given immunity from criminal prosecution.

In re Heirich, 10 Ill. 2d 357, 140 N.E.2d 825 (1957); Keithley v. Stevens, 238 Ill. 199, 87 N.E. 375 (1909); *In re* Edge, 282 S.W.2d 830 (Ky. 1955); *In re* Craven, 178 La. 372, 151 So. 625 (1933); In the Matter of Keenan, 287 Mass. 577, 192 N.E. 65 (1934); *In re* Randolph, 347 S.W.2d 91 (Mo.), *cert. denied*, 368 U.S. 916 (1961); In the Matter of Pennica, 36 N.J.2d 401, 177 A.2d 721 (1962); see In the Matter of Rouss, 221 N.Y. 81, 116 N.E. 782 (1917), *cert. denied*, 246 U.S. 661 (1918); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960); *cf.* In the Matter of Solovei, 250 App. Div. 117, 293 N.Y. Supp. 640, *aff'd*, 276 N.Y. 647, 12 N.E.2d 802 (1937).

Florida, which does not allow disbarment of attorneys for invoking the privilege against self-incrimination, Sheiner v. State, 82 So. 2d 657 (Fla. 1955), does allow a person granted immunity from "penalty or forfeiture," FLA. STAT. § 932.29 (1941), to be disbarred on the basis of evidence he produces. Florida Bar v. Massfeller, 170 So. 2d 834 (Fla. 1964).

44. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); DaCosta v. Holland, 151 F. Supp. 746 (E.D. Pa. 1957); Cheng Chan Chu v. Shaughnessy, 127 F. Supp. 681 (S.D.N.Y. 1955).

45. At the present time, almost all of the states have statutes which could be utilized. *E.g.*, N.Y. PENAL CODE § 2247:

> In any investigation or proceeding . . . if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made . . . that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him . . . .