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Constitutional Law--Right To Decline To Give Incriminating Testimony--Disciplinary Action Against Lawyers

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Petitions were submitted by the Florida State Bar Board of Governors and the Miami Bar Association to amend the integration rule of the Florida State Bar. The amendments sought to discipline members who pleaded the fifth amendment as to inquiries relating to past or present communist affiliations.

The petition put forth by the Miami Bar Association provided that if a lawyer, in refusing to answer questions as to his past or present communist affiliations by pleading the fifth amendment to the United States Constitution, magnifies the doubt as to whether he is a fit person to engage in the practice of the law, this would be conclusive grounds for disbarment. The modification sought by the Board of Governors would only have made such refusal to answer questions prima facie evidence of unfitness. Held, petitions for amendment granted, but the court substituted a revised amendment, deleting that portion concerning refusal to answer questions under the fifth amendment. In re The Integration Rule of the Florida Bar, 103 So. 2d 873 (Fla. 1958).

In order to evaluate the problem of disbarment of a lawyer on the basis of his pleading the fifth amendment, the following issues will be raised: 1. Is one entitled to the protection of due process of law in a disbarment proceeding? 2. What inferences can be drawn from its use? 3. What weight of evidence is necessary to show lack of moral fitness as grounds for disbarment, as compared with that necessary to moral fitness as a condition precedent to admittance to the bar?

In McCarthy v. Arndstein, 266 U.S. 34, 40 (1924), the court stated that "the constitutional privilege against self-incrimination applies to civil proceedings . . . whenever the answer might tend to subject to criminal responsibility him who gives it." The weight of authority is that the amendment can be invoked in any proceeding provided that an answer may lead to later incrimination. Grae v. Kennedy, 282 N.Y. 428, 26 N.E.2d 963 (1940).

As to what inferences may be drawn from the plea of the fifth amendment in refusing to answer questions relevant to the proceedings, the Supreme Court of the United States has been consistent in the view that such refusal cannot be taken as an inference or presumption of guilt. Slochower v. City of New York, 350 U.S. 551 (1955); United States ex rel. Belfrage v. Shaughnessy, 212 F.2d 128
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(2d cir. 1953). The highest state courts have also been consistent in applying this general rule to disbarment proceedings. *Sheiner v. Florida*, 82 So. 2d 657 (Fla. 1955).

However, in *Brown v. Walker*, 161 U.S. 591 (1896), the court indicated that if the testimony sought cannot possibly be used as a basis for a criminal prosecution against the witness the rule ceases to apply. This case also stands for the proposition that if the answer would have tended only to disgrace the witness and bring him into disrepute, he might still be compelled to answer; in such a case his refusal may sustain an inference or presumption against his cause.

It was stated in the case of *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917), that disbarment is not a criminal proceeding, nor is deprivation of right to practice a criminal penalty. This means that an inference of guilt is valid if the attorney refuses to testify at all. *Fish v. State Bar of California*, 214 Cal. 215, 4 P.2d 937 (1931); *McIntosh v. State Bar of California*, 211 Cal. 261, 294 Pac. 1067 (1931); *In re Vaughn*, 189 Cal. 514, 209 Pac. 353 (1922). Such an inference is also valid where it is found that the fifth amendment was pleaded in bad faith. *In re Becker*, 241 N.Y. Supp. 369 (1930). The reasoning behind these causes is that the lawyer is guilty of intentional obstruction of justice, and that this is misconduct serious enough to warrant dismissal.

No case has been found wherein an attorney was disbarred solely because of membership in the Communist Party. In certain cases the court appeared to base disbarment on this ground, but on closer examination, the disbarment seems to rest upon the doing of overt acts in furtherance of the communist cause. *Cf. In re Smith*, 133 Wash. 145, 233 Pac. 288 (1925); *In re Margolis*, 269 Pa. 206, 112 Atl. 478 (1921). This is a matter left for future determination. For the purposes of this comment we will assume that it is grounds for dismissal.

No cases have been discovered where disbarment was based on the refusal of an attorney to answer possibly incriminating questions at a disbarment proceeding. There are, however, cases holding that a good faith refusal to answer pertinent questions is not grounds for disbarment. *In re Holland*, 37 Ill. 346, 36 N.E.2d 543 (1941); *In re Rouss, supra*.

In the cases involving denial of admission to the bar because of refusal to answer questions, the courts have reached a different result. In this situation the applicant has the burden of satisfying the committee of his moral fitness to be a member of this honored
profession; in which case, if he refuses to answer relevant questions,
he is not entitled to admission to the bar. In re Anastaplo, 3 Ill. 2d
471, 121 N.E.2d 826 (1954); In re Brown, 389 Ill. 516, 59 N.E.2d
855 (1945).

The cases involving refusal to answer as justified by the fifth
amendment are probably sound; but assuming that membership in
the Communist Party is ground for disbarment, it is submitted that
a refusal to answer the question, "Are you a member of the Com-
munist Party?", may mean only one of two things. Either may well
be argued as grounds for disbarment. If the attorney is properly
invoking the fifth amendment, this would mean that he would have
had to answer in the affirmative, and is a member of the Communist
Party. If he is not a member of the Communist Party, and invokes
the protection of the fifth amendment, this would be grounds for
disbarment as conduct in the nature of perjury, because the attorney
has falsely stated under oath that his answers would be self
incriminating.

The American Bar Association has set forth its views time and
time again in the American Bar Association Journal, that a member
who invokes the fifth amendment is unfit to practice law and should
be disbarred. A statement in 39 A.B.A.J. 1084 (1953), is typical:
"Such conduct is bound to shake public confidence and once this
happens they [lawyers] have forfeited the right to enjoy the
privilege of remaining on the rolls." That this view has met with
much disagreement is reflected in 40 A.B.A.J. 404 (1954), wherein
an article appears expressing the view that want of public con-

West Virginia has provided statutory procedure to be followed
in a disbarment proceeding. W. Va. Code ch. 30, art. 2, § 7 (Michie
1955). The statute is silent as to amount of proof needed, or any
inference to be drawn from the refusal of accused to answer ques-
tions. However, West Virginia cases remove any doubt as to amount
of evidence needed, and by implication would seem to remove any
doubt as to possible inferences of guilt based on refusal to answer.
In the case of In re Damron, 131 W. Va. 66, 45 S.E.2d 741 (1947),
the court stated that "to suspend or annul the license of an attorney
in a proceeding for that purpose under 30-2-7, Code, 1931, the mis-
conduct which justifies the suspension or the annulment of his
license must be established by full, clear and preponderant evi-

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