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Attorney and Client--Disbarment of Attorney For Invoking Fifth Amendment-Denial of Due Process

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CASE COMMENTS

ATTORNEY AND CLIENT—DISBARMENT OF ATTORNEY FOR INVOKING FIFTH AMENDMENT—DENIAL OF DUE PROCESS.—*D*, an attorney, was disbarred for refusing to answer questions concerning his alleged membership in the communist party by invoking the privilege against self-incrimination. On appeal the court stated that an attorney cannot practice law and be a member of the communist party because the irreconcilable conflict in philosophies would prevent him from taking the oath required for admission to the bar. Here, however, the issue is whether or not the privilege against self-incrimination is available to an attorney in a disbarment proceeding. *Held*, that disbarring an attorney merely for invoking the constitutional privilege against self-incrimination is a denial of due process of law. The dissent stated that an attorney has a right to the constituional protection against self-incrimination but there is no constitutional right to practice law, only a privilege, and once he invokes this protection he loses the privilege granted him by the state. *Sheiner v. State*, 82 So.2d 657 (Fla. 1955).

The majority opinion recognizes that the communist ideology of world revolution is so diametrically opposed to the democratic philosophy of free government that a lawyer who joins the communist party forfeits his privilege to practice law; the question here being whether or not due process was accorded *D*. The historical purpose of the privilege against self-incrimination was to impede prosecution of crimes in which religious or political belief was materially involved. *Sheiner v. State, supra* at 658. However, it has been said that "if the privilege is to be effective at all it must be given a comprehensive application, and thus must prevent compulsory self-incrimination in *any* proceeding." GRISWOLD, THE FIFTH AMENDMENT TODAY 55 (1955). That this applies to a witness in his general capacity as an individual is not questioned. However, should attorneys who are in a special position of trust in the administration of the judicial branch of government be allowed to invoke it?

The general rule is that the practice of law is not a right but a privilege. *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917). "This license, a personal privilege, is burdened with pre-existing as well as subsequent conditions calculated to uphold and maintain the dignity of the court, the ethics of the profession and the welfare of all concerned with the administration of justice." *In re Taylor*,

309 Ky. 388, 217 S.W.2d 954 (1949). It is a privilege with conditions attached, and compliance with these conditions is not only required at the time of admission to the bar but also afterwards. *In re Rouss, supra.* Generally states impose as a condition precedent for admission to the bar the taking of an oath to support the state and federal constitutions. Such an oath demands loyalty to our government. Is this loyalty to be demanded only at the moment of admission or also afterwards?

Although membership in the bar is a privilege, the courts have not separated an attorney's rights as a citizen and his privilege as a lawyer. They recognize that as a layman, and as an attorney, he has the right to invoke the fifth amendment, without losing his privilege to practice law. *In re Holland,* 377 Ill. 346, 36 N.E.2d 543 (1941). Courts have no trouble in making such a distinction when teachers, policemen, or public officers are involved. In a case involving a teacher invoking the fifth amendment the court stated that owing to a statute, "the assertion of the privilege against self-incrimination is equivalent to a resignation." *Daniman v. Board of Education,* 306 N.Y. 532, 119 N.E.2d 373 (1954). The court stated that teachers work for the state upon reasonable terms laid down by the state and not upon their own terms. In *Board of Education v. Wilkinson,* 125 Cal. App. 2d 100, 270 P.2d 82 (1954), a teacher was dismissed for refusing to answer questions concerning her alleged communist activities. Here the teacher did not plead the fifth amendment but invoked another basis for refusal. The court found that mere refusal to answer questions made her guilty of unprofessional conduct and subject to dismissal. The court stated: "[a] teacher's employment in the public schools is a privilege, not a right. A condition implicit in that privilege is loyalty to the government under which the school system functions. It is the duty of every teacher to answer proper questions in relation to his fitness to teach our youth when put to him by a lawfully constituted body authorized to propound such questions."

In *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892), the court recognized the demarcation between a person's rights as a citizen and those as a policeman. There Mr. Justice Holmes stated; "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." In *Christal v. Police Comm'n of San Francisco,* 33 Cal. App. 2d 564, 92 P.2d 416 (1939), police officers refused to testify before a grand jury. The court stated the privilege "may be exercised by

all persons, including police officers, in any proceeding, civil or criminal." However, "duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them."

In a case where police officers were discharged for refusing to waive immunity from prosecution which might arise out of testimony before a grand jury, the court stated: "the basic question is not the right of the public officer to exercise a constitutional privilege but whether their refusal was a breach of their public trust . . . ." The court decided that the exercise of the privilege was inconsistent with their duty as police officers. *Drury v. Hurley,* 339 Ill. App. 33, 88 N.E.2d 728 (1949).

The majority opinion in the principal case recognizes the distinction between the rights of an individual in his general capacity as a citizen and his rights as a teacher or police officer, but says there is no such distinction concerning lawyers. *Sheiner v. State, supra* at 658; *accord, In re Grae,* 282 N.Y. 428, 26 N.E.2d 963 (1940). However, do policemen and teachers owe a greater duty to support our government than do lawyers who actively participate in the operation of the judicial machinery, a vital branch of government? It is submitted that lawyers because of the integral part they play in the judicial function of government owe as much, if not more, of a duty to support our government than do teachers and police officers. The court possesses an inherent power to disbar which could be exercised without statutory reasons so that there is no need for a statute authorizing disbarment under the circumstances of the principal case. *State Bar of Michigan v. Hartford,* 282 Mich. 124, 275 N.W. 791 (1937).

As was stated by Lord Mansfield, "the question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion." *Ex parte Brownsall,* 2 Cowp. 829, 98 Eng. Rep. 1385 (1778).

However, it should be noted that in a very recent United States Supreme Court case, the Court stated that the dismissal of a teacher for asserting the privilege against self-incrimination is a violation of due process of law. *Slochower v. Board of Higher*

Education of City New York, 24 U.S.L. WEEK 4178 (U.S. April 10, 1956) (5-4 decision). Although it is not readily ascertainable, the future effect of this decision may prove to be extreme. Hence former cases discussed above may be overruled. But it is the opinion of the writer that if this case is to be applied as a comprehensive rule and not easily distinguishable on its facts, it is unsound in principle. It should also be noted that this was a 5 to 4 decision which although binding law at the present, may cast some doubt as to the future.

M. J. P.

CONSTITUTIONAL LAW—DUE PROCESS—WAIVER OF RIGHT TO OBJECT TO COMPOSITION OF GRAND JURY.—*D* (Poret), arrested in 1951 and charged with rape, eluded officers and fled the State of Louisiana. He was indicted for the crime of rape shortly thereafter, but his location was not discovered until about a year later when it was learned that he was in prison in Tennessee. Upon completion of the Tennessee prison term in 1953, *D* was returned to Louisiana where he was arraigned. He pleaded to the indictment and entered a motion for severance, another defendant (Labat) having been joined with him. The motion was denied and *D* then entered a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury which had returned the indictment. The motion was denied upon the ground that it was made too late. The Louisiana supreme court affirmed, holding that § 202 of the *Louisiana Criminal Code* as interpreted, required that all such objections be made before the end of the third judicial day following the term of the grand jury by which the attacked indictment had been returned and that *D*'s motion, therefore, came more than a year and a half too late. *Held*, that a state may attach reasonable time limitations to the assertion of federal constitutional rights. "The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court.'" The fact that *D* was a fugitive does not give him immunity from the operation of a valid state statute. The fact that *D* had no lawyer during the eighty-seven day period from his indictment to the expiration of his time to file the motion to quash does not alter the situation for he, by his own voluntary action, "failed to avail himself of Louisiana's adequate remedies." Conviction affirmed. *Poret and Labat, Petitioners v. Louisiana*, 350 U.S. 91 (1955).