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Constitutional Law - Self-Incrimination - Refusal of Attorney to Produce Demanded Financial Records and to Testify in a Disciplinary Proceeding on Ground That the Records and Testimony Would Tend to Incriminate Him Not Ground for Disbarment

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DISCUSSION OF RECENT DECISIONS

Regardless of the merits of these suggestions, it is clear that while the standard in the *New York Times* case of knowing or reckless falsehood may be reasonable when dealing with public officials, such a requirement, which is tantamount to a finding of malice, is clearly too severe to apply to persons who are the involuntary subjects of public interest. Often such individuals, as the plaintiff here, already have suffered greatly from circumstances which gave them prominence in the public eye and, therefore, should not be exposed to additional invasions of their privacy by false reports of their tribulations without a suitable means of redress.

Private citizens, as Judge Cooley observed in 1888, have "the right to be let alone" and that right should not be jeopardized by a standard which equates the rights of privacy of one who seeks the public spotlight with one who purposely walks in its shadow.

RICHARD A. BRAUN

CONSTITUTIONAL LAW—SELF-INCrimINATION—REFUSAL OF ATTORNEY TO PRODUCE DEMANDED FINANCIAL RECORDS AND TO TESTIFY IN A DISCIPLINARY PROCEEDING ON GROUND THAT THE RECORDS AND TESTIMONY WOULD TEND TO INCRIMINATE HIM NOT GROUND FOR DISBARMENT.—In the case of *Spevack v. Klein*, 385 U.S. —, 87 Sup. Ct. 625 (1967), the United States Supreme Court was asked to decide whether an attorney's refusal to produce demanded financial records and to testify in a disciplinary proceeding on the basis that the records and his testimony would tend to incriminate him was ground for disbarment. The Court held that the self-incrimination clause of the fifth amendment had been absorbed in the fourteenth and protects lawyers as well as other individuals and could not be watered down by imposing disbarment as a price for asserting it.

The case arose out of a proceeding to discipline the petitioner, a member of the New York Bar, for professional misconduct. Of the various charges made against him, the one surviving was his refusal to honor a subpoena duces tecum demanding that he produce certain financial records pertaining to cases involving contingent fee compensation which, under a New York Court Rule, he was under a duty to preserve. Not only did the

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23 Cooley, Torts 29 (2d ed. 1888).

1 Rule IV(6) of the Rules of the Appellate Division, Second Department of the Supreme Court of New York states:

Attorneys for both plaintiff and defendant in the case of any such claim or cause of action [claims or actions for personal injuries, property damage, wrongful death, loss of services resulting from personal injuries and claims in connection with condemnation or change of grade proceedings] shall preserve, for a period of at least five years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other data relating to the
petitioner refuse to surrender the demanded records, but he also refused to testify at the judicial inquiry. His sole defense was that the production of the records and his testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered the petitioner disbarred, holding that the constitutional privilege against self-incrimination was no defense under the holding of the United States Supreme Court in *Cohen v. Hurley.*

The Court of Appeals affirmed, and the case then came before the United States Supreme Court by writ of certiorari.

In the *Cohen* case, the petitioner had been called to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct as to members of the New York Bar. Cohen, like the petitioner in the instant case, had been requested to produce certain records and to answer the inquiries. He also refused to acquiesce to the demands, invoking the privilege against self-incrimination, and was subsequently disbarred. Cohen argued that the fourteenth amendment gave him a federal constitutional right not to be required to incriminate himself in the state proceeding. The Court rejected this argument on the basis of the holding of *Twining v. New Jersey,* rendered fifty-three years before. A second argument propounded by Cohen was that his disbarment, resulting from his assertion of the privilege against self-incrimination, gave rise to a doctrine whereby lawyers are separated into a special group upon whom special burdens could be imposed. In rejecting this argument, the Court stated:

> We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented...4

In 1964, in the case of *Malloy v. Hogan,* the Supreme Court was once again faced with the proposition that the self-incrimination clause of the fifth amendment was applicable to the states by reason of the fourteenth. In that case the petitioner, a witness in a state inquiry into certain crimes, refused to answer certain questions by invoking the privilege against self-incrimination. In reversing his conviction for contempt, the Supreme Court said:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against fed-

claim of the loss of time from employment or loss of income, medical reports, medical bills, x-ray reports, x-ray bills, repair bills, estimates of repairs, all correspondence concerning the claim or cause of action, and memoranda of the disposition thereof as well as canceled vouchers, receipts and memoranda evidencing the amounts disbursed by the attorney to the client and others in connection with the aforesaid claim or cause of action.

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5 378 U.S. 1, 84 Sup. Ct. 1489 (1964).
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Several infringements—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such silence.6

While the Malloy holding is obviously contrary to that of the Cohen case, the Appellate Division in Spevack v. Klein7 distinguished Malloy on the ground that there the petitioner was not a member of the Bar. It should be noted that in the Malloy case, the Court did not distinguish the Cohen case nor expressly overrule it. The Court in Spevack, noting this fact, stated: "While Cohen v. Hurley was not overruled [by Malloy], the majority indicated that the principle on which it rested had been seriously eroded."8 The New York Court of Appeals affirmed Spevack's disbarment on the authority of the Cohen case and on the ground that the fifth amendment privilege did not apply to a demand that an attorney produce records required by law to be kept by him.

Since the facts of the Cohen case were substantially the same as those of Spevack, the Court had to either affirm the holding by affirming petitioner's disbarment or overrule it. The Court chose the latter course:

We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.9

In a separate concurring opinion, Mr. Justice Fortas agreed with the overruling of the Cohen decision but distinguished between a lawyer's right to remain silent and that of a public employee who is asked specific questions relating to the performance of his official duties.10 He stated that a lawyer is not an employee of the state and 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.

The dissenting opinion written by Mr. Justice Harlan, in which Justices Clark and Stewart concurred, emphasized that the issue was not whether lawyers may enjoy first-class citizenship or whether lawyers may be deprived...
of their federal privilege against self-incrimination but whether the petitioner's disbarment for his failure to provide information relevant to charges of professional misconduct vitiated the protection afforded by the privilege. The minority stated that since the Constitution contains no standard by which the full scope of the privilege against self-incrimination can be ascertained, the Court has been obliged to fashion standards for the application of the privilege. "In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests involved." Recognizing the state's authority to devise both requirements for admission and standards of practice for those wishing to enter the professions, the minority concluded that the rules of the New York Court requiring attorneys to actively assist the courts and appropriate professional groups in the prevention and detection of unethical legal activities and to keep various records in certain kinds of cases were intended to protect the public and could not be said to be unreasonable, arbitrary or unrelated to an attorney's continued fitness to practice.

The minority also pointed out that because the petitioner may lose his status as a lawyer by invoking the privilege against self-incrimination, this in itself is not an impermissible infringement on the protection offered by the privilege. "The Court has repeatedly recognized that it is permissible to deny a status or authority to a claimant of the privilege against self-incrimination if his claim has prevented full assessment of his qualifications for the status of authority." Finally, the minority concluded:

The petitioner was not denied his privilege against self-incrimination, nor was he penalized for its use; he was denied his authority to practice law within the State of New York by reason of his failure to satisfy valid obligations imposed by the State as a condition of that authority. The only hazard in this process to the integrity of the privilege is the possibility that it might induce involuntary disclosures of incriminating materials; the sanction precisely calculated to eliminate that hazard is to exclude the use by prosecuting authorities of such materials and of their fruits.

In a separate opinion in which Mr. Justice White dissented to the holdings of the majority in both Garrity v. State of New Jersey and Spevack, he stated that the petitioner was properly disbarred because the inquiry was about the performance of his public duty and he was therefore obliged to disclose all pertinent information.

The holding in the Spevack case appears to have enlarged the scope of

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12 Supra note 1.
14 Id. at ——, 87 Sup. Ct. at 635.
15 Supra note 10.
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protection provided by the self-incrimination clause of the fifth amendment to include lawyers who assert it in state disciplinary proceedings. However, from the very outset there was never any question as to the petitioner's right to invoke the privilege; and even though he was neither indicted nor convicted of a crime because he invoked the privilege, the majority stated that a person has the right to remain silent and to suffer no penalty for the silence and that "penalty" is not restricted to a fine or imprisonment but means the imposition of any sanction which makes the assertion of the fifth amendment privilege costly.\(^\text{16}\) The only conclusion which the Court could draw from this premise was that the petitioner's disbarment and resulting loss of professional standing and livelihood because of the assertion of the privilege was indeed costly and could not be sustained.

While there can be no question that what the petitioner stood to lose as a result of his invoking the fifth amendment privilege made its assertion costly, the fact that the petitioner was a lawyer whose professional conduct was under scrutiny makes the majority's holding difficult to reconcile. This is especially true when one acknowledges the state's power to regulate the admission of attorneys to the bar and the standards of practice of the legal profession. The lawyer is under a duty, be it because of rules imposed by the highest court of the state in which he practices or because of the standards of conduct imposed by the profession itself, to see that the trust which the public places in him as an officer of the court is not violated. Was what the petitioner was asked to do in the instant case nothing more than what he was under a duty to do? He was asked to produce records which the state court had required him to keep and to cooperate in investigating alleged professional misconduct, and as the minority opinion stated:

These rules are intended to protect the public from the abuses revealed by a lengthy series of investigations of malpractices . . . . It cannot be said that these conditions are arbitrary or unreasonable, or that they are unrelated to an attorney's continued fitness to practice.\(^\text{17}\)

In view of all the circumstances, it appears that the question becomes one of whether the petitioner had the right to remain silent; and by weighing the public good against the disadvantage at which he was placed as a result of the inquiry into his professional conduct, the answer to the question posed would have to be negative.

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\(^{17}\) Id. at ——, 87 Sup. Ct. at 633.