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Report on Lawyers and the Fifth Amendment

George W. Martin

REPORT ON LAWYERS AND THE FIFTH AMENDMENT

Mr. George W. Martin, on Behalf of the Board of Governors

This report is being made on behalf of the Board of Governors on the resolution adopted by last year's convention on Lawyers and the Fifth Amendment.

The Fifth Amendment provision that a person cannot be compelled to be a witness against himself has always been a subject of extended discussion and has been highlighted in recent years through the press and in many publications because of the refusal of a large number of people to answer questions before Congressional committees and other bodies as to whether they are or have been members of the Communist Party.

Lawyers are familiar with the history and development of the privilege and are keenly aware of the struggle we have had to preserve that right. As a part of our heritage it was placed in the Constitution, in the Bill of Rights and was also incorporated in our various state constitutions. No one will deny that this privilege is one of the great landmarks in the struggle for justice, no one in his right mind would advocate that this right be taken away. Questions concerning the exercise and abuse of this privilege by a few lawyers have been aroused in the public mind and carried forward in the press, and it is necessary that our State Bar Association assume its responsibility to the public and take definite action to eliminate the problem as far as lawyers are concerned.

It has been proven beyond doubt that the Communist Party advocates and is engaged in a conspiracy to overthrow the United States Government by force and violence. Everyone agrees that it is necessary to destroy that party and membership in it or any alleged subversive group for the safety of our country. Lawyers have a loyalty to our form of Government that is not surpassed or even equalled by any other business, trade or group. Unfortunately, a very small number have disgraced themselves in the past by membership in the Communist Party or by engaging in subversive or questionable activities and refusing to answer questions concerning possible membership.

The American and State Bar Associations have been and are making an effort to ferret out any disloyal members in their ranks and disbar them from the practice of law. You, of course, are familiar with the oath that a lawyer must take before he is admitted to practice. The oath requires that a lawyer support the Constitution. The oath that

has been given since 1950 requires a lawyer or applicant to state that he is not and has not been a member of any organization or party having for its purpose and object the overthrow of the United States Government by force and violence.

We have also incorporated a new provision in the amended rules for admission which will require applicants in the future to answer all pertinent questions that might be asked of them by the Board of Governors relative to their fitness to practice law in this state, and the Board's recommendation to the Supreme Court in addition will provide that the refusal of an applicant to answer all pertinent questions will give the Board grounds to deny the application. You are also aware that our discipline rules in Washington provide that membership in an organization which advocates the overthrow of our Government is a ground for disbarment.

Now, I mention these rules because there are many states that have no such rules. You must recognize that Washington has one of the most forward integrated bars in the country, and that we have many rules for the conduct of lawyers that other states do not have. The Board has considered the problem in light of our present discipline rules and a possible need for their amendment.

At the convention last year a resolution was passed which in substance provided that the members of the Washington State Bar Association recommended that the Board of Governors give immediate consideration to the formulation and recommendation to the Supreme Court of the adoption of an amendment to the Rules for Discipline of Attorneys by adding as a ground for reprimand, suspension or disbarment, a provision embodying substantially the following: Claiming protection of the Fifth Amendment of the Constitution to avoid giving testimony before a properly constituted congressional or legislative committee, or before the courts, as to possible Communist affiliation or other subversive activities against our government.

After that resolution was passed the Board of Governors appointed a subcommittee to study the problem because we recognized how important it was, and the Board has studied this question and to that end we held an open hearing in Seattle and requested any lawyers interested in the subject to appear and express their views.

The Board of Governors not only exercises its own best judgment on matters, but it is our duty and it has been our effort also to try and find out what the bar itself, or the majority of the lawyers desire to have done. After all, we are representing the rank and file of the

lawyers and we are not there merely to exercise our own views, but to express the view of the bar as a whole.

In that hearing at Seattle fourteen lawyers appeared and were present from nine-thirty in the morning to five o'clock in the afternoon. Thirteen of the lawyers present expressed opposition to any amendment along the lines suggested at the convention. One lawyer was there to uphold it.

Following that meeting there was a debate on the question at a Seattle Bar Association dinner at which there was a very large attendance. There were lawyers present that I would consider very liberal in their view who told me that the resolution ought to be adopted one hundred percent. There were conservative lawyers who told me that it should not be, and that we should not allow hysteria to force the Board into taking some action that was not proper and sound.

The Seattle Bar Association which has in its membership approximately half the lawyers of this state appointed a special committee to study the problem. The committee was composed of eminent, able lawyers well representing different elements of the bar who undertook a careful study of the question and made a written report which was filed in January, 1955, as a report of the Civil Rights Committee of the Seattle Bar Association.

Bearing in mind that the resolution passed at our last convention would have made the mere invocation of the Fifth Amendment a ground for disbarment . . . period. The Seattle committee unanimously agreed that the Washington Supreme Court should not adopt a rule making the mere invocation by an attorney of the Fifth Amendment or Article 1, Section 9 of our state constitution a ground for disbarment or discipline for the following reasons:

First, because the invocation of the privilege is not necessarily in itself an admission of guilt and of conduct which is ground for disbarment, and

Second, because the committee was of the opinion that we already have adequate disciplinary machinery available under our present rules to suspend or disbar a lawyer from practice if he makes an improper and unjustified use of the privilege, and referred to decisions in which it has been held that an attorney may not refuse to be a witness against himself in disciplinary proceedings.

The committee did recommend, however, that whenever a Washington attorney invoked the privilege against compulsory self-incrimination that the Bar Association should do something about it and in

the exercise of its present powers cause an investigation to be made and take appropriate disciplinary action.

After that report was made a meeting of the Bar Association Board of Governors was held at Aberdeen in March, 1955, and the matter was again reviewed and studied, and the Board of Governors reached this conclusion, which I believe was published in the papers. The Board of Governors approved in principle the report of the Civil Rights Committee of the Seattle Bar Association, and determined that the Board of Governors would take action to investigate any case in which a Washington lawyer invoked the Fifth Amendment, to ascertain whether he was guilty of conduct which would warrant disciplinary proceedings resulting in possible disbarment. The Board of Governors also at that time decided that an unjustified refusal of an attorney to testify or produce evidence before a regularly constituted body under claim of the Fifth Amendment should be grounds for disbarment.

Questions were raised as to whether or not with such a recommendation we would deprive a lawyer of the right to invoke the privilege in a proper case before a body other than the Bar. So, the Board decided that they would withhold final action on the matter pending a decision in the State of Florida involving a case in which a lawyer had been disbarred where he had refused to answer in disciplinary proceedings before a trial judge whether he was or had been a member of the Communist Party. There were also matters pending before the California and Massachusetts Bar Associations. We wanted to get the benefit of the views of the Appellate Courts on the subject and so the matter was held up with expectation that at this convention our Board of Governors would make a definite answer on this problem.

Now, the Florida case was decided in July, 1955, and copies of that decision have been distributed, or are presently available and you can read for yourself the decision of the Florida judges and the vigorous dissent made by one of the members. If you are not acquainted with that case, may I say that it is the case of the State of Florida vs. Leo Scheiner. In Florida proceedings are had upon complaints filed before their courts. In that case, an attorney who apparently had a good reputation and had never been charged with any misconduct before had refused to testify before a senate subcommittee and later before a grand jury as to whether he had been or was a member of the Communist Party. A complaint was filed in which it was charged as grounds for disbarment—that he had engaged in unprofessional acts, unlawful conduct and deceit and violated the code of ethics and

was and had been a member of the Communist Party. In his sworn answer he denied that he was presently a member of the Communist Party and alleged that he was not guilty of any misconduct which would warrant disbarment. There was very little, if any, testimony introduced. The transcript of prior proceedings was put in evidence. No material evidence outside of that was produced, and the trial judge asked the lawyer two questions: Have you been a member of the Communist Party? And are you now a member of the Communist Party? The lawyer exercised his right under the Fifth Amendment to refuse to testify on the ground that it might result in criminal prosecution against him.

Without taking any further evidence in the case the judge decided the case on the spot and promptly ordered the lawyer's immediate disbarment. The decision was appealed to the Florida Supreme Court and the National Lawyers Guild filed a brief against his disbarment, and the American Bar Association filed a brief upholding it, and other parties appeared individually for and against.

The Florida Supreme Court after consideration of the matter reversed the trial judge and set aside his order of disbarment on the ground that refusal to answer the questions asked of him in prior proceedings and in court wasn't evidence in itself, and that without other material evidence of improper conduct, they could not disbar him. The Appellate Court recognizes how disgraceful it was for a lawyer or anyone else to be a member of the Communist Party and how his affiliation with it or any other subversive group was in conflict with his oath and cited other decisions in which the discharge of teachers and policemen was upheld for refusing to testify as to Communist membership and activities, without expressing any disagreement with those decisions and also cited cases in which the Appellate Courts have barred applicants for admission to practice law where they declined to answer similar questions. In short, the Florida Supreme Court decided that the lawyer charged was innocent until proven guilty and that the burden of proof was upon the state and that they had failed to meet that burden by merely relying on the fact that he refused to answer. In other words, the Florida court would require the state to prove membership in the Communist Party or other subversive activities by independent evidence. A vigorous dissent was made by one of the judges who took the position that the practice of law was a privilege and that when a lawyer refused to admit whether he presently was or had been a member of the Communist

Party or other subversive group he violated his oath and his duties as a lawyer and should be summarily disbarred without further evidence. On August 17, 1955, there became available a printed pamphlet by the trial judge, Hon. Vincent C. Giblin, who entered the disbarment order against Scheiner in the lower court. He politely but strongly criticised the majority opinion of the Florida Supreme Court. A pamphlet may be obtained by writing him at Room 416, Dade County Court House, Miami 32, Florida.

While there may be some difference of opinion regarding that decision, it was up to the Board of Governors to decide this question for the State of Washington, based upon our own disciplinary rules as they now exist and we feel this way about it. A lawyer is an officer of the court and pledged by his oath to support, protect and defend the Constitution. He holds a position of public trust. The people's confidence in our judicial system depends on their confidence in the courts and the members of the legal profession. The Bar Association of this state has the responsibility to maintain that confidence and intends to do so. We believe that the practice of law is a privilege and that when a lawyer is admitted to practice he submits himself to our disciplinary rules and if he violates them he has to suffer the consequences of suspension or disbarment from practice. We believe that our present disciplinary rules are sufficient to protect the public and the legal profession against a lawyer who invokes the Fifth Amendment without proper justification, and that the amendment proposed at the last convention cannot be recommended to the Supreme Court by the Board of Governors for the reason that it would deprive a lawyer of the right to exercise his privilege under the Fifth Amendment before anybody under any circumstances and that it would automatically disbar a lawyer who exercised that privilege, irrespective of whether he was or was not justified in doing so.

However, the Board of Governors is determined, and I am authorized to tell you, that the Board will take action to investigate any case in which a lawyer exercises the Fifth Amendment to determine whether he is guilty of conduct warranting a suspension or disbarment.

If the investigation warrants it, a charge will be filed against him enumerating the grounds on which disbarment is sought and the trial will be carried through in the ordinary manner as prescribed by law. The lawyer will have the right to appear and be represented by counsel and interrogate witnesses and may produce any evidence in support of his position or defense. If such a lawyer appears in a disciplinary

hearing and satisfactorily explains his conduct and answers the pertinent questions, the Board of Governors will determine from the facts themselves whether the complaint or charge should be dismissed or whether the lawyer should be disciplined or disbarred.

The Board has reached the conclusion that if a lawyer invokes the Fifth Amendment and refuses to testify or produce evidence in a disciplinary proceeding before the Bar Association that the Board will recommend to the Supreme Court that the lawyer be suspended or disbarred.

We believe that the decision made by the Board of Governors on this matter is sound and practical and that it will protect the rights of innocent parties, and at the same time, enable the State Bar Association to fulfill its obligations to the public.

REPORT OF THE LEGISLATIVE COMMITTEE

Col. C. A. Orndorff

Col. Orndorff supplemented the report of the Legislative Committee published in the Washington State Bar News, Vol. IX, p. 30, by emphasizing the need for legislation easing the work load on the Supreme Court and correcting inequities in the distribution of work among the judges of the Superior Courts of the state. Col. Orndorff also pointed out that legislation modernizing the justice courts of the state consistent with the State Constitution is of primary importance.

REPORT OF THE AMERICAN CITIZENSHIP COMMITTEE

Mrs. Helen Graham Greear of Bremerton

Mrs. Greear supplemented the report of the American Citizenship Committee published in the Washington State Bar News, Vol. IX, p. 33, with a recommendation that an annual conference of presidents of local bar associations be convened by the Board of Governors to acquaint the presidents with the objectives of the State Bar Association committees.