Civil Rights Committee Report

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CIVIL RIGHTS COMMITTEE REPORT

The Trustees of the Seattle Bar Association have requested its Civil Rights Committee to make a study of and to report their recommendations upon the matter of whether the Supreme Court of Washington should promulgate a rule generally to the effect that there be added as an additional ground for disbarment, the ground that an attorney has invoked the Fifth Amendment to the Federal Constitution or Article I, Section 9 of the State Constitution, dealing with compulsory self-incrimination.

This matter, with particular reference to Communism and subversive activities generally, has received considerable attention by reason of the passage of a resolution of the House of Delegates of the American Bar Association adopted on February 24, 1953, quoted in the footnotes,¹ and more recently by reason of the action of the Washington State Bar Association at its convention in Spokane in September of

¹ The resolution adopted by the House of Delegates on February 24, 1953, reads as follows:

"WHEREAS, it has been thoroughly established that International Communism, the Communist Party of the United States and individual Communists aim and plan to overthrow the government of this country and of other countries by force and violence and that Communist activities in this country are dominated and dictated by a foreign power; and

"WHEREAS, membership in or adherence to the Communist Party of the United States by an attorney is inconsistent with and violates his fundamental oath of office; and

"WHEREAS, evidence has been adduced through sworn testimony in Congressional investigations that some attorneys, relatively few in number, have been members of Communist Party cells; and

"WHEREAS, some attorneys have, in lawful inquiries into their membership and activities in the Communist Party, refused to testify on the ground that such testimony would tend to incriminate them; and

"WHEREAS it is the duty of the Bar to cause further inquiry to be made to determine the fitness of such attorneys to continue to practice;

BE IT RESOLVED,

(a) That the Attorney General be requested to review the roster of such attorneys and if he believes the facts warrant to move before any Federal Court to which each of said attorneys may have been admitted, that the Court inquire into his activities and conduct and determine his fitness to continue to practice in such court, and

(b) That the state bar associations or other local associations having jurisdiction be requested to make like inquiry and, where warranted, to institute proceedings to determine his fitness to continue to practice."
1954, at which time the matter dealt with in this report was made the subject of a resolution, the text of which is set out in the footnotes.²

The Civil Rights Committee has made an independent study of the question and now submits its report and recommendations.

Under the State Bar Act (R.C.W. 2.48), the statutory grounds of disbarment or suspension are set out in Section 2.48.220, in which the grounds for disbarment include:

"(1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence. . . ."

"(3) By violation of his oath as an attorney. . . ."

"(6) For the commission of an act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney at law or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from the practice thereof."

Under Rule 10 of the Rules of Court for the Discipline of Attorneys membership in any party or organization whose purpose is to overthrow the United States Government by force or violence, is ground for disbarment. Ever since 1950 the Rules for Admission to Practice prescribed by the Supreme Court of the State of Washington have had in the required "Oath of Attorney" the following statement (Rule 18):

"I am not now, and never have been, a member of any organization or party having for its purpose and object the overthrow of the United States Government by force or violence; . . ."

Although the validity of Rule 10 and Revised Rule 18 has not been passed upon in this state, the fact that the court by the exercise of its rule-making power, in effect amends the statutes dealing with the

² "BE IT RESOLVED: That the Washington State Bar Association does hereby go on record in favor of having the Board of Governors give immediate consideration to the formulation and recommendation to the Supreme Court of the adoption of an amendment of the rules for the discipline of attorneys by adding as a ground for reprimand, suspension or disbarment, a provision embodying substantially the following:

"Claiming protection under 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 communistic affiliation or other subversive activities against our Government."
admission to the bar and with disbarment, has not in most courts been considered beyond the power of the court.\(^3\)

It will be noted from the foregoing review of the applicable statutes and rules that ample power exists under the present law for the disbarment of an attorney who is a member of a subversive organization, or whose conduct, whether or not as a member of a subversive organization or violator of any law, is such as to disclose a lack of the integrity requisite to admission to the bar or to continued membership therein.

It will be noted, however, that under the existing statutes and rules, the mere invocation of the Fifth Amendment by an attorney, whether the proceeding be before a court or legislative body, is not in itself ground for disbarment. It is necessary to go further and show that the attorney is guilty of misconduct either incident to or independently of the invocation of the constitutional privilege against compulsory self-incrimination, which misconduct under the statute and rules of the Supreme Court is ground for disbarment.

We are therefore led to a consideration of the nature and purpose of a disbarment proceeding (including suspension or other discipline), and the nature and purpose of the constitutional provisions against compulsory self-incrimination.

A disbarment proceeding is a special proceeding, neither criminal nor civil in character.\(^4\) The purpose of such a proceeding is not to punish the individual lawyer, but rather to determine his fitness for the continued practice of law.\(^5\) Consequently, the fact that a lawyer may have been pardoned\(^6\) or the fact that the statute of limitations may be a bar to prosecution,\(^7\) or the fact that the attorney has been acquitted in a criminal proceedings,\(^8\) would not prevent disbarment proceedings.

It is to be noted that the investigation is not confined to the investigation of conduct constituting crimes. Under the statute above quoted,\(^9\) "any action involving moral turpitude, dishonesty or corruption,  

\(^4\) See note 11, 12 infra.
\(^5\) See Notes 12, 21 infra; Grievance Committee of Hartford County Bar Ass'n. v. Broder, 112 Conn. 269, 152 Atl. 292 (1930). A higher standard of private conduct is expected from an attorney than from the rank and file of our citizenry. State v. Bieber, 121 Kan. 536, 247 Pac. 875, 48 A.L.R. 252 (1926), State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914).
\(^6\) See Notes 12, 23 infra.
\(^7\) See Notes 12, 23 infra.
\(^8\) The cases are collected in Annotation, 123 A.L.R. 780.
\(^9\) RCW 2.48.220.
whether the same be committed in the course of his relations as an attorney at law or otherwise, or whether the same constitutes a felony or misdemeanor or not" would be ground for disbarment. Of course, a lawyer may be disciplined for improper conduct even though no crime is involved.\textsuperscript{10}

So careful have courts been to assure themselves of the fitness of an attorney to continue to practice law that they have held that a disbarment proceeding is not a criminal proceeding\textsuperscript{11} and that accordingly the right that an attorney would otherwise have to refuse to testify against himself is not available in a disbarment proceeding.\textsuperscript{12} In a California case\textsuperscript{13} there is ambiguous language suggesting that a defendant attorney in a disbarment proceeding who is compelled to testify as a witness may nevertheless refuse to answer questions propounded to him on the ground that his testimony would tend to incriminate him. However, it has also been held, both in that same case and in others, that should an attorney fail or refuse to testify on his own behalf with respect to evidence against him in a disbarment proceeding, adverse inferences from the fact of such refusal may be drawn against him.\textsuperscript{14}


\textsuperscript{11}In re Vaughan, 189 Cal. 491, 209 Pac. 353 (1922), McIntosh v. State Bar of California, 211 Cal. 261, 294 Pac. 1067, (1930), Johnson v. State Bar of California, 4 Cal. Rep. (2d) 744, 52 P. 2d 928 (1936), Brophy v. Industrial Accident Commission, 46 Cal. App. (2d) 278, 115 P.2d 835 (1941). See also: In re West, 348 Mo. 30, 152 S.W.2d 69 (1941), In re Fenn, 235 Mo. App. 24, 128 S.W.2d 657 (1939). In re Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), Martin v. Law Society of British Columbia, 3 D.L.R. 173 (British Columbia, 1950). (These two cases deal with admission to the bar as distinguished from disbarment proceedings and discuss membership in Communist or subversive organizations as grounds for refusing admission to the Bar.) For an understandable limitation of this rule in reinstatement proceedings, see Ex parte Marshall, 163 Miss. 523, 147 So. 791 (1933). Note 16, infra.

\textsuperscript{12}In re Vaughan, 189 Cal. 491, 209 Pac. 353, 24 A.L.R. 858 (1922): "In our opinion, in view of these considerations, this is not such a criminal prosecution against appellant as would entitle him to decline to testify on the ground that he cannot be compelled to "be a witness against himself" (Cal. Const. Art. 1, § 13), but he may be called and examined for the information of the court, without, of course, infringing his right to decline to answer questions propounded to him, on the ground that his testimony would tend to incriminate him." It is not clear whether the court intended to uphold the attorney's right to refuse to answer specific questions (as distinguished from refusing to testify as a witness) or whether the court merely meant that because a disbarment proceeding is not a criminal proceeding there was no right to decline to answer questions and therefore no infringement of any such right. Although it is likely that the court intended the latter, it is assumed for purposes of this report that the court is of the former view. Later California cases do not clear up this ambiguity. See Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992 (1941), West Coast Home Imp. Co. v. Contractors' St. L. Bd., 72 Cal. App.2d 287, 164 P.2d 811 (1945); see also In re Barach, 279 Pa. 89, 123 Atl. 727 (1924).

As a practical matter, therefore, the possible privilege against self-incrimination in a disbarment proceeding, even if it can be said to exist, furnishes no substantial obstacle to the ascertainment of the facts concerning the fitness of the attorney to practice law. It has been suggested that there may be circumstances (in other than disbarment proceedings) in which the privilege against self-incrimination should not in all honesty and good conscience be invoked,16 but no case has been found so holding. Indeed, in the three principal cases in which the question has been raised as to whether the invocation of the privilege against self-incrimination is in itself ground for disbarment, each of the courts involved, namely, New York, Illinois and Mississippi, has held that the mere invocation of the privilege does not violate any legal or moral rule and therefore is neither ground for disbarment nor ground for refusing reinstatement.16

We turn to a consideration of the nature and purpose of the constitutional protection against compulsory self-incrimination.

Compulsory self-incrimination is the subject of constitutional protection both under the Fifth Amendment to the Federal Constitution and Article I, Section 9 of the State Constitution. Similar provisions will be found in forty-six state constitutions in this country. In the two states where there is no constitutional provision, compulsory self-incrimination is protected against in the common law of the states.17

Protection against compulsory self-incrimination finds its roots in the common law of England, which provides protection against such self-incrimination as a protection against a species of torture compelled by the use of the oath in ecclesiastical courts and compelled by physical means in the common law courts, where the practice in time was considered so odious as to be condemned. When the colonists came to America from England, they brought with them the common law principle against compulsory self-incrimination. In time the principle became embodied in the constitution of the various colonies when, upon the colonies declaring their independence, they established state constitutions embodying bills of rights. Protection against compulsory

15 In re Holland, 377 Ill. 346, 36 N.E.2d 543, 548 (1941).
16 In re Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940) involving refusal to sign waiver of immunity in an investigation of unlawful practices ordered by the court, In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941) involving refusal to answer questions before a Grand Jury, Ex Parte Marshall, 165 Miss. 523, 147 So. 791 (1933) involving reinstatement of disbarred attorney who refused to testify in reinstatement proceedings concerning matters determined by the judgment in the disbarment proceedings.
17 See Note 16 infra. The privilege is aimed at decency in law enforcement. Its existence aids the innocent as well as the guilty. Twining v. New Jersey, 211 U.S. 78 (1908), 8 WIGMORE, EVIDENCE (3rd Ed.) 308-9.
self-incrimination was not established by these constitutions. The constitutions merely recognized rights already existing against compulsory self-incrimination, and erected a constitutional barrier to legislative or judicial changes in such rights.¹⁸ So highly esteemed was this right that even in a time of stress it became one of the ten amendments to the Constitution constituting the traditional Bill of Rights.

Since then the Fifth Amendment has been frequently invoked throughout the country. When federal prosecutions were involved, the Fifth Amendment was invoked; when state prosecutions were involved, the corresponding state privilege against compulsory self-incrimination was invoked. In the course of time it has become settled that the invocation of the Fifth Amendment protects only against federal prosecutions and not against state prosecutions.¹⁹ Consequently, evidence obtained in a federal prosecution or proceeding disclosing the existence of a state crime, may be the basis for conviction in a state criminal proceeding thereafter begun.²⁰ Correspondingly, evidence obtained in a state proceeding disclosing the existence of a federal crime, may be the basis for conviction in a federal proceeding thereafter begun.²¹ The fact that a federal crime may be disclosed does not prevent the giving of testimony in a state proceeding.²²

Likewise, it is settled that if, as a result of a pardon or the expiration of the statute of limitations or the existence of an immunity statute co-extensive with the privilege, it is no longer possible to prosecute the witness, the privilege against compulsory self-incrimination cannot be invoked.²³

It is also settled that the privilege is personal to the witness, it must be claimed by the witness himself, and²⁴ cannot be claimed by the

²⁰ See United States v. Penn, 111 F. Supp. 605 (M.D.N.C., 1953).
attorney for the witness. Furthermore, the witness cannot claim it on behalf of others. Thus, he may be compelled to relate crimes committed by others and may be compelled to identify the persons involved so long as he himself is not involved.

The right to invoke the privilege may be waived either expressly or impliedly. The privilege is deemed waived unless it is affirmatively invoked as soon as it becomes reasonably apparent that the questions may incriminate or have a tendency to incriminate that witness. Answers which are privileged are not limited to answers which in themselves amount to a confession of guilt. If the answers to the questions would furnish a link in the proof of possible guilt, the witness may invoke the privilege.

The privilege extends not only to oral testimony, but to the production of incriminatory documents which would furnish a link in the proof of crime. Thus, documents which have been acquired in violation of the Fourth Amendment prohibiting unreasonable searches and seizures, if used against the witness, would violate his privilege against compulsory self-incrimination. Likewise, if the court rules or the prosecutor argues, that an inference of guilt should be established

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30 Brown v. United States, 276 U.S. 134 (1928), Ex Parte Irvine, note 26, supra.


by reason of the failure of the accused to deny evidence, such ruling or argument would constitute a violation of the witness's privilege against compulsory self-incrimination. 4

On the question of whether the invocation of the privilege should be ground for disbarment, a controlling consideration is whether the invocation of the privilege necessarily means that the witness is guilty of an offense inquired into. It has been suggested that a witness would not invoke the privilege unless he were guilty of something—that that is why he urges that the answer to a question propounded may incriminate him. 3 However, an examination of the decisions and the logic of the matter, discloses that the use of the privilege is not only consistent with innocence in fact, but is consistent with innocence as a matter of law. 36 That is not to say that the privilege may not be and often is used as a shield to protect the guilty. The point is, that the privilege was intended to be and may be used as a shield to protect the innocent. In a recent address by Justice Jesse W. Carter of the Supreme Court of California, published in "Vital Speeches," April 1, 1954, he pointed out (page 368) that a witness might claim the privilege and be wholly innocent of any crime. He there stated:

"Let us again suppose that our witness claims the privilege conferred by the fifth amendment, and let us assume that he is wholly innocent of any crime. He may do so for several reasons: (1) He may have done something, or said something, or joined some organization which was, at the time it was done, said, or joined, devoid of any criminal aspect and may be so even at the time of the investigation, but his answers might be offered as evidence against him in a criminal case; (2) he might be willing to answer questions about himself, but unwilling to answer them about others, and thus afraid to answer the personal questions because of the doctrine of waiver; (3) he might be afraid that truthful answers might not check with answers given by someone else and thus subject him to a prosecution for perjury; or (4) he might simply and honestly disapprove of the entire investigation and the methods by which such proceedings are conducted, feeling that the questioning is not in accord with the principles of democracy laid down by the framers of our great Constitution for this wonderful

36 Burdick v. United States, 236 U.S. 79 (1915). "If it be objected that [Burdick's] refusal to answer was an implication of crime, we answer, 'Not necessarily in fact; not at all in theory of law.'" This is quoted in Dean Griswold's article, cited in footnote 37, infra.
country known as America. These reasons show that an inference of guilt is not the only inference to be drawn when the privilege is claimed."

We are of the opinion that the above stated second and fourth reasons for invoking the privilege are not proper grounds for so doing, but the point is that if the privilege is invoked on such grounds in an honest belief that the privilege is properly invoked, guilt would not necessarily be inferred on account thereof.

Dean Irwin N. Griswold of the Harvard Law School,37 as well as others,38 have pointed out the consistency of the claim of innocence with the invocation of the privilege against compulsory self-incrimination.

It is because the invocation of the privilege is consistent with innocence that it is believed that those courts that have heretofore passed on the question in New York, Illinois and Mississippi39 properly and correctly held that the mere invocation of the privilege should not be ground for disbarment.

It should be remembered that there is adequate machinery presently available under the law of Washington to discipline any lawyer who aids in subversion. Recent federal legislation—namely, the Communist Control Act of 195440 (as well as the Smith Act),41 coupled with the recently-enacted Public Law 60042 to compel testimony under certain conditions and to grant immunity from prosecution in connection therewith, provide methods and means by which in connection with the disbarment procedure provisions of the State Bar Act, courts are enabled to protect the public against any possible unworthy members of the bar.43 Furthermore, the recent interest in providing for a code of fair procedure by legislative investigating committees, as evidenced by the recommendations of the American Bar Association,44 the enact-

39 See Note 16, supra.
40 Chapter 886, Public Law 637.
43 See RCW 2.48.220.
ment of legislation by New York in 1954, and the efforts in Congress to provide for such fair procedures, should serve to reduce to a minimum whatever attempt there would be to otherwise invoke the Fifth Amendment in hearings before Congressional committees. Fortunately, the number of lawyers who have invoked the Fifth Amendment has been very small.

Recently there has been considerable agitation concerning and criticisms leveled against the invocation of the Fifth Amendment. Such criticisms overlook the reason for the Fifth Amendment and the history out of which it arose, and further overlook the fact that a witness may claim the protection of the Fifth Amendment without necessarily being guilty of the crime involved or under investigation. Thus fear of unjustified prosecution is itself under the authorities sufficient to justify the invocation of the Fifth Amendment. What the legal profession must make certain is that the profession will not by its rules of discipline hamper lawyers in the fearless discharge of their duties to advise their clients with that free independence of spirit that is so essential to a vigorous and courageous defense of the liberties of the citizen. The fact that a lawyer may hold unpopular opinions or defend a client in an unpopular cause is not professional misconduct. Indeed, the observance of the lawyer's oath is the citizen's protection against illegal conduct. Recently the trustees of the Seattle Bar Association adopted a resolution pointing up the lawyer's duty in cases involving the defense of persons involved in unpopular causes.

46 The privilege is also available under the State Constitution in hearings before a state legislative committee. State v. James, 36 Wn.2d 882, 221 P.2d 482 (1950).
49 That was the reason relied on in the cases of In re Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940) and In re Holland, 377 Ill. 346, 36 N.E.2d 543, 545, 549 (1941). See also, Blau v. United States, 340 U.S. 159 (1950).
51 The resolution adopted by the Board of Trustees of the Seattle Bar Association reads as follows:
"BE IT RESOLVED by the Board of Trustees of the Seattle Bar Association on this 11th day of June, 1954:
That certain of the fundamental principles underlying the representation by lawyers of unpopular persons and causes should be set forth at this time for the information and assistance of the public and the bar and that, therefore, the following statement should be issued and made public:
Throughout the course of history lawyers have been frequently called upon to
It seems plain, however, that when an attorney of this State refuses to answer a question properly put to him, upon the ground that the answer would tend to incriminate him, that refusal should be properly investigated by the State Bar Association. It certainly should not be ignored.

Summarizing, therefore, the results of the foregoing discussion, it is the opinion and recommendation of the Civil Rights Committee of the Seattle Bar Association as follows:

1. That the Supreme Court of the State of Washington should not adopt a rule making the mere invocation by an attorney of the Fifth Amendment or Article I, Section 9 of the State Constitution, in itself ground for disbarment because

First: The invocation of the privilege is not necessarily an admission of the guilt of conduct which is ground for disbarment;

Second: Adequate disciplinary machinery is available for the improper or unjustified use of the privilege by an attorney, including its use for a purpose not warranted by the privilege, and its use to hide personal guilt. In that connection, it is to be recalled that it has been held that in a disbarment proceeding an attorney may not refuse to be a witness against himself by invoking a constitutional provision, thereby preventing full and free investigation of his conduct as an attorney for the purpose of determining his fitness to continue the practice of law. Furthermore, should he decline to answer questions

represent and defend persons and causes known to be unpopular. This has been particularly true in criminal matters, but it has been and is also true in other fields, including investigations and hearings conducted by the legislative department of the government.

The right of an accused person, or of a person called as a witness in a legislative investigation, to have legal counsel carries with it the right of the lawyer to represent and defend him in accordance with the ethical standards of the bar.

Having undertaken any such representation, the lawyer has a duty to assert for his client every remedy or defense authorized by the law of the land. The duty of the lawyer is to be performed, however only within the bounds of the law and his office does not permit, nor demand of him, for any client, any violation of the law nor any manner of fraud nor improper conduct.

The public and the bar should recognize the duties and responsibilities of the lawyer in such cases and should keep in mind that such representation, when performed in accordance with the applicable ethical standards, is lawful and proper and that it does not impute to the lawyer his client's views, character, deeds or reputation.

The doctrine of guilt by association in the absence of participation in conspiracy is repudiated in the Report of the Committee (dated June 1, 1954) to "The Board of Governors of the State Bar of California," page 7, although the report favors the view that the invocation of the Fifth Amendment by a lawyer is ground for disbarment. Dean Griswold has emphasized the fact that the Fifth Amendment is regarded by many as a symbol and testing ground of civil liberties.

See Note 37 supra.
propounded on the ground that his answers might tend to incriminate him, adverse inferences may be drawn against him on that account.

It will be recalled that the resolution of the House of Delegates of the American Bar Association merely recommended inquiry into the conduct of lawyers who invoked the Fifth Amendment, and did not recommend that the mere invocation of the Fifth Amendment should be ground for disbarment. The conclusions here reached are therefore consistent with that resolution.

2. The Committee further recommends, however, that hereafter, whenever a Washington attorney invokes the privilege against compulsory self-incrimination, the local Administrative Committee of the Bar with jurisdiction in the matter, in the exercise of the power to investigate which that Committee now has, should cause an investigation to be made of his reason for invoking the privilege with a view to determining after fair consideration whether the attorney involved is in fact guilty of misconduct, either incident to or independently of the invocation of the privilege, which is of such serious character as to warrant disciplinary proceedings including possible disbarment.\footnote{See Note 38, footnote 10. For a discussion of the invocation of the privilege as ground for the mandatory dismissal of public officials or public personnel, such as teachers, see University of Pennsylvania Law Review, June, 1953, and May, 1954: Vol. 101 U. of Pa. L. R. 1190, 102 U. of Pa. L. R. 871.}

Respectfully submitted,

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\footnote{Rules for Discipline of Attorneys, Rules 1 to 5 as amended.}