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Constitutional Law—Attorney's Refusal to Testify at Inquiry Into ·Unethical Practices Ground for Disbarment

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to claim their privilege and were adjudged guilty of criminal contempt. The Court of Appeals held that the defendants were guilty of criminal contempt and that had they answered the questions of the Grand Jury they would have obtained total immunity against any prosecution as to matters disclosed by the testimony, except for perjury or contempt.

The *Cioffi* decision is based on the assumption that the defendants were summoned as witnesses only, but even if the defendants could be considered potential targets of the investigation, the decision in the instant case would probably have been the same. The *Steuding*[51] case holds that a potential defendant does not have to claim his privilege in order to get immunity from indictment based on incriminating testimony he might give; but the case does not refer to contempt proceedings for failure to testify when he has obtained immunity. Since the defendant is accorded automatic immunity, there is no reason for him to refuse to testify since he would not be bearing witness against himself, and a contempt proceeding for refusal to testify is proper.

It has been consistently said that the immunity granted must be as broad as the privilege of silence which is destroyed.[52] In *People v. De Feo*[53] the Court of Appeals decided that the immunity conferred under Section 2447 was not co-extensive with the constitutional protection against self-incrimination because the grand jury limited the immunity to specific crimes, and as a result the conviction of criminal contempt could not stand. However, when, as in *In re Cioffi*,[54] Section 2447 is properly used it grants complete immunity, and is sufficiently broad to protect against prosecution of all violations of the laws of New York State.

ATTORNEY'S REFUSAL TO TESTIFY AT INQUIRY INTO UNETHICAL PRACTICES GROUND FOR DISBARMENT

After ordering a "Judicial Inquiry and Investigation" into the unethical practices of certain attorneys,[55] the Appellate Division disbarred the appellant when he failed to answer relevant questions at the inquiry.[56] The appellant maintained that the disbarment order violated his privilege against self-incrimination under Article 1 Section 6 of the New York Constitution. The issue presented to the Court of Appeals in the case of *In re Cohen*[57] was whether the constitutional privilege against self-incrimination, which protects one against criminal prosecution, also protects one from disciplinary action as a member of the bar for failing to answer questions at a judicial inquiry. The Court of Appeals[58] affirmed the disbarment of the Appellate Division.

51. Supra note 49.
52. Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).
53. Supra note 48.
54. Supra note 50.
55. N.Y. Judiciary Law § 90.
56. 9 A.D.2d 436, 195 N.Y.S.2d 990 (2d Dep't 1959).
57. 7 N.Y.2d 488, 199 N.Y.S.2d 658 (1960).
58. Ibid.

The Court held that the appellant was not being disbarred because he invoked his constitutional privilege. He had the right to assert the privilege which could not be denied to any citizen. However, standing before the inquiry, appellant was more than just a citizen; he was also a member of an honored profession, an officer of the court.[59] The court is charged by the New York Legislature with the duty of supervising the ethical standards of the legal profession and is given the power, which it exercised in the present case, to discipline any member of the bar who refuses to cooperate with the court, particularly where unethical practices are involved.[60]

It must be remembered that the holding of the present case applies only to such a "Judicial Inquiry and Investigation," which is not an adversary proceeding. These proceedings are conducted solely for the puprose of maintaining the dignity and honor of the profession.[61] Membership in the bar is not a right but a high privilege which is burdened with many exacting conditions,[62] and this membership may be revoked in order to show the public that a man is no longer qualified to represent himself as an attorney.[63]

In *People ex rel. Karlin v. Culkin*,[64] the Court noted in a dictum that the lawyer, being an officer of the court, was required to cooperate with the court in an inquiry, but that such cooperation was subject to his claim of privilege. In a later case[65] the Court of Appeals held that disbarment was proper when the constitutional privilege was employed in bad faith, but refused to pass on the question of such an assertion in good faith, indicating that the dictum in the *Culkin* case was not controlling. The cases of *In re Kaffenburgh*[66] and *In re Solvei*[67] do not control the present case because of the variance in the fact situations. Appellant relied heavily on *In re Ellis*[68] and *In re Grae*[69] as supporting his position. A strict reading of the Court of Appeal's holdings in those cases, however, indicates that "the single question of law" decided was that a refusal by an attorney to sign a waiver of immunity at a judicial inquiry similar to the present one did not constitute conduct warranting disciplinary proceedings reasonably feared that criminal prosecution might follow. The Appellate Division in *In re Ellis*[70] clearly held that a good faith refusal to answer based on the constitutional privilege against self-incrimination constituted professional

59. People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).
60. In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917); Canons of Professional Ethics, Canon 22.
61. In re Branch, 178 App. Div. 585, 165 N.Y. Supp. 688 (1st Dep't 1917).
62. In re Rouss, supra note 60.
63. Theard v. United States, 354 U.S. 278 (1957).
64. Supra note 5 at 471, 162 N.E. at 489.
65. In re Levy, 255 N.Y. 223, 174 N.E. 461 (1931).
66. 188 N.Y. 49, 80 N.E.2d 802 (1907). (Attorney who is a witness at a trial may not be disbarred for invoking constitutional privilege.)
67. 276 N.Y. 647, 12 N.E.2d 802 (1938). (Attorney who testifies before a grand jury may not be disbarred for refusing to sign a waiver of immunity.)
68. 282 N.Y. 435, 26 N.E.2d 967 (1940).
69. 282 N.Y. 428, 26 N.E.2d 963 (1940).
70. 258 App. Div. 558, 17 N.Y.S.2d 800 (2d Dep't 1940).

misconduct, but the Court of Appeals never passed on this specific issue in its opinion.

As a result of the present Court of Appeal's decision, the attorney is placed in a dilemma, for if he speaks he may be criminally prosecuted as well as disbarred; if he remains silent, he may also be disbarred. To say that one has a fundamental constitutional privilege, but that if he exercises it he will be dismissed from his position, as the Court of Appeals is saying, is to place a premium on his exercises of that privilege.[71]

Judge Fuld, dissenting in the present case, argued that the mere exercise of a constitutional privilege, standing alone, was not grounds for disbarment. There must be other independent evidence. If that evidence indicated that appellant was guilty of professional misconduct, a disbarment proceeding based on the damaging evidence should be instituted. If the appellant again refused to testify, this other evidence would then be construed most strongly against him. The Court's decision, however, appears sound, for the conduct of attorneys should be subject to effective regulation by the courts of which they are officers.

Recent developments in the law indicate also that when a person occupies a position of public trust and responsibility, which requires a high degree of moral character, such a person may be removed from his position, if he elects to assert his constitutional privilege instead of answering questions asked for the purpose of determining his character and fitness for his position.[72] This proposition is best illustrated by several recent United States Supreme Court cases.[73] Although a full discussion of these cases is beyond the scope of this note, it may be observed that the Supreme Court is divided as to whether a public employee who invokes his constitutional privilege of self-incrimination may be discharged from public employment. Most of these cases have involved the refusal to testify regarding activities in the Communist Party, and the Court has refused to unequivocally state that the dismissal occurred because of the invoking of the privilege. In *Lerner v. Casey*,[74] for example, a subway conductor was fired when he refused to testify regarding his present membership in the Communist Party. The Court of Appeals, with Justices Fuld and Van

71. In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).

72. Lerner v. Casey, 2 N.Y.2d 355, 161 N.Y.S.2d 7 (1957), aff'd 357 U.S. 399 (1958); Beilan v. Board of Education, 357 U.S. 399 (1958) (a teacher, who invoked Fifth Amendment, dismissed on ground that he was incompetent to teach under a Pennsylvania statute); Christal v. Police Comm. of San Francisco, 33 Cal. App. 2d 564, 92 P.2d 416 (1939) (a policeman dismissed on the ground that the invoking of the constitutional privilege was inconsistent with his duty as a police officer).

73. Nelson v. Los Angeles County, 362 U.S. 1 (1960) (a county employee dismissed on ground of insubordination); Lerner v. Casey, supra note 72; Beilan v. Board of Education, supra note 72. See also Slochower v. Board of Education, 350 U.S. 551 (1956) in which a statute interpreted to mean "assertion of the privilege against self-incrimination is equivalent to resignation" was held to deprive a professor, who had invoked the Fifth Amendment before a Congressional committee investigating subversive influences in education, of due process of law.

74. 2 N.Y.2d 355, 161 N.Y.S.2d 7 (1957).

Veorhis dissenting, held that the man was not fired because of any inference that he was a member of the Communist Party, nor because he invoked the Fifth Amendment, but because of the doubt created in the mind of his employer as to his reliability. The Supreme Court affirmed this decision.[75]

In the present case, duty required the attorney to answer: privilege permitted him to decline to answer. The exercising of the privilege, however, was entirely inconsistent with his duty as a member of the bar, and the violation of his duty constituted cause for disbarment.[76]

BRIGHT LIGHTS DRIVING STATUTE HELD NOT VAGUE

> New York Vehicle and Traffic Law Section 375(3) states: ". . . whenever a vehicle approaching from ahead is within five hundred feet . . . the headlamps, if of the multiple beam type, shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle. . ."

In *People v. Meola*[77] the constitutionality of this section was put in question. Defendant was convicted in the Court of Special Sessions of the Town of Newburg for failing to dim her headlights.

On appeal defendant made two contentions. First, that the statute in question is constitutionally vague insofar as the phrase "dazzling light" is incapable of any objective measurement, and is thereby meaningless as to furnishing the citizen a standard of required conduct. Secondly, the term "interferes" is indefinite and makes criminality depend entirely on the subjective effect of the light upon the complainant.

The judgment was reversed in County Court,[78] on the grounds that the rules of criminal law are applicable to statutes which create traffic infractions,[79] and as such this statute was vague and failed to give the required warning to citizens as to what constitutes a violation of the law.[80] The clarity of the offense described by a criminal statute raises a constitutional question since it is one of the requirements of the due process guarantee.[81]

Upon petition of the Attorney General in his statutory capacity,[82] the case was reviewed by the Court of Appeals.

The Court answered defendant's first contention by stating that vagueness only resulted when the phrase "dazzling light" was isolated from the overall context of the statute. The proscribed conduct of the accused is the operation of multiple beam headlamps so as to produce dazzling light. Read in its entirety this can have but one meaning which the average citizen would so under-

75. 357 U.S. 468 (1958).
76. Christal v. Police Comm. of San Francisco, supra note 72.
77. 7 N.Y.2d 391, 198 N.Y.S.2d 276 (1960).
78. 19 Misc. 2d 837, 194 N.Y.S.2d 823 (County Ct. 1959).
79. People v. Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377 (1955).
80. People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957).
81. Jordan v. DeGeorge, 341 U.S. 223 (1951).
82. N.Y. Executive Law § 71.