The Privilege against Self-Incrimination in Bar Disciplinary Proceedings: What Ever Happened to Spevack

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THE PRIVILEGE AGAINST SELF-INCrimINATION IN BAR DISCIPLINARY PROCEEDINGS: WHAT EVER HAPPENED TO SPEVACK?

I. INTRODUCTION

The question of when if ever, an attorney facing misconduct charges may assert the privilege against self-incrimination prior to and during an appearance before a disciplinary tribunal has been litigated for many years. Distinguish the parameters of the privilege in general, from the right as it accrues to lawyers with respect to disciplinary proceedings, has given the courts considerable difficulty. For some years a balance appeared to have been struck between the right of the attorney as an individual to refuse to incriminate himself, and that of the state to control the attorney as a licensee; however, this established balance was twice upset in the 1960's by the Supreme Court.

First the Court, in Cohen v. Hurley, gave greater weight to the state's need to control members of its bar. Attorney Cohen had invoked the privilege in an attempt to avoid testifying and producing records for judicial inquiry into his alleged misconduct. The state court disbarred him for his refusal to cooperate in the courts' efforts to expose unethical practices, without any independent proof of misconduct on his part. The Supreme Court affirmed Cohen's disbarment. A few years later, in Spevack v. Klein, the Supreme Court overruled Cohen and placed the emphasis on the attorney's fifth amendment rights. The year after Spevack, in In re

1. See, e.g., Spevack v. Klein, 385 U.S. 511 (1967); Cohen v. Hurley, 366 U.S. 117 (1961); In re Ming, 469 F.2d 1352 (7th Cir. 1972); Sheiner v. Florida, 82 So. 2d 657 (Fla. 1955); In re Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); In re Becker, 255 N.Y. 223, 174 N.E. 461 (1931); In re Rouss, 221 N.Y. 81, 116 N.E. 782, cert. denied, 246 U.S. 661 (1917); In re Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907); In re Kunkle, 218 N.W.2d 521 (S.D.), cert. denied, 419 U.S. 1036 (1974).

2. The fifth amendment provides the standard articulation of the privilege. It states in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.


4. See In re Rouss, 221 N.Y. 81, 116 N.E. 782, cert. denied, 246 U.S. 661 (1917). The holding in Rouss, which became the "established balance" for state courts, mandated that an attorney not be disciplined for refusing to testify at a trial on the grounds that to do so might incriminate him. Id. at 90-91, 116 N.E. at 785. However, the court emphasized the civil nature of disbarment proceedings, so that any admission of the attorney, even under a grant of immunity, could be utilized in subsequent disbarment proceedings. Id. at 87, 116 N.E. at 784. For a discussion of Rouss, see notes 55-61 and accompanying text infra.

5. 366 U.S. 117 (1961). For a further discussion of Cohen, see notes 76-87 and accompanying text infra.

6. 366 U.S. at 120.

7. Id. at 121-22.

8. Id. at 131.


10. 385 U.S. at 513. The facts of Spevack were on all fours with the facts of Cohen. See id. See also text accompanying notes 76-94 infra.
Ruffalo, the Supreme Court reversed another disbarment order and, stressing the attorney's constitutional rights, described the disbarment proceedings as "quasi-criminal."

The state courts, predictably, have been reluctant to characterize disbarment as a criminal sanction. If disciplinary procedures are criminal, the states' burden of proof would become greater, and a long line of earlier decisions based on the assumption that disciplinary proceedings were civil actions would be overruled. Therefore, in the absence of further Supreme Court guidance, the state courts have narrowly interpreted Spevack and Ruffalo in resolving the questions raised by those decisions.

The implications of Spevack and Ruffalo and the use made of these decisions in the state courts is the focus of this comment. An exploration of the history and development of the privilege against self-incrimination in both criminal and disciplinary proceedings is included, along with a discussion of the important conflicting interests involved in the latter context and the delicate balance required to accommodate them.

II. HISTORY

The privilege against self-incrimination has its roots in resistance to the oath *ex officio* as practiced by the Ecclesiastical Courts of England. The oath was given while the accused was still ignorant of the charges against him or the identity of his accusers and the questions thereafter addressed to him were designed to compel a confession. In 1568 the maxim *nemo tanetur supsum prodere* (no man is bound to produce against himself) was
first used by an English common law court,\textsuperscript{23} and by 1641, with the abolition of the Star Chamber, it was a recognized principle of law.\textsuperscript{24}

The function of the privilege has historically been that of protecting "a natural individual from compulsory incrimination through his own testimony or personal records."\textsuperscript{25} The federal version of the privilege is set forth in the fifth amendment to the United States Constitution, which provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."\textsuperscript{26}

All but two states have a privilege against self-incrimination incorporated into their state constitutions;\textsuperscript{27} many state provisions employ the same language to describe the privilege as does the fifth amendment of the federal constitution.\textsuperscript{28} Notwithstanding the almost universal existence of state constitutional provisions effectively synonymous with the fifth amendment, in the 1964 case of \textit{Malloy v. Hogan},\textsuperscript{29} the Supreme Court declared that the self-incrimination clause of the fifth amendment, by absorption through the due process clause of the fourteenth amendment, applied to the states.\textsuperscript{30} This clause translates into two privileges:\textsuperscript{31} the right of the accused in a criminal trial to refuse to testify at all,\textsuperscript{32} and the right of any person when testifying in any trial, whether civil or criminal, to refuse to answer a specific question on the grounds that the answer might tend to incriminate the speaker.\textsuperscript{33}

Since the right to invoke the privilege against self-incrimination is contingent upon the potential for criminal liability,\textsuperscript{34} the question of what is "criminal" must be answered in order to determine the availability of fifth amendment protection. The Supreme Court has liberally and pragmatically interpreted the criminal requirement, emphasizing that the label placed on

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\bibitem{23} 77 Eng. Rep. 1308 (1568).
\bibitem{24} L. Levy, \textit{supra} note 19, at 282. For a description of the struggles of Parliament and the common law courts to abolish the oath \textit{ex officio} and the Star Chamber, as well as to establish the privilege against self-incrimination, see \textit{id.} chs. II & III.
\bibitem{25} Andresen v. Maryland, 427 U.S. 463, 470–71 (1976) (citation omitted). See also Bellis v. United States, 417 U.S. 85, 89–90 (1974); United States v. White, 322 U.S. 694, 701 (1944). For additional information about the \textit{Andresen} case and its effect upon this historic protection, see note 90 \textit{infra}.
\bibitem{26} U.S. Const. amend. V. For a general discussion of the privilege, see \textit{Note, supra} note 20, at 84.
\bibitem{27} See 8 J. Wigmore, \textit{Evidence} § 2252, at 319 (McNaughton rev. ed. 1961). Iowa and New Jersey are the two exceptions. These states do, however, have a statutory privilege. \textit{Id.}
\bibitem{28} Sixteen states duplicate the fifth amendment's language. \textit{Id.} at 320–23. The remaining state constitutions express the privilege in terms very similar to those used in the fifth amendment. \textit{Id.} at 323–24.
\bibitem{29} 378 U.S. 1 (1964). See notes 95 & 96 and accompanying text \textit{infra}.
\bibitem{30} 578 U.S. at 8.
\bibitem{31} Black v. State Bar of Cal., 7 Cal. 3d 676, 686, 499 P.2d 968, 972–73, 103 Cal. Rptr. 288, 293 (1972) (discussing the distinction between these two facets of the privilege as it relates to bar discipline cases).
\bibitem{32} Griffin v. California, 380 U.S. 609, 614 (1965).
\bibitem{33} \textit{In re} Gault, 387 U.S. 1, 47, 49 (1967); Murphy v. Waterfront Comm'n., 378 U.S. 52, 94 (1964).
\bibitem{34} See text accompanying note 26 \textit{supra}.
\end{thebibliography}
the action is not necessarily determinative of this issue. The Court has consistently held that the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

It is well-settled, however, that the states have compelling interests in detecting and controlling criminal behavior and that, therefore, counterbalancing right exists to enable states to force testimony from a suspect under a grant of immunity from criminal sanctions. Courts have nevertheless consistently held that statutes establishing grants of immunity must be carefully worded to give the accused a true substitute for his privilege against self-incrimination. To be constitutional, a statute must apply "complete protection" from "all the perils against which the constitutional prohibition was designed to guard." On the federal level, this "complete protection" was historically thought to require a statutory grant of "transactional immunity;" i.e., freedom from any prosecution relating to the compelled testimony. The 1972 Supreme Court case of Kastigar v. United States has recently established, however, that immunity statutes that

35. For example, in Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court held that where penalties such as fines or imprisonment could be imposed, even if an action were technically labeled "civil," the action was criminal and the fifth amendment applied. Id. at 634.

36. In re Gault, 387 U.S. 1, 49 (1967). Gault was one in a line of juvenile cases holding that juvenile defendants, despite the civil label placed upon the process by which they were tried, were entitled to the procedural safeguards given adult defendants in criminal cases. Id. at 30–31, 49. Another recent case emphasized this idea, holding that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." In re Winship, 397 U.S. 358, 365–66 (1970). For further discussion of Gault, see notes 151 & 152 and accompanying text infra.

37. For an example of the states' right to compel disclosure of crimes if there is adequate immunity, see In re Rouss, 221 N.Y. 81, 116 N.E. 782, cert. denied, 246 U.S. 661 (1917). The immunity statute involved in Rouss provided that "no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial." Id. at 84, 116 N.E. at 783 (citation omitted).


40. Congress responded to the "complete protection" standard articulated by the Supreme Court in Counselman v. Hitchcock, 142 U.S. 547 (1892), by passing the Immunity Act of 1893, ch. 83, 27 Stat. 443 (repealed 1970). Counselman had invalidated an earlier immunity statute (Act of Feb. 25, 1868, ch. 13, 15 Stat. 37) that provided only "use immunity." 142 U.S. at 585–86. The 1893 transactional immunity statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence . . . ." Ch. 83, 27 Stat. 443.

41. 406 U.S. 441 (1972). Kastigar was the first case in which the Supreme Court ruled on the constitutionality of the Immunity Statute of 1970, 18 U.S.C. §§6001–6005 (1970). Although this new statute provided only "use and derived use immunity," the Court held that the statute satisfied the "complete protection" standard of
merely protect against the direct or derived use of compelled testimony are a constitutionally adequate substitute for the privilege against self-incrimination. Since Kastigar, state immunity statutes must provide at least this "direct and derived use" immunity.

The privilege against self-incrimination has been invoked by attorneys in disciplinary proceedings with mixed results. The state courts have weighed two factors in this situation — the attorney's privilege and the states' right to control its bar. Two landmark decisions of the New York Court of Appeals illustrate the importance of these interests. The earlier case, In re Kaffenburgh, dismissed that part of a disbarment complaint

**Counselman** and was thus constitutional. In *Kastigar*, Justice Powell, writing for the Court, explained the differences in the immunities provided by the two statutes as follows:

While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.


42. 406 U.S. at 453.

43. See *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472 (1972). *Zicarelli*, which involved a state immunity statute, was decided on the same day as *Kastigar*. The *Zicarelli* Court noted that "[i]n *Kastigar*, we held that immunity from use and derivative use is commensurate with the protection afforded by the privilege . . . . Our holding in *Kastigar* is controlling here." *Id.* at 475-76. In 1972, the Louisiana legislature revised a state immunity statute to be consistent with *Kastigar* and *Zicarelli*. LA. CODE CRIM. PRO. art. 439.1; see *Louisiana v. Wallace*, 321 S.2d 349 (La. 1975); see also In re *Birdsong*, 216 Kan. 297, 532 P.2d 1301 (1975).

44. The general components and sequence of disciplinary proceedings were described by one authority as follows:

In practically all jurisdictions, a complaint of misconduct by a lawyer may be filed by anyone. In most states there is a grievance committee of the state bar association, and also in many of local county associations. This committee is charged with the duty of receiving and investigating such complaints, and of making preliminary findings. These are referred to a court which may hear additional evidence from both sides, either directly or through a referee, rule on the propriety of the lawyer's conduct, and exonerate him or subject him to censure, suspension or disbarment. In some states the court proceedings are instituted and conducted by the Attorney General or the County Attorney, or by an attorney appointed by the court. Everywhere the lawyer has the right of ultimate appeal to the highest court of the state. Everywhere he has the right to a full hearing, with ample notice.


46. 188 N.Y. 49, 80 N.E. 570 (1907).
which charged an attorney with the refusal to testify as a witness in a conspiracy trial in which he was not the defendant.\footnote{47} Although on appeal Kaffenburgh was disbarred on other grounds,\footnote{48} he was held to have a right to refrain from answering any question which might form the basis of or lead to the prosecution of himself or a forfeiture of his office of attorney and counselor at law. To now hold that by availing himself of such privilege it amounted to a confession of his guilt upon which a forfeiture could be adjudged would, in effect, nullify both provisions of the Constitution and the statute.\footnote{49}

The Kaffenburgh court maintained that disbarment was a very strong sanction and held that a state must keep disciplinary proceedings within the boundaries of constitutional limitations.\footnote{50}

This same New York Court of Appeals, in In re Rouss,\footnote{51} adopted a different viewpoint and placed greater emphasis on the state's need to control its bar.\footnote{52} Rouss, however, is distinguishable from Kaffenburgh in one important detail. Kaffenburgh had originally refused to testify as a witness in a trial in which he was not the defendant, and that refusal prompted the Kaffenburgh disbarment proceeding.\footnote{53} Rouss, however, had testified freely under a grant of immunity in a trial in which he was not the defendant, and in a subsequent disciplinary proceeding was disbarred on the basis of his prior testimony.\footnote{54}

\footnote{47} Id. at 53, 80 N.E. at 571. At a previous trial of his employer for conspiracy, Kaffenburgh had refused to answer any questions on the grounds that his answers might incriminate himself. \textit{Id.} at 51, 80 N.E. at 570. The bar contended that this refusal was a deliberate deception of the court or proof of his guilty connection with the conspiracy, and therefore that Kaffenburgh was unfit to practice law. \textit{Id.} at 50-51, 80 N.E. at 570. The court refused to disbar Kaffenburgh on such grounds. \textit{Id.} at 53, 80 N.E. at 571.

\footnote{48} Id. at 57, 80 N.E. at 573. Kaffenburgh had filed a certificate claiming the right to continue the practice of the law firm for which he worked as a clerk, even though one partner was dead and the other disbarred. \textit{Id.} at 55, 80 N.E. at 572. This violated a provision of the state civil procedure code that necessitated the use of the attorney's own name or the true firm name. \textit{Id.} (citation omitted).

\footnote{49} 188 N.Y. at 53, 80 N.E. at 571. The "statute" mentioned was the state immunity statute. For the pertinent portions of this New York law, see note 37 supra.

\footnote{50} 188 N.Y. at 53, 80 N.E. at 571. The Kaffenburgh court's view that constitutional safeguards should be "applied in a broad and liberal spirit," \textit{id.}, presages the later reasoning of the Supreme Court in Spevack v. Klein, 385 U.S. 511, 515-16 (1967). For a discussion of Spevack, see notes 88-94 & 99-115 and accompanying text infra.

\footnote{51} 221 N.Y. 81, 116 N.E. 782, \textit{cert. denied}, 246 U.S. 661 (1917). Rouss is perhaps the single most influential case dealing with the clash between the constitutional right of the individual who happens to be an attorney and the need of the bar (and society as well) to assure itself of the integrity of the members of the legal profession. For a sampling of the cases that cite Rouss, see note 62 and accompanying text infra.

\footnote{52} 221 N.Y. at 87, 116 N.E. at 784. The Rouss court chose to limit, rather than overrule, its prior holding in Kaffenburgh. \textit{Id.} at 91, 116 N.E. at 785.

\footnote{53} 188 N.Y. at 51, 80 N.E. at 570. \textit{Compare} the factual situation in Kaffenburgh, \textit{id.} at 51-52, 80 N.E. at 570-71, with that of the Cohen and Spevack cases. 366 U.S. at 119-23, 365 U.S. at 512-13. See notes 80-81 & 89-94 and accompanying text infra.

\footnote{54} 221 N.Y. at 84, 116 N.E. at 783. Rouss' testimony amounted to a confession of participation in a scheme to bribe a witness against his client to remain outside the
On appeal, the New York Court of Appeals affirmed the order disbarring Rouss from practice as attorney and counselor at law. Justice Cardozo, writing for the court, reasoned that membership in the bar was a privilege, conditioned in part on good character. Emphasizing that disbarment proceedings were not criminal proceedings, Justice Cardozo stated that disbarment is not a punishment or a penalty to the lawyer, but rather a decision that the attorney is no longer fit to practice law. The Rouss court held that when an attorney has given evidence of his own illegal behavior, a grant of immunity does not extend to subsequent disbarment proceedings but only to criminal proceedings and penalties.

Additionally, the court's opinion in Rouss expressly limited one implication of Kaffenburgh, stating that the former case had not decided that "disbarment for professional misconduct is a penalty or forfeiture within the meaning of an act of amnesty," but only that an attorney could not be disciplined for refusing to testify on grounds that to do so might incriminate him.

Rouss was soon cited by state courts all over the country, because it provided a reasonable basis for reconciling the disbarment of an attorney of known moral unfitness with the constitutionally guaranteed protections.
provided by the privilege — or by its statutory immunity substitute.\textsuperscript{63} There
remained for the states, however, the issue with which \textit{Kaffenburgh} had
struggled: how to deal with the attorney who had never spoken and thus had
never confirmed the suspicions of his unfit behavior.\textsuperscript{64}

In an attempt to resolve this question, zealous prosecutors and bar
disciplinary committees have pushed to extend the \textit{Rouss} holding by
demanding of attorneys — as distinguished from other citizens — a “duty of
candor.”\textsuperscript{65} In practice, this duty has operated to shift the burden of proof to
the attorney in a disciplinary proceeding, requiring him to vindicate his
conduct once a prima facie case has been made against him.\textsuperscript{66} In a more
extreme form, however, this “duty of candor” has become an obligation on
the part of the attorney, under pain of disbarment, to clear his name of any
slur cast upon it, if questioned by “duly constituted authority.”\textsuperscript{67}

\textsuperscript{63} For a discussion of statutory immunity as a substitute for the right against
self-incrimination, see notes 37–43 and accompanying text \textit{supra}.

\textsuperscript{64} See notes 68 & 69 and accompanying text \textit{infra}.

\textsuperscript{65} There is a duty upon attorneys to adhere generally to high moral standards.
\textit{CODE OF PROFESSIONAL RESPONSIBILITY}, Cannon 1, E.C. 1–1 to –6; DR 1–101 to –103
(2d ed. 1975). This may also include a duty to deal candidly in every contact with the
court. See H. \textit{Drinker}, \textit{supra} note 44, at 74–76. For purposes of this comment, this
duty has been labeled a “duty of candor.” See also notes 66 & 67 and accompanying
text \textit{infra}.

Disciplinary Rule 1–102 states that “[a] lawyer shall not . . . (6) engage in
any other conduct that adversely reflects on his fitness to practice law.” \textit{CODE OF
PROFESSIONAL RESPONSIBILITY}, Cannon 1, DR 1–102 (2d ed. 1975). It has been
suggested that asserting the fifth amendment protection rather than testifying before
a bar or court adversely reflects on an attorney’s fitness to practice, and may
(1961); Niles \& Kaye, \textit{supra} note 3, at 1123; \textit{Lawyers and the Fifth Amendment}, 39
(1956).

\textsuperscript{66} See Niles \& Kaye, \textit{supra} note 3, where the authors explained:

In the ordinary disciplinary proceeding, once an affirmative case has been made
against an attorney, the burden of explanation quite routinely shifts to him. If
for any reason he does not answer, this “raises the legal presumption of the truth
of these facts, which must have been known [to the attorney], and which he
failed to contradict.”

\textit{Id.} at 1123 (citations omitted). The circumstances considered sufficient to constitute a
prima facie case against an attorney vary greatly. In some cases, quite substantial
independent evidence has been required. See, \textit{e.g.}, \textit{In re Randel}, 158 N.Y. 216, 52 N.E.
1106 (1899); \textit{In re Becker}, 229 App. Div. 62, 241 N.Y.S. 369 (1930). However, in other
cases, the existence of a suspicious circumstance has been deemed sufficient. See, \textit{e.g.},

\textsuperscript{67} \textit{Lawyers}, \textit{supra} note 65, at 1084. The House of Delegates for the American Bar
Association (A.B.A.) stated:

We should be the last to countenance any move calculated to deprive anyone of
constitutional rights. But that is not necessarily the effect of what has been
proposed. The choice lies with the offending lawyer. He must answer and thus
disabuse the public of any lingering doubt as to his record and his standards and
ideals or he must take the consequences.

\textit{Id.} at 1084 (emphasis added). The court may be the only “proper authority” with the
right to demand testimony from attorneys. \textit{In re Randel}, 158 N.Y. 216, 52 N.E. 1106
(1899). \textit{See note 73 infra}.

For example, in \textit{In re Randel}, 158 N.Y. 216, 52 N.E. 1106 (1899), there was
proof of money payments by a sheriff to Randel for his client, and proof that the client
never received these monies. \textit{Id.} at 219, 52 N.E. at 1107. A note existed acknowledging

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this additional “duty” has been added to the holding in Rouss, irreconcilable differences have arisen between one’s constitutional right to assert the privilege against self-incrimination and a state’s right to control its bar. 68

Historically, the bar has exerted great pressure to establish the “duty of candor” in periods in which it has felt threatened by a nonconforming minority. 69

Proponents of the “duty of candor” have always emphasized the powerful privileges granted to lawyers by the state, and the consequent dangers to the public if the attorney is not honorable. For an excellent discussion of the kinds of powers granted to attorneys, see Niles & Kaye, supra note 3, at 1122. However, regardless of the recognized state interest in control and prosecution of the bar, the counterbalancing right is a constitutional one, and any infringement is of greatest significance. The importance the Supreme Court attaches to the privilege is summarized in its opinion in Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964). In Murphy, the Court stated:

The privilege against self-incrimination “registers an important advance in the development of our liberty — one of the great landmarks in man’s struggle to make himself civilized.” . . . It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,” . . . our respect for the inviolability of the human personality and the right of each individual “to a private enclave where he may lead a private life”, . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”

Id. at 55 (citations omitted). The Court in Spevack emphasized the value of the privilege, and denied that attorneys formed a class with an exceptional duty of cooperation with the court, stating: “We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others.” 385 U.S. at 516.


Interestingly, these two dissimilar “threats” have had similar impacts on the thinking of the bar with regard to the use of the privilege against self-incrimination in disciplinary proceedings.
Although the burden of proof has traditionally been held to be civil rather than criminal, the bar has still supported the establishment of a "duty of candor" in order to eliminate the need to prove more than a prima facie case.

The attitude of the New York bar and courts to "ambulance chasing" evolved between 1930 and 1940. In In re Schneidkraut, 231 App. Div. 109, 246 N.Y.S. 505 (1930), and in In re Becker, 229 App. Div. 62, 241 N.Y.S. 369 (1930), both attorneys had freely admitted participating in certain activities in preliminary investigations, but later refused to testify, claiming the privilege. 231 App. Div. at 113, 246 N.Y.S. at 509; In re Becker, 229 App. Div. 62, 63, 241 N.Y.S. 369, at 370 (1930). The court in Schneidkraut found that the attorney had become honestly concerned that he might be criminally prosecuted, which indeed he was, and therefore deemed his use of the privilege legitimate and not a ground for disbarment. 231 App. Div. at 113, 246 N.Y.S. at 509. The Becker court, however, on substantially identical facts, held that the attorney had improperly asserted the privilege to obstruct justice and disbarred him. 229 App. Div. at 76, 241 N.Y.S. at 384.

By 1940 the approach of the New York courts to ambulance chasing had altered. See, e.g., In re Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); In re Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940). Both Grae and Ellis concerned lawyers who had agreed to testify but had refused to waive their privilege beforehand; neither had testified to anything before the disbarment proceedings were begun. 282 N.Y. at 430-31, 26 N.E.2d at 964-65; 282 N.Y. at 436-37, 26 N.E.2d at 967-68. Their disbarments were overturned on the grounds that mere refusal to waive the privilege in advance of testimony was a proper invocation of the privilege. 282 N.Y. at 434, 26 N.E.2d at 966; 282 N.Y. at 436-37, 26 N.E.2d at 968.

In the McCarthy era, the state bars fought once again for the right to discipline their members without shouldering a burden of proof of a substantive criminal act. See, e.g., In re Florida Bar, 103 So.2d 873 (1956); State v. Sheiner, 9 Fla. Supp. 161 (1957), rev'd on rehearing, 10 Fla. Supp. 161 (1957), aff'd, 112 So.2d 571 (Fla. 1959) (per curiam). See also Proceedings, supra; Lawyers, supra note 65; 41 CORNELL L.Q. 304 (1956). A resolution passed by the A.B.A. in 1953 and published in the A.B.A. Journal was interpreted in an editorial in the same volume as showing "grave doubt" that a lawyer who took advantage of the privilege should be allowed to practice. Proceedings, supra note 69 at 344-45. For another portion of this editorial, see note 73 infra.

A state supreme court decision which firmly rejected the ABA view was Sheiner v. Florida, 82 So.2d 657 (Fla. 1955). In Sheiner, the court reversed a lower court's decision for disbarment. Id. at 663. The court reasoned that the result was not based on guilt, but on Sheiner's refusal to waive the privilege. Id. at 658. For an analysis of Sheiner, see 40 CORNELL L.Q. 304 (1956).

With the Florida Bar was pressuring the Supreme Court of Florida to change its attitude. See In re Florida Bar, 103 So.2d 873 (Fla. 1956). The court, though well aware of the criticisms regarding its decision in Sheiner, stood firm, stating: "This court is committed to the doctrine that claiming the privilege against self-incrimination is not a disgrace; it is not to be construed as an inference of guilt or that the one who claims it is addicted to criminal tendencies . . . ." Id. at 875.


Courts frequently state that disciplinary actions are sui generis, but are quick to add that they are not criminal. See, e.g., In re Ming, 469 F.2d 1352, 1353 (7th Cir. 1972); In re Echeles, 430 F.2d 347, 349-50 (7th Cir. 1970); Black v. State Bar of Cal., 7 Cal. 3d 676, 686, 499 P.2d 968, 973, 103 Cal. Rptr. 288, 293 (1972); In re Vaughan, 189 Cal. 491, 496, 209 P. 353, 355 (1922); Zuckerman v. Greason, 20 N.Y.2d 430, 438, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6 (1967), cert. denied, 390 U.S. 925 (1968); In re Randel, 158 N.Y. 216, 219, 52 N.E. 1106, 1107 (1899); H. Drinker, supra note 44.

72. See notes 65, 68 & 69 and accompanying text supra.
The final power to discipline lies, however, with the courts rather than in the bar, and until 1961 the courts had consistently rejected disbarment as a sanction for use of the privilege in two circumstances: for refusal to waive the privilege before testifying at all, and for simple refusal to respond to questioning or to a subpoena.

III. THE SUPREME COURT DECISIONS IN THE 1960's

In 1961, Cohen v. Hurley came to the Supreme Court from the New York Court of Appeals which had earlier decided Kaffenburgh, Rouss, and later cases that refused to disbar attorneys for the mere assertion of the privilege. Despite this tradition, however, the New York courts had disbarred attorney Cohen although he had never testified, there was no independent proof of misconduct, and he had merely invoked the state privilege against self-incrimination. The New York Court of Appeals emphasized that Cohen's disbarment was based not upon the attorney's...

73. In re Edwards, 45 Idaho 676, 266 P. 665 (1928) (statute giving commissioners of state bar power to discipline attorneys held void as conferring judicial power); In re Royall, 33 N.M. 386, 268 P. 570 (1928) (disbarment is a judicial function which cannot be exercised by board of commissioners of state bar); In re Ward, 106 Wash. 147, 179 P. 76 (1919) (statute providing proceedings for disbarment before state board of law examiners is constitutional except in respect to a final order of disbarment). See note 44 supra.

74. Pre-1961 cases refusing to disbar for failure to waive the privilege include Sheiner v. Florida, 82 So.2d 657 (Fla. 1955); In re Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); In re Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940); In re Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907). For cases with similar holdings after Cohen, see, e.g., Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967).

75. Pre-1961 cases refusing to disbar for refusal to respond to questioning include Sheiner v. Florida, 82 So.2d 657 (Fla. 1955); In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); In re Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907). For cases with a similar result after Cohen, see Spevack v. Klein, 385 U.S. 511 (1967).


77. See notes 46-50 and accompanying text supra.

78. See notes 51-59 and accompanying text supra.

79. In re Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); In re Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940). For a discussion of these cases, see note 69, supra.

80. 366 U.S. at 119-20.

Cohen had been called to testify by a New York judge who was conducting an inquiry into alleged unethical practices pursuant to court order. 7 N.Y.2d 488, 492, 166 N.E.2d 672, 173, 199 N.Y.S.2d 658, 659-60 (1960). A court rule required any attorney who agreed to accept contingent fees for certain types of cases to register such agreements with the court. Id. at 493, 166 N.E.2d at 674, 199 N.Y.S.2d at 660-61. Cohen filed many such agreements, and was therefore required to testify on matters relating to those agreements. Id. at 493, 166 N.E.2d at 674, 199 N.Y.S.2d at 661. He refused to comply, claiming the privilege against self-incrimination. Id. at 493-94, 166 N.E.2d at 674, 199 N.Y.S.2d at 661. The justice in charge of the inquiry found such refusal "in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that...such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer..." 366 U.S. at 121. The New York Court of Appeals stated that, as a citizen, Cohen had a right to the privilege, but that in the capacity of attorney and officer of the court he had no right to withhold his full co-operation; therefore he was disbarred for his refusal to answer. 7 N.Y.2d at 495, 166 N.E.2d at 675, 199 N.Y.S.2d at 662.
assertion of the privilege but on his deliberate refusal to cooperate with the
court in its efforts to investigate unethical practices. 81

On appeal, the Supreme Court affirmed on the grounds that the state
courts had a right to determine the extent of their own privilege against self-
incrimination, 82 and that the lower court's decision could not be considered
arbitrary. 83 The majority admitted that the investigation of Cohen's
activities was based largely on the fact that he had filed an unusually large
number of contingent-fee agreements with the court, 84 and that Cohen had
relied upon the privilege in refusing to give any testimony or records. 85 The
dissent, however, emphasized that: "the single offense charged is his refusal
to yield a constitutional privilege," 86 and that "there is not one shred of
evidence in this record to show . . . a violation [of law]." 87

The anomalous holding of Cohen did not last long; it was reversed within
six years by Spevack v. Klein. 88 The facts of Spevack bore a striking
resemblance to those of Cohen. 89 In disciplinary proceedings before the New
York bar, attorney Spevack had refused to respond to a subpoena duces tecum 90

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81. 7 N.Y.2d at 495, 166 N.E.2d at 675, 190 N.Y.S.2d at 662. This resembles an
earlier rationale used by the New York Court of Appeals in In re Becker, 255 N.Y. 223,
174 N.E. 461 (1931). See note 69 supra. There is, however, a striking dissimilarity
between the two cases in that Cohen, unlike Becker, had not testified on any record
before invoking the privilege. 9 App. Div. 2d at 437-38, 195 N.Y.S.2d at 993-94; 229

82. 366 U.S. at 125.
83. Id. at 124. The Supreme Court determined that the standard of review for the
New York courts' decision was that of minimum rationality. Id. at 123. The Court
found a substantial state interest in investigations of the activities of its bar and in
having the power to discipline attorneys who refused to cooperate. Id. at 123.
Therefore, the Court concluded that the state court's insistence that its privilege
allowed it to compel testimony by threat of disbarment was not "devoid of rational
justification" and comported with due process. Id.

84. Id. at 119. See note 80 supra.
85. 366 U.S. at 120.
86. Id. at 133 (Black, J., dissenting).
87. Id. at 149 (Black, J., dissenting). Justice Black also asserted that the Cohen
decision was a "radical departure" from New York's prior interpretation of its own
privilege. Id. at 133 (Black, J., dissenting). See notes 69 & 79 and accompanying text
supra.

88. 385 U.S. 511 (1967).
89. See note 80 and accompanying text supra.
90. 24 App. Div. 2d 653 (1965); see Klein v. Spevack, 16 N.Y.2d 1048, 213 N.E.2d
457, 266 N.Y.S.2d 126 (1965). For reference to the protection traditionally given records
under the privilege, see note 25 and accompanying text supra. This historic protection
has been somewhat eroded by the recent Supreme Court decision in Andresen v.
Maryland, 427 U.S. 463 (1976). Andresen's files were seized under a warrant issued
upon probable cause to believe that the attorney committed the state crime of false
pretenses. Id. at 466. The Supreme Court affirmed two lower court decisions holding
that the fifth amendment protection had not been violated, even though there was no
question that the files were the attorney's personal records and were incriminating.
Id. at 471-72, 484. The Court, however, sharply distinguished seizure by proper
warrant, which does not put a suspect under compulsion to incriminate himself, from
subpoena of records, which compels a suspect to participate personally in the
surrender of his records:

Thus although the Fifth Amendment may protect an individual from complying
with a subpoena for the production of his personal records in his possession
because the very act of production may constitute a compulsory authentication of
incriminating information . . . a seizure of the same materials by law

http://digitalcommons.law.villanova.edu/vlr/vol23/iss1/6
or to testify, claiming that to do so might incriminate him.\textsuperscript{91} A petition for disciplinary action was filed and the appellate division ordered Spevack disbarred.\textsuperscript{92} The New York Court of Appeals held, on the authority of Cohen, that the constitutional privilege was not available to him,\textsuperscript{93} and emphasized once again that its decision was not based on the use of the privilege but on the attorney's lack of candor and cooperation.\textsuperscript{94}

Between the Cohen and Spevack decisions, however, the Supreme Court had held in Malloy v. Hogan\textsuperscript{95} that the self-incrimination clause of the fifth amendment was applicable to the states by reason of the fourteenth amendment and that state determination of the extent of its own privilege was no longer valid.\textsuperscript{96} Since Malloy did not concern a member of the bar, there was a question as to whether its holding that the federal privilege was guaranteed in state cases\textsuperscript{97} also extended to disciplinary proceedings.\textsuperscript{98}

To resolve the question of whether the holding in Cohen had survived Malloy, the Supreme Court granted certiorari to the Spevack case and overruled Cohen.\textsuperscript{99} The Supreme Court, reemphasizing that the self-incrimination clause of the fifth amendment had been absorbed into the fourteenth amendment and was therefore applicable to state cases,\textsuperscript{100} stated

\begin{quote}
... enforcement officers differs in a crucial respect — the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.
\end{quote}

\textit{Id.} at 473–74 (citations omitted). It is submitted that the Andresen decision has little direct bearing on the applicability of the privilege against self-incrimination in bar disciplinary hearings because although Andresen was an attorney, the case involved only a conventional criminal prosecution.

91. 16 N.Y.2d at 1049, 213 N.E.2d at 457, 266 N.Y.S.2d at 126.
92. \textit{Id.}
94. \textit{Id.} at 1049–50, 213 N.E.2d at 457, 266 N.Y.S.2d at 126. Although the New York court decided that the state privilege against self-incrimination was available to Spevack as a citizen, the court held that his failure to supply all pertinent information was deemed a failure to his duties to the court and proof that he was unfit to be a member of the bar. \textit{Id.}
95. 378 U.S. 1 (1964). Malloy was a witness in a state inquiry into gambling and other crimes. 150 Conn. 220, 221–22, 187 A.2d 744, 745–46 (1963). He refused to testify, invoking the fifth amendment privilege. \textit{Id.} at 222, 187 A.2d at 746. Nevertheless, the Connecticut Supreme Court found the privilege improperly invoked, and adjudged Malloy in contempt. \textit{Id.} at 223, 187 A.2d at 746. The Connecticut Supreme Court affirmed. \textit{Id.} at 232, 187 A.2d at 750. The United States Supreme Court reversed, holding that the fourteenth amendment guaranteed the protection of the fifth amendment to Malloy, 378 U.S. at 8, and that under the federal standard, the privilege was properly invoked because the record showed the witness had a valid reason to fear that his testimony would be incriminating. \textit{Id.} at 12–14.
96. 378 U.S. at 3, 6. See notes 27 & 28 and accompanying text supra.
97. 378 U.S. at 3, 6. States generally had held, pre-Malloy, that mere refusal to honor a subpoena or to refuse to waive the privilege against self-incrimination before testifying, were not grounds for disbarment. See, e.g., \textit{In re Florida Bar}, 103 So.2d 873 (Fla. 1956); Sheiner v. Florida, 82 So. 2d 657 (Fla. 1955); \textit{In re Ellis}, 282 N.Y. 435, 426 N.E.2d 927 (1940); \textit{In re Grae}, 282 N.Y. 428, 26 N.E.2d 963 (1940); \textit{In re Rouss}, 221 N.Y. 81, 116 N.E.782, \textit{cert. denied}, 246 U.S. 661 (1917); \textit{In re Kaffenburgh}, 188 N.Y. 49, 80 N.E. 570 (1907).
98. \textit{See} 385 U.S. at 514.
99. 385 U.S. at 513, 514. The New York Appellate Division, in deciding Spevack, had distinguished Malloy on the grounds that Malloy had not been a member of the bar. 24 App. Div. 2d 653, 654 (1965).
100. 385 U.S. at 514.
that an accused individual might remain silent without penalty unless he chose to speak.\(^{101}\) In explaining this right, the Court defined "penalty" as any sanction that made the invocation of the privilege "costly."\(^{102}\) Moreover, the Court maintained that the threat of disbarment was a powerful compulsion to force relinquishment of the privilege,\(^{103}\) and concluded that "lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself.'"\(^{104}\) The *Spevack* holding, therefore, established that use of the threat of disbarment to force waiver of the privilege was unconstitutional.\(^{105}\)

Less certain, however, was the Court's approach to the matter of whether disciplinary cases were essentially civil or criminal proceedings. Commentators discussed the possibility that the Supreme Court had held that disciplinary actions, since they could lead to disbarment, were criminal proceedings.\(^{106}\) Such a holding would alter a state's burden of proof in disciplinary proceedings to "beyond a reasonable doubt,"\(^{107}\) overrule *Rouss*,\(^{108}\) and give an attorney statutory immunity protection coextensive

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101. *Id.*
102. *Id.* at 515. The Court cited Griffin v. California, 380 U.S. 609 (1965), as support for this proposition. 385 U.S. at 515.
103. 385 U.S. at 516. State courts had generally agreed that such powerful compulsion was not lawful. See note 97 *supra*. After *Spevack*, the lower courts uniformly held that the threat of job loss, in almost any field of endeavor, to force waiver of the fifth amendment was unconstitutional. See, e.g., Garrity v. New Jersey, 44 N.J. 209, 207 A.2d 689 (1965) (companion case to *Spevack* involving removal from office of a policeman during a state criminal investigation); Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972) (inmates have fifth amendment rights in a prison disciplinary proceeding). See also Lefkowitz v. Turley, 414 U.S. 70 (1973); Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir.), cert. denied, 415 U.S. 960 (1973); *In re Ming*, 469 F.2d 1352 (7th Cir. 1972); Uniformed Sanitation Men's Ass'n, Inc. v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970), cert. denied, 466 U.S. 961 (1972).
104. 385 U.S. at 516 (citation omitted).
106. See, e.g., Cole, *Bar Discipline and Spevack v. Klein*, 53 A.B.A.J. 819 (1967) (advocating the consideration of a constitutional amendment disallowing use of the fifth amendment in disciplinary cases); *Discipline, supra* note 15 (reluctantly accepting that this was the holding); Letters to the Editor, 53 A.B.A.J. 1084 (1967) (the majority express dislike for *Spevack* holding and applaud Cole, *supra*). But see Niles & Kaye, *supra* note 3, at 1124 (*Spevack* does not change the nature of disciplinary proceedings).
107. Committee on Legal Ethics v. Graziani, 200 S.E. 353 (W. Va. 1973), cert. denied, 416 U.S. 995 (1974). In *Graziani*, the Supreme Court of Appeals of West Virginia stated this implication of the *Spevack* decision and commented on the traditional burden of proof:

If disciplinary proceedings were held to be criminal proceedings then the Legal Ethics Committee of the State Bar, where such cases are initiated, would have the burden of proving beyond a reasonable doubt the issues involved and the case would have to be tried by a jury. It has been held that the evidence must be full, preponderating and clear in disciplinary actions, and not beyond a reasonable doubt.

*Id.* at 355.
108. For a discussion of *Rouss*, see notes 51–59 and accompanying text *supra*. 
with that enjoyed by criminal defendants. However, the Spevack opinion did not explicitly overrule the long-held belief that disbarment was not a criminal penalty and did not address the issue of the state's burden of proof in disciplinary proceedings.

The Court did, however, explicitly state that another ground for reversing the attorney's disbarment was lack of procedural due process. At the trial level, no mention had been made of a duty on the part of Spevack to produce records, yet this duty had been one ground for disbarment at the appellate level. Justice Douglas' opinion for the Court noted the fundamental unfairness of the procedure since the accused had not been accorded an opportunity to make a responsive, protective record at the trial level.

One year after Spevack, the Supreme Court continued to emphasize the constitutional rights of attorneys in disciplinary proceedings in In re Ruffalo. Ruffalo's testimony to his state disciplinary board revealed information previously unknown to his examiners. The charges were then amended to include one based on his own testimony. This charge, eventually, became the only basis for his disbarment. The Supreme Court, with Justice Douglas again writing for the majority, reversed the disbarment order. The Court characterized the disbarment proceedings as "quasi-criminal," and held that the attorney was entitled to fair notice of all charges against him before any testimony was given, and that therefore, his due process rights had been violated.

110. See 385 U.S. at 515. For a listing of cases holding that disciplinary cases are not criminal, see note 71 supra.
111. For information on burden of proof, see note 70 and accompanying text supra.
112. 385 U.S. at 518.
113. Id. at 517-18.
114. Id. at 518.
115. Id. at 518-19.
117. Id. at 546.
118. Id. The added charge claimed that Ruffalo hired an employee to investigate his employer, and that this act was morally and legally wrong. Id. at 547. Ruffalo's counsel objected that there was nothing morally or legally wrong with such an act, and protested that his client had "a right to know beforehand what the charges are against him . . . ." Id. at 546.
119. Id. at 547.
120. Id. at 552.
121. Id. at 551. The Court cited In re Gault, 387 U.S. 1 (1967), as support for its use of the term "quasi-criminal" in Ruffalo, 390 U.S. at 551. Gault was one of a line of juvenile cases holding that juvenile defendants, despite the civil label placed upon the process by which they were tried, were entitled to many of the procedural safeguards given adult defendants in criminal cases, id. at 23, 30. The Gault Court reached this decision because the possible sanctions for erring children could be as great as those for erring adults. Id. at 36. See also McKeiver v. Pennsylvania, 503 U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970).
122. 390 U.S. at 552.
Although the Ruffalo decision was based on lack of timely notice, the Court stressed the seriousness of disbarment as a sanction. The Ruffalo Court did not, however, explicitly overrule the state cases holding that disbarment was not a criminal sanction for purposes of statutory immunity.

IV. STATE COURT INTERPRETATION OF Spevack AND Ruffalo

There is no doubt that the state courts and bars felt threatened by the Spevack and Ruffalo holdings. The states' conservative interpretations of the law in disbarment cases have continued, however, and the Ruffalo and Spevack holdings have been narrowly construed to eliminate any implication that Rouss was overruled or that statutory immunity applied to disbarment proceedings. The state courts continue to rebut the contention that statutory immunity applies equally to criminal and disciplinary proceedings, relying on the rationale Justice Cardozo expressed in the Rouss opinion. Unfortunately, the states' conviction that they need not continue to license admittedly unfit practitioners has not led to clearly reasoned

decisions in the state courts to support their narrow readings of *Ruffalo* and *Spevack*.

In New York, for instance, the court of appeals refused to reverse a disciplinary order in *Zuckerman v. Greason*, where the attorney's records had been subpoenaed under compulsion of the *Cohen* ruling, shortly before *Cohen* was overruled. The court asserted that attorneys were not “required to invoke the Fifth Amendment . . . but may choose to reveal their professional misconduct . . . when its propriety is drawn in question.” The court avoided the issue of compulsion and constitutional protection by applying the fiction of voluntary confession, and then asserted that “the Fifth Amendment relates to self-incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature . . . .” The *Zuckerman* court further stated that “*Spevack* [does not] confer upon [the defendants] a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.”

The following year, in *Kelly v. Greason*, the New York Court of Appeals relied upon its *Zuckerman* decision to support a holding that there was no privilege against disclosure of criminal matters that would be used only in a disciplinary proceeding. The California Supreme Court in

130. See notes 131–46 and accompanying text infra.

131. 20 N.Y.2d 430, 231 N.E.2d 718, 285 N.Y.S.2d 1 (1967). The New York Court of Appeals held that sustaining misconduct charges on the basis of evidence supplied by the attorneys themselves was not unconstitutional, since the fifth amendment protection did not extend to disbarment but only to criminal penalties. *Id.* at 438–39, 231 N.E.2d at 721, 285 N.Y.S.2d at 5–6. It should be noted that *Zuckerman* was decided before *Ruffalo*.

132. *Id.* at 435, 231 N.E.2d at 719, 285 N.Y.S.2d at 3. The court found that the petitioners’ claim that they had revealed their conduct under compulsion of the holding in *Cohen* was speculative. *Id.* at 439, 231 N.E.2d at 722, 285 N.Y.S.2d at 6–7. While the court stated that the attorneys could not have been disciplined for mere use of the privilege, the fact that they had made disclosures merely led to suspension, not to criminal sanctions covered by the fifth amendment. *Id.* at 438–39, 231 N.E.2d at 721, 285 N.Y.S.2d at 6.

133. *Id.* at 439, 231 N.E.2d at 722, 285 N.Y.S.2d at 6. This insistence that the attorneys “chose” to reveal their misconduct in the face of a clear record to the contrary seems to be a version of the “duty of candor” argument — the assumption is that an attorney must “choose” to speak when accused of improper behavior.

134. *Id.* Chief Justice Fuld, in dissent, pointed out the fictional nature of this “choice,” stating that the attorneys, by reason of *Cohen*, were faced with “a Hobson’s choice” of disbarment or waiver of their right to the privilege. *Id.* at 439, 231 N.E.2d at 722, 285 N.Y.S.2d at 7 (Fuld, C.J., dissenting). If inquiry into the voluntariness of the testimony was “too speculative,” the Chief Justice felt charges should be dismissed. *Id.* at 440, 231 N.E.2d at 722, 285 N.Y.S.2d at 7 (Fuld, C.J., dissenting).


137. 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968). Kelly had been investigated in 1963 during a judicial inquiry into the conduct of lawyers in his county. *Id.* at 372, 244 N.E.2d at 458, 296 N.Y.S.2d at 940–41. On appeal of his subsequent suspension from practice, he argued that compulsory disclosure by subpoena of the law firm’s records violated constitutional limitations. *Id.* at 372, 244 N.E.2d at 458, 296 N.Y.S.2d at 940.

138. *Id.* at 384, 244 N.E.2d at 465, 296 N.Y.S.2d at 950–51. The *Kelly* court reasoned that *Spevack* had not decided the question of whether the privilege attached to the
Black v. State Bar of California,\textsuperscript{139} also cited Zuckerman, along with other courts and commentators,\textsuperscript{140} as rejecting the idea that Spevack held disciplinary cases to be criminal for purposes of fifth amendment protection.\textsuperscript{141} The court briefly considered the term “quasi-criminal” as used in Ruffalo and denied that this term had effected any change in the original concept that disbarment proceedings were not criminal since they could not lead to “incarceration.”\textsuperscript{142} In addition, the Black court relied upon the rationale that disbarment proceedings were “designed to protect the court and public from official ministrations of persons unfit to practice.”\textsuperscript{143}

In determining that a grant of statutory immunity does not bar the use of self-incriminating evidence against an attorney in subsequent disciplinary proceedings, the state courts have continued to cite Rouss and other pre-Spevack decisions.\textsuperscript{144} The cases usually distinguish the Spevack and Ruffalo decisions, asserting that the Supreme Court did not equate criminal and disciplinary proceedings for questions of immunity.\textsuperscript{145} The reasoning attorney’s records, and that Zuckerman had decided that question for the New York courts. \textit{Id.} at 384, 244 N.E.2d at 465, 296 N.Y.S.2d at 950. Without discussion of this issue, the court then stated that Zuckerman held there was no privilege against disclosure of matters used only in a disciplinary proceeding. \textit{Id.} at 384, 244 N.E.2d at 465, 296 N.Y.S.2d at 950-51.

139. 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972). A bar disciplinary board recommended Black’s suspension from practice for three months. \textit{Id.} at 680, 499 P.2d at 969, 103 Cal. Rptr. at 289. Black contended that his right to the privilege against self-incrimination was violated when he was called to testify against himself during the board’s investigation. \textit{Id.} at 684, 499 P.2d at 972, 103 Cal. Rptr. at 292.


141. 7 Cal. 3d at 687, 499 P.2d at 974, 103 Cal. Rptr. at 294.

142. \textit{Id.} at 687-88, 499 P.2d at 974, 103 Cal. Rptr. at 294. The Spevack decision, however, explicitly stated that “penalty” as defined under the fifth and fourteenth amendments was not restricted to fines or imprisonment. 385 U.S. at 514-15. For other decisions refuting the assertion that proceedings must lead to incarceration in order to be “criminal,” see notes 35 & 36 and accompanying text supra.

143. 7 Cal. 3d at 687, 499 P.2d at 974, 103 Cal. Rptr. at 294.


. . . .

In the case of Florida Bar v. Massfeller, . . . . decided in 1964, it was held that where an attorney admitted to his misconduct he could not rely on the immunity statute in a subsequent disbarment proceeding.

200 S.E.2d at 346 (citation omitted).

behind these decisions may be ambiguous, but there is unanimity of opinion: the state courts believe with Cardozo that "[w]e will not declare, unless driven to it by sheer necessity, that a confessed criminal has been entrenched by the very confession of his guilt beyond the power of removal."  

V. ANALYSIS OF THE STATE COURT'S POSITION

The state courts have defined the parameters of the privilege post-Ruffalo in terms remarkably similar to their enunciation of the privilege pre-Spevack. It is submitted that the state courts' view that Spevack and Ruffalo could not "stand for an equation of criminal and disciplinary proceedings" can be rationally defended. The Supreme Court in Spevack did not specifically hold disbarment proceedings to be criminal and therefore to infer such a conclusion would be problematical. It nevertheless would appear that some relationship between disbarment and criminal proceedings has been established. One such indication was provided by the use of the term "quasi-criminal" to describe disbarment in In re Ruffalo.

The Ruffalo court relied on In re Gault, a decision holding that the civil label on juvenile proceedings was not determinative of a defendant's constitutional right to due process safeguards, and that accused children have a right to many of the same protections due adult defendants in criminal cases. However, a later case, McKeiver v. Pennsylvania, refused to equate the rights of a juvenile with those of a criminal. It is

147. Kelly v. Greason, 23 N.Y.2d at 384, 244 N.E.2d at 466, 296 N.Y.S.2d at 951 (1968). For cases holding that Spevack and Ruffalo did not equate criminal and disciplinary procedures, see note 145 and accompanying text supra.
148. As commentators have noted, the chief source of the idea that Spevack might have held disciplinary procedures to be criminal was the connection made between "disbarment" and "penalty and forfeiture." 385 U.S. at 515. See Niles & Kaye, supra note 3, at 1124.
149. Kaffenburgh had associated disbarment with penalties in 1907, yet no conclusion that disciplinary proceedings were criminal had resulted. 188 N.Y. at 52-53, 80 N.E. at 571. See notes 49 & 50 and accompanying text supra. See also notes 60 & 61 and accompanying text supra.
150. 390 U.S. at 551. For a discussion of Ruffalo, see notes 116-22 and accompanying text supra.
152. In re Gault, 387 U.S. 1, 29-30 (1967). See note 121 supra. It seems reasonable, in view of the uncertainties in interpreting Spevack and Ruffalo, to examine the Ruffalo Court's citation to Gault in the light of further developments announced by the Supreme Court in later juvenile cases. See Note, supra note 20, at 90-92. In In re Winship, 397 U.S. 358 (1970), the Court held that the standard of proof required for juveniles, who are charged with acts that would be criminal if committed by adults, is "beyond a reasonable doubt." Id. at 368. However, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court held that there was no constitutional right to a jury trial in juvenile court. Id. at 545.
154. Id. at 550. The McKeiver Court asserted that "[l]ittle . . . is to be gained by any attempt [to] simplistically call the juvenile court proceeding either 'civil' or
reasonable to conclude, therefore, that the description of a proceeding as "quasi-criminal" indicates that it is criminal only for some due process requirements, and civil where other kinds of due process requisites are concerned. The issue becomes, in any type of proceeding, to discover where the due process line is to be drawn.

As a result of Ruffalo, the state courts must comport with constitutional due process safeguards, specifically, providing notice of charges before the party involved testifies in bar disciplinary cases.\(^{155}\) However, once the "notice" requirement has been satisfied, courts assume that the criminal context of the disbarment proceeding is concluded,\(^{156}\) and the proceedings are civil for other purposes.\(^{157}\)

The history of the origins of the privilege against self-incrimination\(^{158}\) shows that its deepest roots lie in the belief that an accused should testify only when aware of the charges against him,\(^{159}\) although the usual articulation of the privilege focuses on the right of the accused to remain silent when questioned.\(^{160}\) It is submitted that, at a minimum, the privilege accords any accused person the protection of knowing the allegations he faces, whether the label on that procedure is civil, criminal, or quasi-criminal.\(^{161}\) The state courts have conceded this, but insist that to

\(^{155}\) 390 U.S. at 552. See, e.g., Black v. State Bar of Cal., 7 Cal. 3d 676, 687, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972) (Ruffalo concluded that an attorney in disciplinary proceedings is entitled to fair notice of the charges); Kelly v. Greason, 23 N.Y.2d 368, 384, 244 N.E.2d 456, 466, 296 N.Y.S.2d 937, 951 (1968) (Ruffalo requires only that there be notice of charges before proceedings are begun); In re Kunkle, 218 N.W.2d 521, 524 (S.D.), cert. denied, 419 U.S. 1036 (1974) (the complaint in Kunkle was adequate to inform respondent of the nature of the charges, even if the proceedings were regarded as quasi-criminal as in Ruffalo). Arguably, this right to notice was established pre-Ruffalo. See note 44 supra.

\(^{156}\) See, e.g., In re Daley, 549 F.2d 469, 475–76 (7th Cir. 1977); Black v. State Bar of Cal., 7 Cal. 3d 676, 687, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972); Kelly v. Greason, 23 N.Y.2d 368, 384, 244 N.E.2d 456, 466, 296 N.Y.S.2d 937, 951 (1968). See, e.g., In re Daley, 549 F.2d 469, 475 (7th Cir. 1977) (there is a clear distinction between proceedings whose essence is penal, and proceedings whose purpose is remedial — the former is criminal, the latter is not); Black v. State Bar of Cal., 7 Cal. 3d 676, 687–88, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972) (disciplinary proceedings may result in penalties but they are designed as protection for the court and public; the court is not required to hold that disciplinary proceedings are criminal); Kelly v. Greason, 23 N.Y.2d 368, 384, 244 N.E.2d 456, 465–66, 296 N.Y.S.2d 937, 950–51 (1968) (there is no privilege against self-incrimination in a disciplinary proceeding; disciplinary proceedings are not identical to criminal proceedings although they do require notice of charges).

\(^{157}\) See notes 19–24 and accompanying text supra.

\(^{158}\) See L. Levy, supra note 19, at 60–82.

\(^{159}\) See notes 25–33 and accompanying text supra.

\(^{160}\) This assumes that the right to notice implicit in the development of the privilege is synonymous with basic concepts of due process. See generally, In re Ruffalo, 390 U.S. 544 (1968). In Ruffalo, the Court emphasized this basic necessity of notice of charges in any proceeding where the witness, defendant or not, is in danger of severe punishment. Id. at 550. In conclusion, the Court noted that:

He is . . . entitled to procedural due process, which includes fair notice of the charge . . . . In the present case petitioner had no notice that [his acts] . . .
COMMENTS

It is therefore submitted that the state courts' refusal to accept an equation of bar disciplinary cases with criminal cases, for purposes of denying statutory immunity, can be supported. The Spevack and Ruffalo holdings failed to specifically overrule the long-standing belief that disbarment was essentially a civil proceeding, and this left room for interpretation of their meanings. In other areas, the Supreme Court has held that it is possible for a case with a civil label to demand some criminal safeguards without demanding all. Since both the Spevack and the Ruffalo holdings were based in part on lack of notice, and since the right to know what one has been accused of is implicit in the history and policy of the privilege against self-incrimination, it is possible to agree with the state courts' interpretation that providing notice of the alleged misconduct is the only constitutional safeguard those cases demanded to protect against the prosecutorial element of an essentially civil proceeding.

VI. CONCLUSION

The state courts have accepted that part of the Spevack holding that forbade the threat of disbarment as a weapon to force waiver of the privilege by an attorney. They have, however, insisted that disbarment proceedings remained civil, and that the overruling of Cohen did not signify an equation of disciplinary proceedings with criminal cases. A decade of discussion of Spevack and Ruffalo in cases and commentaries has had no discernable effect on the holdings of the state courts. Notwithstanding the confusion regarding the extent of the Supreme Court holdings in Spevack and Ruffalo, some important aspects of this area of the law have been clarified. Since Malloy, it is not possible for a state to interpret its own version of the right against self-incrimination in a manner inconsistent with fifth

would be considered a disbarment offense until after...he...had testified. Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.

Id. at 550-51 (citation omitted).

162. See note 157 supra; see also note 44 supra.
163. See text accompanying notes 110 & 125 supra.
164. See notes 151-54 and accompanying text supra.
165. See notes 112-15, 121 & 122 and accompanying text supra.
166. See L. Levy, supra note 19; Note, supra note 20; text accompanying note 21 supra.
167. Many state courts had already stated before Spevack that such forced waiver was not allowed under state privileges. See note 69 supra.
168. For examples of post-Spevack decisions asserting that disbarment proceedings are civil, see note 145 and accompanying text supra.
169. See notes 140 & 145 supra.
170. For a listing of some of these cases, see note 126 supra. The lower court interpretations of the privilege in disbarment proceedings have been left undisturbed as the Supreme Court has denied certiorari to similar cases. See, e.g., Anonymous v. Association of the Bar of the City of New York, 515 F.2d 426 (5th Cir.), cert. denied, 423 U.S. 863 (1975); Anonymous v. Bar Ass'n of Erie County, 515 F.2d 435, cert. denied (2d Cir.), 423 U.S. 840 (1975).
171. See notes 95 & 96 and accompanying text supra.
amendment requirements,172 and the use of disbarment as a threat to force waiver of the privilege has been absolutely discredited.173 It is submitted that the notion that any slur cast upon a lawyer’s reputation triggers a “duty of candor” has been rejected.174 Therefore, even a prima facie case against an attorney does not impose a duty to speak out or allow subpoena of records; the state has the burden to prove its case by a preponderance of the evidence, which the accused attorney need not supply.175

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172. Id.
174. Even the New York court in Zuckerman and Kelly, where attorneys were disciplined despite the fact that their compelled testimony was taken under compulsion of Cohen before that case was overruled, admitted that under Spevack no suspension or disbarment was possible for mere invocation of the privilege. Zuckerman v. Greason, 20 N.Y.2d 430, 437, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 5 (1967), cert. denied, 390 U.S. 925 (1968); Kelly v. Greason, 23 N.Y.2d 368, 383, 244 N.E.2d 456, 465, 296 N.Y.S.2d 937, 950 (1968). These decisions also stated that Spevack did not confer a privilege to withhold evidence which could not lead to criminal prosecution. 20 N.Y.2d at 438-39, 231 N.E.2d at 721, 285 N.Y.S.2d at 6; 23 N.Y.2d at 384, 244 N.E.2d at 465, 296 N.Y.S.2d at 950.
175. For two commentators’ views that in reality a prima facie case against an attorney shifts the burden of proof to the attorney, see note 66 supra. The burden of proof, however, is ordinarily considered to be on the state. See note 71 and accompanying text supra.

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