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## Attorneys – Disbarment – Quantum of Proof Required

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The decision in the present case is in conformity with the well-settled doctrine that a sovereign, while functioning governmentally, cannot sleep. However, since a relatively large amount of interest had accrued; and since interest on a judgment is generally considered to be a measure of damages as distinguished from compensation for use of money,<sup>18</sup> it appears grossly unfair to give the doctrine the blanket application illustrated herein.

SYLVAN N. HOLTZMAN

## ATTORNEYS—DISBARMENT—QUANTUM OF PROOF REQUIRED

During disbarment proceedings in the Circuit Court, an attorney's license to practice was rescinded because he refused to reply to interrogations by the presiding Judge as to whether he was presently, or had ever been, a member of the Communist Party, on the ground that his answer might tend to incriminate him. *Held*, reversed. Appellant's refusal to answer being insufficient, without more, to sustain the Circuit Court's ruling, and due process having been denied the attorney by the court's presumption of his guilt. *Sheiner v. State*, 82 So.2d 657 (Fla. 1955).

The precise question presented in the instant case had not been adjudicated previously in Florida, nor in any of her forty-seven sister states. While there are a number of grounds for disbarment, they are often stated in broad general terms<sup>1</sup> which make them difficult to interpret. The practice of law is generally considered a privilege,<sup>2</sup> and the purpose of disbarment has been held to be for the protection of the public and the courts and not to punish the attorney.<sup>3</sup> For this reason, it has been held that disbarment is neither a prosecution, penalty, nor forfeiture.<sup>4</sup> However, the Florida view is contra, the precedent for the court's decision in the *Sheiner* case having been established in *Florida State Board of Architecture v. Seymour*.<sup>5</sup>

18. *Ibid*.

1. E.g., misconduct rendering an attorney unfit to be entrusted with the powers and duties of his office *In re Clifton*, 115 Fla. 168, 155 So. 324 (1934); conduct showing such lack of good moral character as to render the attorney unworthy of public confidence: Connecticut Grievance Comm. of Hartford County Bar v. Broder, 112 Conn. 263, 152 Atl. 292 (1930).

2. On the federal level: Application of Levy, 348 U.S. 887 (Tex. 1954); Fed. Sup. Ct. R., RULE 58; Communist Control Act of 1954, 50 U.S.C.A. §§ 841-844. State cases: *In re Anastoplo* 3 Ill. 2d 471, 121 N.E. 2d 826 (1954); *In re Clifton*, *supra* note 1.

3. *Ex parte Wall*, 107 U. S. 265 (1882); *In re Mains*, 121 Mich. 603, 80 N.W. 714, 716 (1899); *People ex rel. Karlin v. Culkan*, 248 N.Y. 465, 162 N.E. 487.

4. *In re Rouss*, 116 N.E. 783 (N.Y. 1917).

5. 62 So.2d 1, 3 (Fla. 1952): "It is, accordingly, our view that a proceeding to revoke appellee's certificate as an architect amounts to a prosecution to effect a penalty or forfeiture as contemplated by Section 932.29, Florida Statutes, 1941, F.S.A. . . ." *In re Durant*, 80 Conn. 140, 67 Atl 497 (1907) agrees with the Florida view.

Disbarment is ordinarily considered a judicial act,<sup>6</sup> based upon due inquiry into an attorney's fitness to practice. The character of the proceedings varies in different jurisdictions,<sup>7</sup> but it is generally established that the accused is entitled to a trial in accordance with legal rules and principles.<sup>8</sup> There is a difference of opinion, in state courts, as to the amount of proof necessary to sustain the charges.<sup>9</sup> The Supreme Court of the United States puts the burden upon an attorney who is a member of its bar to show cause, after being disbarred by a state, as to why he should not be disbarred there.<sup>10</sup> However, the rationale for this is the confidence the High Court has in the bars maintained by the states.<sup>11</sup>

In view of the fact that the general rule is that a fair hearing is required,<sup>12</sup> it appears that the Supreme Court of Florida was not only justified, but duty-bound to overrule the Circuit Court, inasmuch as the lower court based its decision solely upon an inference of guilt of the accused, and not upon a preponderance of the evidence. Regardless of the guilt or innocence of the attorney a fair trial is a prerequisite for disbarment.

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6. *Toft v Ketchum* 18 N.J. 280, 113 A.2d 671; *In re Durant*, *supra* note 5. *Contra*, *In re Anastoplo*, *supra* note 2, holds that disbarment is an administrative, rather than a judicial, proceeding.

7. Some courts regard disbarment proceedings as being criminal or at least quasi-criminal in nature: Annotation: 95 Am.Dec. 335; others have said it is not a criminal action: *Armitage v. Bar Rules Comm.*, 266 S.W. 2d 818 (Ark. 1954); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930); *In re Burnette*, 73 Kan. 609, 85 Pac. 575, (1906); *Ex parte Young*, 131 N.Y.S. 2d 499, 284 App. Div. 406 (1954); still others regard it as a civil proceeding: *Toft v. Ketchum*, *supra* note 6; or sui generis: *Ex parte Burr*, 22 U. S. (9 Wheat.) 529 (1824); *In re Sparrow*, 338 Mo. 203, 90 S.W. 2d 401, 404 (1935).

8. *People v. McCaskrin*, 325 Ill. 149, 156 N.E. 328, 333 (1927): "The case made by the record must not only be free from doubt as to the act charged, but as to the motive with which it was done"; *People v. Kerker*, 315 Ill. 572, 146 N.E. 439 (1925): "Disbarment of an attorney is the death of his professional life. Regardless of whether the misconduct charged amounts to a crime or merely to professional misconduct, such charge must be proved by clear and convincing testimony"; *In re Rice*, 167 Okl. 330, 29 P.2d 599 (1934); *Norfolk and Portsmouth Bar Assn. v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934) (form is not controlling so long as the essentials of a fair trial are present).

9. Courts which consider disbarment to be a criminal action require proof beyond a reasonable doubt: Annot., 90 A.L.R. 1111; whereas in courts which hold it to be a civil action, proof of guilt by a preponderance of the evidence is all that is required: *Furman v. State Bar of Calif.*, 12 Cal. 2d 212, 83 P.2d, 12 (1938); *Gould v. State*, *supra* note 7; *In re Mayberry*, 3 N.E. 2d 248 (Mass. 1936); Annot., 105 A.L.R. 985, 987. But see *State v. Maxwell*, 19 Fla. 31 (1882) (the court has over attorneys a jurisdiction which is to be exercised according to a standard of conscience and not according to technical rules).

10. FED. SUP. CT. R. 2(5).

11. *In re Isserman*, 345 U.S. 286 (1953). But disbarment is not automatic. The Court does not follow the rule used in some state courts that disbarment in a sister state is followed as a matter of comity.

12. *Ex parte Garland*, 71 U. S. (4 Wall.) 333 (1866); See DAVIS, ADMINISTRATIVE LAW 250-51 (1951).