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Attorneys—Admission to the Bar Denied for Refusal to Answer Inquiry into Membership in Communist Party, In re Anastaplo, 121 N.E.2d 826 (Ill. 1954)

COMMENTS

ATTORNEYS—ADMISSION TO THE BAR DENIED FOR REFUSAL TO ANSWER INQUIRY INTO MEMBERSHIP IN COMMUNIST PARTY

In re *Anastaplo, 121 N.E.2d 826 (Ill. 1954)*

Petitioner passed the Illinois bar examination and applied for a certificate of approval from the district Committee on Character and Fitness.[1] The committee denied approval of the application because petitioner refused to disclose[2] to the committee whether he was a member of the Communist Party. Petitioner filed a motion for admission with the Supreme Court of Illinois,[3] contending that the committee had abused its discretion and violated his right of free speech under the Due Process Clause of the Fourteenth Amendment by inquiring into his political affiliations. The Supreme Court denied admission, holding that the committee was justified in refusing to approve petitioner's application because of his refusal to disclose whether he was a member of the Communist Party, and that the committee's action did not violate petitioner's right of free speech.[4]

In all states the moral character and general fitness of applicants for the bar must be approved prior to their admission to practice.[5] Although in some states the applicant need only submit affidavits as proof of good character,[6] the majority of states provide for a character investigation of applicants either by the bar examining board or

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1. ILL. REV. STAT. c. 110, § 259.58 (1951), provides:
Section IX. Committee on Character and Fitness
1. . . . The Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State. . . .
2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. . . . Each applicant shall appear before the Committee of his district . . . and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.
3. If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

2. The applicant based his refusal to answer upon the irrelevancy of the committee's inquiry and did not invoke the privilege against self-incrimination. It has been held, however, that an attorney cannot claim such privilege when his conduct is being investigated by a court. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

3. As part of their inherent power to regulate the practice of law, courts, in a proper situation, may overrule the decision of the examining committee. A motion for admission to the supreme court of the state is a proper manner in which to present the question. See, *e.g.*, Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929).

4. *In re* Anastaplo, 121 N.E.2d 826 (Ill. 1954).

5. RULES FOR ADMISSION TO THE BAR (West Publishing Co. 33d ed. 1953).

6. Shafroth, *Character Investigation*, in BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 251, 257 (1952).

by a separate character committee.[7] The board or committee, in its investigation, may inquire into any matter that is relevant to the determination of the applicant's character and general fitness for the practice of law.[8] The applicant is required to disclose any relevant matter, such as a prior conviction or indictment,[9] previous disbarment for professional misconduct,[10] or personal misconduct which affects his fitness to practice.[11] The recommendation made by the character committee or examining board on the basis of its inquiry is subject to judicial review, but is usually considered to be conclusive in the absence of a clear abuse of discretion.[12]

In a number of states an inquiry into the applicant's loyalty is included as part of the character investigation.[13] The petitioner in the principal case, in refusing to answer the committee's inquiry, asserted that his relation to the Communist Party was irrelevant to the determination of his fitness to practice law. Courts have held, however, that an individual may be denied admission[14] or disbarred from practice[15] because of his participation in an organization which advocates the use of unlawful force to effectuate social change.[16]

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7. For a listing of the various character requirements and investigative procedures, see Jackson, *Character Requirements for Admission to the Bar*, 20 FORD. L. REV. 305 (1951).

8. The inquiry into the moral character of applicants for admission is broader in scope than in a disbarment proceeding. *In re* Stepsay, 15 Cal. 2d 71, 98 P.2d 489 (1940). The character committee's task of ascertaining character and general fitness apparently does not include questions regarding the scholastic ability of the applicant. Application of Brennan, 230 App. Div. 218, 243 N.Y. Supp. 705 (2d Dep't 1930).

9. Spears v. State Bar of California, 211 Cal. 183, 294 Pac. 697 (1930); *In re* Kristeller, 154 App. Div. 556, 139 N.Y. Supp. 64 (1st Dep't 1913); State *ex rel.* Board of Law Examiners v. Podell, 189 Wis. 457, 207 N.W. 709 (1926).

10. *In re* Mash, 28 Cal. App. 692, 153 Pac. 961 (1915); State Bar v. Riccardi, 53 Nev. 128, 294 Pac. 537 (1931).

11. *In re* Wells, 36 Cal. App. 785, 172 Pac. 93 (1918); *In re* Moshkow, 250 App. Div. 780, 294 N.Y. Supp. 474 (2d Dep't 1937).

12. To show abuse of discretion the applicant would probably have to prove prejudice on the part of the examiners, lack of fair procedure during the inquiry, or a decision manifestly contrary to the evidence. See, *e.g.*, Higgins v. Hartford County Bar, 111 Conn. 47, 149 Atl. 415 (1930); *In re* Frank, 293 Ill. 263, 127 N.E. 640 (1920); *In re* Hughey, 62 Nev. 498, 156 P.2d 733 (1945).

13. For a comprehensive survey of the actual inquiries made by bar committees during their character investigation of applicants, see Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. OF CHI. L. REV. 480 (1953).

14. Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (2d Dep't 1944), *aff'd* 296 N.Y. 926, 73 N.E.2d 41 (1947) (member of the Christian Front denied admission for advocating the unlawful use of force against subversive elements).

15. Margolis's Case, 269 Pa. 206, 112 Atl. 478 (1921); *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925). *But cf. In re* Clifton, 33 Idaho 614, 196 Pac. 670 (1921).

16. It has not been determined whether mere membership in the Communist Party would disqualify the individual for the practice of law, as the courts have based their decisions on the overt activity by the person involved. See notes 13, 14 *supra*. See, however, Martin v. Law Society of British Columbia, 3 D.L.R. 173, 195 (1950), in which the applicant, an admitted member of the Communist

While it may be conceded that an inquiry into an applicant's political affiliations ordinarily would be irrelevant, an inquiry regarding an applicant's membership in the Communist Party, whose conspiratorial purpose is well recognized,[17] would appear to be particularly relevant to the determination of his fitness to practice law.[18]

Once the relevancy of the inquiry is established, the applicant cannot invoke his right of free speech under the Due Process Clause of the Fourteenth Amendment to defeat such inquiry. In *Garner v. Board of Public Works*,[19] the United States Supreme Court upheld the discharge of municipal employees because of their refusal to file affidavits, as required by ordinance,[20] stating whether they had ever been members of the Communist Party. It was indicated in the *Garner* case, as in the principal case,[21] that the only constitutional question was whether the individual could be required to disclose his Communist affiliations in answer to relevant inquiry; whether his disclosure of past or present membership in the Communist Party then would be a justification for denying the individual his chosen occupation is a quite different problem.[22] While the *Garner* case involved municipal employees, the requirement of loyalty is equally applicable to the lawyer, who occupies a quasi-public position and is obligated by his oath to uphold the Constitution.[23]

It is well established that a lawyer, upon admission to practice,

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Party, claimed that he personally was opposed to the use of violence or force to achieve the party's goals. The court denied admission, saying:

> If a man joins a body that is in effect conspiring against the Government he goes beyond mere opinion; his very joining is an overt act.

17. See, for example, Mr. Justice Jackson's opinion in American Communications Ass'n v. Douds, 339 U.S. 382, 424 (1950), where the Communist Party is characterized as a "revolutionary junta" whose purposes are foreign to our constitutional system of government.

18. The American Bar Association has recommended that each state require each member of the bar to file an affidavit stating whether he is, or ever has been, a member of an organization supporting the overthrow of the government by unconstitutional means. *Proceedings of the House of Delegates*, 36 A.B.A.J. 948, 972 (1950).

19. 341 U.S. 716 (1951).

20. The ordinance also required that the individual take an oath that he had not, within the previous five years, advised, advocated or taught the overthrow of the government by unlawful means. The majority of the Court also upheld this provision as against the claim by the petitioners that it was an ex post facto law. Garner v. Board of Public Works, 341 U.S. 716, 721 (1951).

21. *In re* Anastaplo, 121 N.E.2d 826, 831 (Ill. 1954).

22. Certainly past membership in the Communist Party could be justified on the basis of the applicant's innocence of its conspiratorial nature. It is doubtful, however, whether *present* membership could be considered as innocent, in view of the Communist Control Act of 1954, Pub. L. No. 637, 83d Cong., 2d Sess. § 886 (Aug. 24, 1954), which stripped the Communist Party of any of the rights of recognized political parties.

23. In *In re* Summers, 325 U.S. 561 (1945), the Supreme Court of the United States upheld the Illinois Supreme Court's denial of admission to a conscientious objector. The Court reasoned that the applicant could not conscientiously take the lawyer's oath to uphold the constitution when he was unwilling, because of his religious scruples, to bear arms if required to do so.

becomes an officer of the court whose duty is to exercise a high degree of candor in all his relations with the court. The principal case has adopted a sound policy, for, regardless of whether the petitioner was, in fact, a member of the Communist Party,[24] information regarding his membership in the Party is clearly relevant to his fitness to practice law.

CRIMINAL LAW—NEW TEST OF INSANITY AS A DEFENSE IN THE DISTRICT OF COLUMBIA

Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)

Defendant, who had a long history of mental illness, was accused of housebreaking.[1] At the trial, his only defense was insanity at the time the act was committed. His conviction was reversed on appeal to the Court of Appeals for the District of Columbia, which adopted, as a new test of insanity in that jurisdiction, the rule that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[2] The court retained the District's rule that the prosecution must prove the mental responsibility of the accused beyond a reasonable doubt.[3]

There are two principal tests utilized in determining the insanity of the defendant in criminal cases. In England and twenty-nine states,[4] the only standard of mental responsibility is the "right-wrong" test, made famous in *M'Naghten's* case,[5] which absolves the defendant of criminal responsibility if he did not "know the nature and quality of the act he was doing; or, if he did know it, that he did not know he

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24. There was no affirmative evidence in the principal case that the petitioner had ever been a member of the Communist Party. During the investigation by the committee, however, the petitioner had expressed his belief in the doctrine of revolution and the right of the people to overthrow the government by force of arms, if necessary. The court, however, based its decision upon the petitioner's refusal to disclose whether he was a Communist, and not upon the statements made by the petitioner during the committee's inquiry.

1. D.C. CODE ANN. § 22-1801 (1951).

2. Durham v. United States, 214 F.2d 862, 874-875 (D.C. Cir. 1954). The test has subsequently been rejected by the United States Court of Military Appeals. United States v. Smith, 23 U.S.L. Week 2321 (U.S. Ct. of Mil. App. Dec. 30, 1954).

3. Durham v. United States, 214 F.2d 862, 866 (D.C. Cir. 1954).

4. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 51 (1954). Missouri is one of these states; see State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950).

5. Daniel M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). Daniel M'Naghten was found not guilty by reason of insanity for the killing of Edward Drummond, secretary to Robert Peel, then prime minister of England. The furor caused by the verdict resulted in a debate in the House of Lords in which leading judges in England were asked questions regarding the law with respect to insanity. Their answers were not new law but were merely a recitation of what the law in England was at that time. See HALL, PRINCIPLES OF CRIMINAL LAW 480 (1947).