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THE SO-CALLED "JUDICIAL FUNCTION EXCEPTION"

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Rather than adopting a fair and just definition of candor for everyone, the Judiciary chooses to impose an irrational standard on Nonattorneys. Fully aware that the standard cannot possibly be met by any human being, and not wanting itself to be subjected to an irrational standard, the Judiciary exempts itself from the scope of the standard's application. When a person enters law school, they begin to learn how the legal profession really functions. They are taught as a matter of "substance" how to lie when presenting a client's case to the Court. The entire concept of representing a client (advocacy) is predicated upon presenting the facts supporting the client's case in the light most favorable to the client, and failing to disclose material facts that are detrimental to your client's case. This concept relies entirely on the ability of the attorney to mislead the Court or Jury, about the importance, weight and materiality of the presented facts. These are "traditional trial tactics."

Stated simply, the very heart and soul of a lawyer's professional success is predicated on how well they can nimbly misrepresent, mislead, contort or hide the facts, law and evidence, while simultaneously demonstrating that they do so in furtherance of a genuine quest for truth. The prospective attorney learns that as a matter of practicality, the art of successful lying requires one to repeatedly emphasize the importance of truth. Essentially, the concept is that by giving maximum lip-service to truth, the attorney is not only allowed to lie, but is in fact expected to lie. Licensed attorneys and Judges are then personally protected from the consequences of their lies, by the manner in which the Judiciary strategically defines what constitutes a "lie." That definition notably excludes most conduct and actions of licensed attorneys and Judges, under the guise that such is incorporated within their duty of advocacy. It therefore is not a "lie." It is concededly a clever little manipulative game of word play that the Judiciary plays and demonstrates how the power to interpret law includes the power to evade law.

Since members of the Judiciary cannot possibly meet the irrational standard of candor which they unhesitantly impose on Nonattorneys, the Judiciary simply defines a "lie" in manner that excludes the scope of their own conduct from its' definition. The fact is that no human being on this earth can possibly meet their irrational, subjective character standard and the Judiciary realizes this. Such being the case, in order to protect itself, the Judiciary had to exempt itself from application of its' own character standards. They have done so in many forms. One is by determining that as a matter of law, misleading or false representations made by Judges in appellate opinions are not encompassed within the legal definition of a "lie." Another technique used, is known as the "Judicial Function Exception (JFE)." Federal statute 18 USC 1001 enacted by the U.S. Congress was revised in 1934. The statute criminalizes the following type of conduct:

> ". . . whoever shall knowingly and willfully falsify or conceal . . . a material fact, . . . in any matter within the jurisdiction of **any department** or agency of the United States. . . ."

In 1948, definitions associated with the statute, were adopted by Congress which read in part as follows:

> "The term "department" means one of the executive departments . . . **unless the context shows that such term was intended to describe the** executive, legislative or **judicial branches** of the government."

The question for consideration is whether the statute criminalizes the making of false statements or the concealment of material facts in judicial proceedings. The U.S. Supreme Court first addressed the issue in *U.S. v. Bramblett*, 348 U.S. 503 (1955). The Court held that the statute did in fact apply to the judicial branch of government stating:

> "It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section **shows that "department," as used in this context, was meant to describe the** executive, legislative and **judicial** branches of the Government."

What occurred next was nothing less than astounding. In 1962, the Federal Court of Appeals in the case of *Morgan v. United States*, 114 U.S. App. D.C. 13, 309 F.2d 234 (D.C. Cir. 1962) created the so-called "judicial function exception" to the statute. The case notably dealt with a person convicted of violating Sec. 1001 by holding himself out to practice law, even though he was not an attorney. It was a case dealing with the Unauthorized Practice of Law. The UPL rules as demonstrated previously herein form the basis of the State Bars' legal monopoly. It is therefore unsurprising that the so-called "judicial function exception" was first created in a case addressing UPL, as the exception itself is a protective measure that benefits the legal monopoly. In *Morgan*, the Defendant presented the brilliant argument that upholding his Sec. 1001 conviction, would mean that it would be a Sec. 1001 violation to engage in "traditional trial tactics," such as when a Defense Attorney makes a closing argument on behalf of a client he knows to be guilty. To evade Morgan's inescapable logic, the Court created the so-called "judicial function exception" that excluded "traditional trial tactics," from Sec. 1001. The Court then affirmed his conviction. The *Morgan* Court accomplished its' manipulative subterfuge by writing:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms "conceals or covers up." "

The impact of *Morgan* was an express, frontal assault to a Congressional enactment and the U.S. Supreme Court's opinion in *Bramblett*, which held that Sec. 1001 applies to the judicial branch. It was also a virtual blank check for attorneys and Judges to engage in the exact type of falsifications and concealments, which they regularly condemn when made by Nonattorneys. Notwithstanding the express language of the statute, the express language of the definitions section of the statute, and the holding of the U.S. Supreme Court, the Judiciary exempted "traditional trial tactics" by creation of an artificially concocted "judicial function exception." Subsequent to *Morgan*, almost every other Federal Circuit followed in adopting the so-called "judicial function exception."

As a matter of form, the U.S. Supreme Court's opinion in *Bramblett* was still binding law, but as a matter of substance, the Federal Courts of Appeal by engaging in deceptive manipulation and word play, had succeeded in evading and nullifying the *Bramblett* opinion. In 1967, the Sixth Circuit Federal Court of Appeals, expanded the scope of the so-called "judicial functions exception" by holding in *U.S. v. Erhardt*, 381 F.2d 173 (6th Cir. 1967) that Sec. 1001 was not violated by the submission of a false writing or false testimony in a criminal proceeding. The Court stated:

> "We hold that appellant's conviction under <Sec.> 1001 must be reversed . . . because <Sec.) 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding."

The *Erhardt* Court had expanded the "judicial function exception" and its' exemption from Sec. 1001 to include not only "traditional trial tactics," but also falsified evidence. The Sixth Circuit addressed the issue again in 1994. They diametrically reversed course. They determined in *U.S. v. Hubbard*, 16 F.3d 694 (1994), as follows:

". . . the judicial function exception does not rest on solid legal ground."

Under the Court of Appeals opinion in *Hubbard*, at least in the Sixth Circuit, the "judicial function exception" no longer appeared to provide safe haven for attorneys and Judges to render false or misleading statements or conceal material facts in judicial proceedings. This however jeopardized the ability of attorneys to engage in traditional trial tactics, zealous advocacy. It subjected them in fact, to the same type of irrational, subjective assessment of disclosure that is typically applied to State Bar applicants during the admissions process.

Faced with a split in the Circuits, as to whether the "judicial function exception" existed, the U.S. Supreme Court decided to revisit the issue. It granted Certiorari in *Hubbard*. The U.S. Supreme Court opinion in *Hubbard v. United States*, 514 U.S. 695 (1995) overruled *U.S. v. Bramblett*, 348 U.S. 503, (1955). Under the Supreme Court's opinion, as a matter of <u>form,</u> there was no longer any need for a "judicial function exception" to Sec. 1001, because the scope of Sec. 1001 was held to not include the judiciary branch at all. <u>They were now completely and totally exempt from Sec. 1001</u>. This was accomplished by holding that the term "department" did not include the judiciary. The effect was astonishingly that as a matter of <u>substance</u>, the scope of the "judicial function exception" was vastly expanded, by virtue of its' own elimination. It was simply relabeled.

The "exception" was eliminated on the ground that an entire branch of government was exempted from the rule. **One obviously does not need the benefit of an exception to a rule, when they are not covered in any manner by the rule itself.** Under *Hubbard*, every single falsification, every single concealment of a material fact, and every single dishonest action taken by a licensed attorney or Judge was now exempt from Sec. 1001. Prosecutors could still proceed against Nonattorneys, legislators and members of the executive branch of government for violating Section 1001 in non-judicial proceedings, or could proceed against falsification and concealments of fact if they were covered by other criminal statutes; but prosecuting an individual for a falsification in a judicial proceeding under Section 1001 was now out of the question.

What is the proper assessment of the U.S. Supreme Court's opinion in *Hubbard*? I submit there are two ways of assessing the opinion. First, it could be argued that the opinion was bad because it is unfair for falsifications of fact and concealment of facts to be criminal in nature when made with respect to the executive or legislative branch of government, but not the judicial branch. Such an argument relies on the premise that the judiciary is entitled to no exception from the law, whether such is phrased as previously as a "judicial function exception," or currently as a complete exemption from Sec. 1001 under *Hubbard*.

Alternatively, there is concededly some basis for asserting it was a good opinion. The reasons are as follows. The U.S. Supreme Court properly realized that the nature of advocacy <u>does</u> in fact require the licensed attorney to conceal material facts. The practice of law has always been like that. It is a key element of representation. The good attorney should never voluntarily provide full disclosure of material facts that are detrimental to his client's position. That would be a betrayal. Strict compliance by attorneys with Section 1001 is in fact, totally incompatible with the nature of the legal profession, traditional trial tactics and the nature of advocacy. Every attorney in virtually every litigation would be legally required to betray their client, if strict compliance with Section 1001 was required. How can we possibly require attorneys to disclose facts detrimental to their client's position? Although it is morally reprehensible to allow attorneys to conceal facts, it is also morally reprehensible to require attorneys to betray their clients by disclosing such facts. The issue therefore poses a Catch-22 ethical dilemma beyond resolution no matter what decision is made.

The only way to provide some justification for the Court's opinion in <u>*Hubbard*</u> , mandates focusing on the rights of Nonattorneys to receive zealous representation and zealous advocacy, rather than the attorney's ability to provide such by engaging in "traditional trial tactics." The two however, do obviously tend to go hand in hand. If the benefit to society of providing clients with zealous

advocacy is outweighed by the detriment to society of allowing attorneys to conceal facts, society benefits overall. However, it is unresolved whether the benefits do outweigh the detriments. I am doubtful, but not totally decided as to whether the Hubbard opinion was correct. I do know that any validity to the opinion hinges upon focusing on the Nonattorney's representational rights. That means the Judiciary must demonstrate that the exemption from Sec. 1001 that it has granted to itself is not attributable merely to a desire to satisfy its' own self-serving interest.

In many respects, the determinative factor is similar to the UPL issue, previously discussed herein. UPL prohibitions benefit the economic interests of the legal profession. That fact however, provides absolutely no justification for their existence. UPL rules are only justifiable if they benefit the public. For this reason, as discussed in a separate section of this book, there is an inverse relationship between UPL rules and State Bar admission requirements. Like UPL prohibitions, *Hubbard* also benefits the legal profession by exempting it from a congressional enactment. That fact however, provides absolutely no justification for the exemption. *Hubbard* is only potentially justifiable if it benefits the Nonattorney general public. Even then, its' ethical validity is doubtful.

The U.S. Supreme Court's *Hubbard* decision, intersects with the State Bar admissions process in the following manner. First, the Court's holding is in direct conflict with the irrational nature of inquiries included by State Bars on their applications. Stated simply, the vagueness, ambiguity, scope of time covered, and amount of detail currently required by Bar applications renders compliance with Section 1001's requirements an absolute impossibility for any human being. Similarly, the "traditional trial tactics" argument conflicts with the admissions process because it allows licensed attorneys to engage in concealment of facts that is not permitted of State Bar Applicants.

Focusing on the public's interest mandates that licensed attorneys and judges be held to a standard of moral character no lower than required of the Nonattorney Bar Applicant. This fact, is particularly critical in light of the leeway that the attorneys and Judges have been provided by the *Hubbard* decision. Society must ensure that the discretion provided by *Hubbard* is not abused, and this can only be accomplished by holding attorneys and judges to the same moral character standard required of Nonattorney Bar Applicants. This will ensure that the benefits enjoyed by attorneys and judges as a result of the *Hubbard* decision and UPL prohibitions, function for the primary purpose of enhancing the general public's interest. The failure to do so renders *Hubbard*, the Judicial Function Exception and UPL prohibitions illegitimate. In 1996, Congress enacted amendments to Section 1001, the effect of which was to reinstate the Judicial Function Exception and overrule ***Hubbard's*** exclusion of the judiciary from Section 1001. Kind of six of one, half dozen of the other. Whether called a Judicial Function Exception or an exclusion from the rule, the effect is largely the same. The revision to the statute by overruling Hubbard did reduce the degree of deception that attorneys and the judiciary can engage in back to its Pre-Hubbard level, but in light of the codification of the Judicial Function Exception the arguments presented herein are equally applicable.