RECENT CASES

ATTORNEYS

DISBARMENT BY FEDERAL COURT FOR FAILURE TO PERFORM DUTIES OF STATE OFFICE

A group of ministers and others brought proceedings in federal district court to have the name of a Commonwealth's Attorney of the state of Kentucky stricken from the rolls of the federal court. The complaint alleged that the respondent was unfit to be an attorney at law in federal court because of his failure properly to discharge the duties of his office. Evidence was introduced which indicated open and widespread violations of the gambling laws over many years, during which time respondent had held the office of Commonwealth's Attorney. Held: Respondent's name ordered stricken from the rolls of the federal district court. Respondent was on notice of the flagrant violations of the law and therefore had a duty to investigate and prosecute. *Wilbur et al. v. Howard,* 70 F. Supp. 930 (E.D. Ky. 1947).

Although there is no substantial doubt of the power of the federal district court to take the disciplinary steps evidenced by the instant case,[1] strong policy arguments would seem to militate against use of the federal power to correct situations which are largely matters of state concern. The problem thus presented is not a legalistic one, but involves the compatibility of federal and state courts of concurrent territorial jurisdiction. Several factors indicate that the course here taken might be criticized as an unwise exercise of federal authority.

1. Ex parte Wall, 107 U.S. 265 (1882); Bradley v. Fisher, 13 Wall. 335 (U.S. 1871); Randall v. Brigham, 7 Wall. 523 (U.S. 1868). Kentucky also recognizes the inherent power of a court to discipline members of its own bar. Duffin v. Commonwealth, 208 Ky. 452, 271 S.W. 555 (1925).

   Disciplinary proceedings in Indiana are regulated by Ind. Stat. Ann. (Burns, 1946 Repl.) §§ 4-3614 to 4-3618, and by Rules of the Supreme Court, 3-22 to 3-26. For statutory authorization for the Rules of the Supreme Court, see Ind. Stat. Ann. (Burns, 1946 Repl.) §§ 4-109 (general powers) and 4-3605 (giving the Supreme Court exclusive jurisdiction over admission to the bar and disciplinary proceedings). But it has been held that the power of the supreme court to frame rules is derived from the constitution and not from the legislative act. Epstein v. State, 190 Ind. 693, 127 N.E. 441, 128 N.E. 353 (1920).

The argument that striking from the rolls[2] of the federal court has no effect upon respondent's capacity or ability to execute the functions of his state office is of little force. Certainly complainants were interested in the removal of respondent from his state office. One can hardly assume that they were attempting what they themselves considered a futile thing. Striking from the rolls in this case has the necessary effect of exclusion from practice in many other federal courts,[3] and might well be accorded the status of a prima facie case for disbarment proceedings in Kentucky.[4] In addition, a Commonwealth's Attorney in Kentucky has the duty to represent his state in civil as well as criminal actions, brought in the circuit court of his district.[5] Though the Commonwealth's Attorney is under no duty to appear in federal court in his official capacity,[6] inability to do so, either in that official capacity or as a special assistant to the attorney-general, might seriously prejudice prosecution of just claims of the state.

Disbarment in Kentucky does not, of course, necessarily

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2. The court in the instant case (70 F. Supp. 930, 935) states "This is not to disbar or impeach an attorney or a public official, but to strike his name from the roll of this court." The dictionaries seem to make no distinction between "disbarment" and "striking from the rolls," other than to point out that historically disbarment could apply only to attorneys and not to solicitors, who were "stricken from the rolls." The term "disbarment" is in England colloquial, and is effected by the particular Inn "vacating its call." 1 Bouvier's Law Dictionary 876 (8th ed., Rawle, 1914). It has been suggested that the judge in the instant case linked formal admission to the bar with the licensing of an attorney to practice in the courts of a state. Concededly, the action of the federal court would not, per se, work a revocation of the attorney's state license to practice, or "disbar" him in that sense. But since the federal courts do not license attorneys, but enroll them only, the action here seems to require as stringent adherence to the rules of evidence and burden of proof as are required in any disciplinary proceedings short of those criminal in nature. In general usage, the terms "disbarment" and "striking from the rolls" are synonymous, and they are so used in this note in the interest of brevity.
3. See e.g. Rules Fed. D. Ct., D. Ariz., Rule 2 (disbarment by any court of competent jurisdiction grounds for disbarment in the federal court); Rules Fed. D. Ct., S.D. Calif., Rule 30 (automatic disbarment upon proof of disbarment by any state or federal court).
4. The Rules of the Kentucky Court of Appeals make no provision for recognition of foreign disbarment. It would seem likely that such action would be at the very least res judicata as to the facts found.
5. Ky. Rev. Stat. (Cullen, 1946) §69.010.
6. Slayton v. Rogers, 128 Ky. 106, 107 S.W. 696 (1908).

follow from the federal court's action. Since disbarment is not res judicata in another jurisdiction,[7] there is apparently nothing to compel a state court to recognize disbarment in a federal court. Neither is disbarment in a state court binding upon the federal courts, except as proof of cause for striking from the rolls of the state court which has taken the disciplinary step.[8] But disbarment by a federal court would indicate a strong probability of subsequent loss of standing before the state courts, upon proceedings being properly brought.

Additional argument for a hands-off policy by the federal courts in such cases is found in the circumstance that the constitution and statutes of Kentucky adequately provide for the removal of Commonwealth's Attorney who are derelict in their duties.[9] They are amenable to the constitutional pro-

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7. See supra nn. 3 and 4. This conclusion is evident from the nature of the power of each jurisdiction over admission to practice before its courts.

8. In re Tinkoff, 101 F.2d. 341 (C.C.A. 7th 1938). "The order of disbarment by a state court necessarily determines that the misconduct of the attorney constitutes cause for disbarment from practice in the state court. To that extent it is binding upon federal courts. But the order of disbarment does not create a legal status of professional unworthiness which must be accepted by the federal courts as an adjudicated fact for purposes of a disbarment proceeding in a federal court. A state court is without power to adjudicate what constitutes cause for disbarment in a federal court." But local rules of court may alter this result. See e.g. Rules Fed. D. Ct. S.D. Calif., Rule 30, cited supra n. 3.

9. It is worthy of note that previous attempts to remove the respondent in the instant case from office by use of the processes herein discussed uniformily met with failure. For a discussion of preceding actions against the respondent in the state courts, see Note, 57 Yale L. J. 125 (1948). It is apparent, however, that the lack of success of such efforts in no way militates against the argument that where state remedies are adequate on the face, the federal court should not lend a gratuitous assist in the administration of the state statutes. The argument here is directed toward showing that the state remedies are prima facie adequate and that maladministration of the local law is a duty which the state should not be permitted to shirk by casting the burden on the federal courts.

Presumably even more difficulty would be encountered in Indiana. On disbarment in Indiana generally, see Notes, 17 Ind. L. J. 551 (1942); 18 Ind. L. J. 234 (1943). The constitutional provision for the removal of judges and prosecutors who have "been convicted of corruption or other high crime" is Ind. Const. 1852, Art. 7, §12. Ind. Stat. Ann. (Burns, 1933) §49-819 makes it a duty of the Attorney-General to bring action under the constitutional provision in cases where such a conviction has been had. The supreme court alone has jurisdiction of the removal proceedings, and the constitutional remedy is exclusive. State v. Dearth, 201 Ind. 1, 164 N.E. 489 (1929); State v. Patterson, 181 Ind. 660, 105 N.E. 228 (1914). Accordingly, judges and prosecutors are

visions for impeachment,[10] and a conviction of bribery works a forfeiture of office.[11] These remedies are criminal in nature, however, and subject to the accompanying burden of proof. Conviction might therefore be difficult, especially where, as here, no intimation of corruption was made, but a simple charge of nonfeasance and apathy.[12] Were these the only remedies available, perhaps the precipitous action of complainants in seeking the circuitous aid of the federal court might be excused.

There is, however, a remedy available to complainants by the disbarment processes of the state. Though disbarment of prosecuting attorneys by state courts has been held to effect disqualification or removal from office only where the prosecuting attorney is required to be admitted to the bar,[13] Kentucky has such a provision in its constitutional require-

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not subject to removal as "state officers" under the provisions of Ind. Stat. Ann. (Burns, 1933) §§49-801 to 49-818. The statement in State ex rel. Spencer v. Criminal Court of Marion Co., 214 Ind. 551, 15 N.E.2d 1020 (1938) that a prosecutor may be removed "only by impeachment" must be understood to refer to the provisions of Ind. Const. Art. 7, §12, since a prosecutor is not liable to impeachment by the General Assembly. State v. Dearth, supra.

There is no requirement that the prosecuting attorney be an attorney or hat he be licensed to practice law. Ind. Const. Art. 7, §11; Ind. Stat. Ann. (Burns, 1933) §49-2501. Presumably, therefore, disbarment would have no effect upon the tenure of office of a prosecutor in Indiana. States having similar provisions have held that a layman is eligible to hold the office. Stato ex rel. Kinsella v. Eberhart, 116 Minn. 313, 133 N.W. 857 (1911); People ex rel. Galvin v. Dorsey 32 Cal. 296 (1867). Contra: State v. Russell, 83 Wis. 330, 53 N.W. 441 (1892) (name of office implies that prosecuting attorney must be admitted to the bar).

Though it would appear, in consideration of the above provisions, that a prosecutor in Indiana may not be removed for nonfeasance in office not constituting "corruption or other high crime," he is disqualified from acting as prosecutor during such time as he is under indictment for a criminal offense. State v. Ellis, 184 Ind. 307, 112 N.E. 489 (1916).

10. Ky. Const. §§66 to 68. Section 68 provides that "The Governor and all civil officers shall be liable to impeachment for any misdemeanor in office. . . . "

11. Ky. Rev. Stat. (Cullen, 1946) §432.350. See also §432.190, imposing a penal sanction for bribery. The similar Indiana statute is found in Ind. Stat. Ann. (Burns, 1933) §10-601.

12. 70 F. Supp. 930, 935.

13. Commonwealth ex rel. Ward v. Harrington, 266 Ky. 41, 98 S.W.2d 53 (1936); Commonwealth ex rel. Pike County Bar Ass'n v. Stump, 247 Ky. 589, 57 S.W.2d 524 (1933); Brown v. Woods, 2 Okla. 601, 39 Pac. 473 (1895); In re Snyder, 301 Pa. 276, 152 Atl. 33 (1930); Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021 (1909); State ex rel. Willis v. Montfort, 93 Wash. 4, 159 Pac. 889 (1916).

ment that Commonwealth's Attorneys and county attorneys be "licensed practicing attorneys."[14] Disbarment thus necessarily creates a "vacancy in office."[15]

Disbarment proceedings are regulated by the Rules of the Court of Appeals, which provide that such proceedings may be instituted by "any person having knowledge of the conduct complained of, or by the Board (of Bar Commissioners) of its own motion."[16] Costs of prosecution are chargeable to the Board, unless the complaint is frivolous.[17] The burden of proof is not onerous,[18] and the trial is informal,[19] the technical rules of pleading being inapplicable.[20] No insulation is afforded by the state office; and disbarment and consequent loss of office does not amount to an impeachment in violation of the constitutional provisions, since the officer is " . . . the producer of his own disqualification, and the following investigation . . . only for the purpose of ascertaining and determining whether or not the disqualification existed."[21] Such disbarment proceedings are triable before a Trial Committee of the Board of Bar Commissioners, which must be presumed to be a body remote enough to be disinterested, and concerned only with the integrity of the Bar.[22] It would appear that complainants should properly resort first to the safety devices set up by their state for the policing of its officers.

State courts have felt free to disbar prosecuting attorneys for unofficial misconduct[23] and for official misconduct

14. Ky. Const. §100.
15. For a definition of "vacancy in office," see Ky. Rev. Stat. (Cullen, 1946) §446.010-(27).
16. Rules Ky. Ct. of Appeals, Rule 3.220.
17. Id., Rule 3.210. Frivolous complaints, Rule 3.230.
18. Id., Rule 3.410 (preponderance of the evidence). Commonwealth ex rel. Buckingham v. Ward, 267 Ky. 627, 103 S.W.2d 177 (1933); In re Darrow, 175 Ind. 44, 92 N.E. 369 (1910). Cf. In re Gladstone, 28 F.Supp. 858 (S.D. N.Y. 1939), in which the court required "convincing proof that the respondents were guilty of the acts charged in the information."
19. Rules Ky. Ct. of Appeals, Rule 3.190.
20. Id., Rule 3.200.
21. Commonwealth ex rel. Pike County Bar Ass'n v. Stump, 247 Ky. 589, 57 S.W.2d 524 (1933).
22. Rules Ky. Ct. of Appeals, Rule 3.160 (Board's jurisdiction of trial); Rule 3.260 (Appointment of Trial Committee).
23. See e.g. Commonwealth ex rel. Ward v. Harrington, 266 Ky. 41, 98 S.W.2d 53 (1936); In re Crum, 55 N.D. 876, 215 N.W. 682 (1927); In re Wakefield, 107 Vt. 180, 177 Atl. 319 (1935).

involving intentional misstatement[24] or use of criminal prosecutions in aid of civil suits.[25] But in cases involving such discretionary matters as failure to prosecute or dismissal of pending prosecutions,[26] there seems to be an almost uniform finding of bribery or corruption. This is not a legal requirement, but a sort of inarticulate doctrine running through the cases, and is evidenced only by the fact of its presence in most of the reported cases in point. Practical reasons for such a result may be found in the judicial recognition given to such factors as the following: Resentment by victims of energetic prosecution,[27] political feuds,[28] the impossibility of enforcing all laws at all times,[29] and the need for protection in the carrying out of official tasks.[30] Possibly these factors are implicit in the theory that public officials are entitled to a presumption of proper motives in the conduct of their offices.[31] At any rate, since the state courts appear, at least, to hesitate before chastising their own officers for delinquency in performing their duties, absent a clear showing of bribery or corruption, it would seem inappropriate for the federal courts to require less, even should one concede the propriety of their acting at all in the policing of the state court officers. Apparently no other federal court has done so.

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24. In re Maestretti, 30 Nev. 187, 93 Pac. 1004 (1908); In re Jones, 70 Vt. 71, 39 Atl. 1087 (1897).

25. In re Truder, 37 N.M. 69, 17 P.2d 951 (1932); In re Joyce, 282 Minn. 156, 234 N.W. 9 (1930); In re Bunston, 52 Mont. 83, 155 Pac. 1109 (1916).

26. Failure to prosecute: People ex rel. Colo. Bar Ass'n v. Anglim, 33 Colo. 40, 78 Pac. 687 (1904); Commonwealth ex rel. Pike County Bar Ass'n v. Stump, 247 Ky. 589, 57 S.W.2d 524 (1933). Dismissal of pending prosecution: In re Norris, 60 Kan. 649, 57 Pac. 528 (1899). Cf. In re Voss, 11 N.D. 540, 90 N.W. 15 (1902).
On the duty to prosecute, generally, see Baker and DeLong, "The Prosecuting Attorney: Powers and Duties in Criminal Prosecution" 24 J. Crim. Law & Criminology 1025 (1934).

27. In re Waggoner, 49 S.D. 78, 90, 206 N.W. 427, 432 (1925).

28. State v. Patterson, 181 Ind. 660, 665, 105 N.E. 228, 230 (1914); State ex rel. Bourg v. Marrero, 132 La. 109, 144, 61 So. 136, 148 (1913); In re Joyce, 182 Minn. 156, 158, 234 N.W. 9, 10, (1930).

29. See State ex rel. Bourg v. Marrero, 132 La. 109, 131, 61 So. 136, 144 (1913).

30. See In re McGarry, 380 Ill. 359, 365, 44 N.E.2d 7, 10 (1942); State v. Patterson, 181 Ind. 660, 665, 105 N.E. 228, 230 (1914).

31. See State ex rel. Coleman v. Trinkle, 70 Kan. 396, 402, 78 Pac. 854, 956 (1904); Maginnis Case, 269 Pa. 186, 197, 112 Atl. 555, 559 (1921).