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CASE COMMENTS

Attorneys—Admission to Bar as Prerequisite of Holding Office as Prosecuting Attorney

D was elected prosecuting attorney of a judicial circuit in Indiana, although he never had been a member of the Indiana State Bar nor had he ever been an attorney at law entitled to practice. No provision of the constitution or statutes of Indiana specifically required a prosecuting attorney to be a lawyer admitted to practice. *D* attempted to appear in circuit court, representing the State of Indiana in criminal cases. The Indiana State Bar Association sought a permanent injunction to restrain his practice of law as a prosecuting attorney. *Held*, in a three-two decision, prosecuting attorneys must be attorneys entitled to practice, and the state supreme court has the exclusive jurisdiction to admit attorneys to the practice of law. Thus, although *D* was elected prosecuting attorney, inasmuch as he had not met the requirements for admission to the state bar, he was not entitled to practice law as prosecuting attorney. *State ex rel. Indiana State Bar Ass'n v. Moritz*, 191 N.E.2d 21 (Ind. 1963).

At one time authorities differed on the question presented in the principal case. This problem only arises when both the state constitution creating the office and the statutes are silent on requiring prosecuting attorneys to be members of the bar. Qualifications may be prescribed by constitutions, but the legislature has the power to fix reasonable qualifications, within constitutional limits, for those who hold the office. *In re Eary*, 134 W. Va. 204, 58 S.E.2d 647 (1950). Where a constitution authorizes the legislature to enact all wholesome and reasonable laws, a statute requiring a district attorney to be a member of the bar was not unreasonable. *In re Opinion of Justices*, 240 Mass. 611, 135 N.E. 305 (1922).

Two early cases had held that unless expressly required by constitution or statute, the prosecuting attorney need not be an attorney at law. It would appear to be beyond rules of construction to hold a mere name given an office defines also the qualification of the holder of the office. *People ex rel. Galvin v. Dorsey*, 32 Cal. 296 (1867). In *State v. Swan*, 60 Kan. 461, 56 Pac. 750 (1899), the court held that the office of county attorney could be held and the prescribed duties performed by a disbarred lawyer or by a person who had never been admitted to the bar, since he acted in the capacity of

agent for the state in discharging his official duties which were prescribed by law. These holdings caused the California and Kansas legislatures to adopt statutes requiring that candidates for the office of prosecuting attorney be persons admitted to practice in the courts of the state. 10 MINN. L. REV. 620 (1926).

It appears to be the general rule that prosecuting attorneys must be attorneys at law entitled to practice even in the absence of specific requirements of statutes or constitutions. 27 C.J.S. *District and Prosecuting Attorneys* § 4c (1959). The problem has been litigated in a number of cases as most state constitutions and statutes contain no specific provisions requiring prosecuting attorneys to be admitted to practice as attorneys. "The word [attorney] . . . unless clearly indicated otherwise, is construed as meaning attorney at law." BALLEN-TINE, *THE SELF-PRONOUNCING LAW DICTIONARY* (abr. ed. 1948). The duties of a prosecuting attorney are concerned primarily with representing the state in criminal matters before the courts. Thus, the duties of a prosecutor and the name of the officer have aided the courts in arriving at decisions when the problem has been litigated.

An early case dealing with the problem was *People ex rel. Hughes v. May*, 3 Mich. 598 (1855). The court held that it was not within the power of the judiciary, or even the legislature, to annex exclusions from office or qualifications for office when the constitution has not established such exclusions or qualifications. But the word "attorney" used in the name of the officer is understood by lawyer and layman, both in its technical and popular sense, to have reference to a class of persons who are by license constituted officers of courts of justice and members of the legal profession. Even if this were not so, when the nature and extent of the duties conferred upon the prosecuting attorney are considered, along with their powers, the framers of the constitution had no design to have these officers not be attorneys at law. Any other decision would be repugnant to sound and acknowledged principles of public policy. *People ex rel. Hughes v. May, supra*.

In South Dakota, an attorney who had been disbarred was later elected state's attorney. Neither the state constitution nor statutes required state's attorney to be an attorney at law. By naming this officer "state's attorney," the framers of the constitution precluded any intention that the office could be held by any person, no matter how learned in the law, if he had not been permitted to practice as

an attorney and was not licensed as such when he sought to apply. *Danforth v. Egan*, 23 S.D. 43, 119 N.W.1021 (1909). The licensing and disbarment of attorneys, while administrative in nature, are judicial functions and within the inherent power of the court. *In re Keenan*, 310 Mass. 166, 37 N.E.2d 516 (1941); *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959); Annot., 137 A.L.R. 766 (1942). Attorneys thus become officers of the court, and courts are vested with the power of discipline. To allow a disbarred attorney to serve as prosecuting attorney would take away a part of the inherent power of the courts to control the practice of law. It is necessary for proper conduct of the court's business that it should have direct control over the attorneys practicing at its bar. *Fallon v. State*, 8 Ga. App. 476, 69 S.E. 592 (1910).

In an Illinois case, a state's attorney was required to appear in court to represent the state and was also given power to file informations, sign indictments, and sue out writs of subpoena and summons. The right to perform the prescribed duties was denied by statute to one who was not a licensed attorney. *Held*, both logic and the weight of authority required that a state's attorney who discharges these duties must be licensed attorney. *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1925); 13 VA. L. REG. (n.s.) 441 (1927). The name of the office, "prosecuting attorney," carries with it the meaning that the officer must be an attorney at law rather than an attorney in fact. *Engel v. Cass*, 28 N.D. 219, 148 N.W. 607 (1914); *State v. Russell*, 83 Wis. 330, 53 N.W. 441 (1892).

In one recent case on the problem, *People ex rel. Elliott v. Benefiel*, 405 Ill. 500, 91 N.E.2d 427 (1950), the court summarized the reasoning used in previous cases. A state's attorney will be disqualified by the fact that he is not an attorney licensed to practice in Illinois. This is the rule even though there is no express constitutional or statutory specification that a state's attorney must be an attorney at law because of (1) the language of the constitution which created the office, (2) the statute enumerating the duties of the state's attorney, and (3) the provisions of the statute prohibiting persons not admitted to the bar from the practice of law.

Minnesota appears to be the only state which does not prohibit a layman from holding the office of prosecuting attorney. *State ex rel. Knappen v. Clough*, 23 Minn. 17 (1876). But the state's current statutes require a county attorney to be "learned in the law." 23 MINN. STAT. ANN. §388.01 (West Supp. 1962). However, there still

appears to be nothing to prevent a layman, learned in the law but without a license to practice law, from holding the office of county attorney and then securing the necessary legal assistance from a licensed attorney. *State ex rel. Kinsella v. Eberhart*, 116 Minn. 313, 133 N.W. 857 (1911). Other courts have held that a prosecuting attorney must discharge the duties himself rather than to have them discharged by his assistant. *People ex rel. Livers v. Hanson*, 290 Ill. 370, 125 N.E. 268 (1919); *Danforth v. Egan, supra*. The appointment of assistant state's attorney did not have the effect of removing the disqualification of the state's attorney himself. *People ex rel. Elliott v. Benefiel, supra*.

The problem could arise in West Virginia. West Virginia's Constitution requires that a prosecuting attorney be elected by the voters of each county, W. VA. CONST. art. IX, § 1; the only qualification is that no person shall be elected to any county office unless he be a citizen entitled to vote. W. VA. CONST. art. IX, § 2. No qualifications are found in the West Virginia Code pertaining to the office of prosecuting attorney.

The West Virginia Supreme Court of Appeals has consistently asserted that the right to practice law is not a natural or constitutional right but is in the nature of a privilege or franchise which the court has the inherent power to grant or refuse. *In re Eary, supra*; *In re Adkins*, 83 W. Va. 673, 98 S.E. 888 (1919). The judicial department of the state has the inherent power to define, regulate, supervise and control the practice of law and can put an end to unauthorized practice wherever it is found to exist. *West Virginia State Bar v. Earley, supra*. This power in the court is enhanced by two statutory provisions: The West Virginia Supreme Court of Appeals has the power and right to grant or deny an applicant a license to practice in West Virginia, W. VA. CODE ch. 30, art. 2, § 1 (Michie 1961); and it is unlawful for any person to appear as an attorney at law for another in a court of record without first being duly admitted to practice law in West Virginia. W. VA. CODE ch. 30, art. 2, § 4 (Michie 1961). Thus, our court clearly would have the power to determine that a prosecuting attorney without a license to practice law in West Virginia could not appear before courts of record.

It would appear that no amendment or legislation is needed in West Virginia. The courts have the inherent power to admit persons to practice law, to prescribe standards of conduct, and to discipline and revoke licenses of persons whose unfitness to practice law had

been duly established. *West Virginia State Bar v. Earley, supra*; 81 A.B.A. REP. 490 (1956). The State Bar Constitution and By-Laws recognize the right of the West Virginia Supreme Court of Appeals to control the bench and bar. In light of the inherent power of the judiciary, along with the duties of the prosecuting attorney, his constitutional name, and the above mentioned statutes, it appears that West Virginia would follow the general rule that prosecuting attorneys must be attorneys at law.

Ward Day Stone, Jr.

Conflict of Laws—Erosion of *Lex Loci Delicti* Theory

P, an automobile guest, brought this negligence action in New York against defendant, host motorist's executrix, for injuries received in an Ontario, Canada accident. The lower court dismissed the complaint on the ground that Ontario's guest statute barred recovery, and the guest appealed. *Held*, reversed. New York, as place where parties resided, guest-host relationship arose, and automobile trip began and was to end, rather than Ontario, as place of accident, had dominant contacts and superior claim for the application of its law upon question whether guest was barred merely because she was a guest. *Babcock v. Jackson*, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

The principal case presents the interesting problem of whether the law of the place of the tort shall invariably govern the availability of relief, or whether the applicable choice of law rule should also reflect a consideration of other factors relevant to the purposes to be served by the enforcement or denial of the remedy? The instant decision provides a major breakthrough in the judicial struggle to abandon the strict place-of-the-wrong theory.

The traditional choice of law rule has been that the substantive rights and liabilities arising out of a tortious occurrence are determined by the law of the place of the tort. GOODRICH, *CONFLICT OF LAWS* § 92 (3rd ed. 1949); RESTATEMENT, *CONFLICT OF LAWS* § 378 (1934). This is the general rule prevailing throughout the various jurisdictions of this country. *Chicago, R. I. & P. Ry. v. Glascock*, 187 Ark. 343, 59 S.W.2d 602 (1933); *Ryan v. Scanlon*, 117 Conn. 428, 168 Atl. 17 (1933); *Norfolk & W. Ry. v. Barney*, 262 Ky. 228, 90 S.W.2d 14 (1936). The rule owes its theoretical foundation to