

February 1961

## Legal Ethics--Attorneys--Disbarment While Serving as Judge

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### Recommended Citation

James W. Sarver, *Legal Ethics--Attorneys--Disbarment While Serving as Judge*, 63 W. Va. L. Rev. (1961).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss2/17>

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of action, it is his privilege to engage in litigation at one of two other levels, the District Court or the Court of Claims. *United States v. Jefferson Elec. Mfg. Co., supra*. The prerequisite for entering the District Court to gain a refund, must, in and of itself, be payment of the entire deficiency assessment. For, if one can request a refund of a partially paid assessment in the District Court, of what value would the Tax Court be, either to the taxpayer or the government? Payment of a mere nominal sum to the Commissioner would gain for each and every taxpayer the right to enter a District Court and debate the merits of the deficiency assessment in that forum. This would defeat the basic purpose for establishment of our Tax Court, and hence one should not be permitted, prior to payment of his entire deficiency assessment, to litigate his case in the District Court, but instead should be made to find his remedy in the Tax Court, and if adverse, to appeal in the Circuit Court of Appeals.

The decision of the United States Supreme Court in this case is one of great insight and one which is indeed basic to the continued existence of our present system of tax litigation.

*Aaron David Trub*

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### **Legal Ethics — Attorneys — Disbarment While Serving as Judge**

Petitioners sought disbarment of defendant, an attorney and judge, because of numerous alleged acts of wilful, deceitful, unlawful and immoral conduct, both in his individual and official capacities. The trial court dismissed the petition on the grounds (1) that defendant, being a judge and constitutional officer, could be removed from office only by impeachment and (2) that the statute relating to disbarment of attorneys was not applicable. The Court of Appeals was equally divided on the question presented and the case came to the Supreme Court of Georgia for review. *Held*, reversed. The facts that a judge of the superior court is a constitutional officer, must be a lawyer with seven years' experience, may not practice law while serving as judge, and may be removed from office by impeachment, constitute no reasons for disallowing proceedings to disbar him as an attorney. *Gordon v. Clinkscales*, 114 S.E.2d 15 (Ga. 1960).

Authorities differ on the major question presented in the principal case—whether an attorney, while serving as judge, is subject to disbarment or other disciplinary measures, when the state constitution provides only for impeachment of judges.

The principal case is in accord with the weight of authority. "A constitutional provision relating to the removal of judges of the supreme or circuit courts has been held inapplicable in determining the power of the court to disbar a member of the bar who is also a judge of the superior court." 7 C.J.S. *Attorney & Client* § 23g (1937). An attorney may be disbarred for the lack of moral qualifications, although the misconduct complained of was in his acts as judge. *In re Rempfer*, 51 S.D. 393, 216 N.W. 355 (1927); *In re Stolen*, 193 Wis. 602, 214 N.W. 379 (1927); Annot., 55 A.L.R. 1355 (1928). This view is advanced on the theory that the practice of law is not a "right" but a "privilege" afforded to persons meeting certain qualifications. *In re Adkins*, 83 W. Va. 673, 98 S.E. 888 (1919); 5 AM. JUR. *Attorneys at Law* § 14 (1936). A separation of the privilege of practicing law and the election or appointment to the position of judge must be made in order to appreciate the holding in the instant case. In *State v. Peck*, 88 Conn. 447, 91 Atl. 274 (1917), a probate judge was disbarred for misconduct. In the case of *In re Dellenbaugh*, 9 Ohio C.C. Dec. 325 (Ohio C.C.R. 1899), the misconduct of a judge resulted in his disbarment.

Those states that do not allow the disbarment of attorneys who are serving as judges follow the doctrine of *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. This minority view maintains that, when the state constitution provides for impeachment as the method of removing judges from office, the courts are not justified in adding other grounds not comprehended therein or recognized by the common law. *In re Florida Bar*, 103 So. 2d 632 (Fla. 1958). This view is advanced on the theory that an attempt to disbar a judge is an attempt to remove the judge from office, a result intended under the state constitution to be accomplished only by impeachment. *Baird v. Justices Court*, 11 Cal. App. 439, 105 Pac. 259 (1909); *Colorado Bar Ass'n*, 137 Colo. 357, 325 P.2d 932 (1958); *In re Silkman*, 84 N.Y. Supp. 1025 (App. Div. 1903).

No provision is found in the West Virginia Constitution or Code requiring circuit or supreme court judges of the state to be

resident members of the bar. Therefore, the question in the principal case presents no problem concerning circuit or supreme court judges in West Virginia. Where a judge of a particular court is not required to be a qualified attorney and disbarment will not affect his official status, he may be disbarred for misconduct in office, obviously without losing his position of judge. However, there is a very real area of concern in courts of limited jurisdiction in this state. Statutes creating courts of limited jurisdiction in various counties require the judges thereof to be resident members of the bar of the counties. See for example, W. Va. Acts 1915, ch. 109 § 3, at 536, providing that the Kanawha county judge of the Court of Common Pleas "shall be a resident member of the bar of Kanawha County." Likewise, the Marion County Criminal Court judge shall be a resident member of the bar of Marion county. W. Va. Acts 1919, ch. 69, § 3, at 266. Raleigh county has a similar provision. W. Va. Acts 1907, ch. 29, § 3, at 206.

Just what effect the decision in the principal case would have on judges of certain courts of limited jurisdiction in West Virginia presents a question which is yet undecided, since the West Virginia Constitution now provides for the removal of judges of courts of record by impeachment only. W. VA. CONST. art. IV, § 9; art. VIII, § 17. The necessity of a West Virginia decision on the question in the principal case could be avoided by revision of the West Virginia Constitution.

Georgia, by allowing the disbarment of judges who by law are required to be members of the bar, runs squarely into the problem of deciding the effect such a disbarment would have on the judge's official office. Would the removal of the judge's privilege to practice law work a forfeiture of his elected position as judge? This question was not considered in the principal case, although, by inference, it appears the Georgia court would rule that removal of the attorney's privilege to practice law can in no way affect his constitutional office of judge. The Georgia court went to great detail to separate the remedies available to the state concerning disbarment and impeachment. As a result of this reasoning, it is proper to assume that a disbarred attorney, as judge, could rule on the law presented by his former bar associates who may have petitioned for the judge's disbarment. The obviously strong reason for allowing this consequence is that the method of removing judges from office as provided by the state constitution is impeachment, before the legislative branch of the state government, and not dis-

barment before the judicial branch of government. If it is alleged that the privilege to practice law is separate and distinct from the constitutional office of judge, how can the removal of the privilege work a forfeiture of the office of judge? However, compare *Mahoning County Bar Ass'n v. Franko*, 168 Ohio St. 17, 151 N.E.2d 17 (1958), in accord with the instant case, allowing the disbarment of an attorney who was serving as a municipal judge, and *State ex rel. Saxbe v. Franko*, 168 Ohio St. 338, 154 N.E.2d 751 (1958), holding that the suspension from practice of law in *Mahoning County Bar Ass'n, supra*, works a forfeiture of the office of municipal judge.

Although the disbarment of a judge should not work a forfeiture of the judgeship on the basis of exclusive remedy of impeachment provided by the state constitution, to disallow disbarment proceedings on the basis of exclusive remedy would deny the bar its right and duty to protect the public from lawyers of unethical standards. See *In re Meraux*, 202 La. 736, 12 So. 2d 798 (1943). Thus, it appears that the necessary measures to halt such a dilemma lie in constitutional revision or with the legislature.

One method of avoiding the problems raised herein would be to require all judges to be resident members of the bar and to provide for the removal of such judges through disbarment proceedings as well as impeachment. A failure to observe the judicial code of ethics, which in essence embrace the "spirit" of the attorneys' code of ethics, should properly result in dismissal from office and revocation of the privilege to practice law.

*James William Sarver*

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**Torts — False Arrest —  
False Imprisonment — Shoplifting**

On November 18, 1957, the manager of *D's* supermarket detained *P* after *P* had left the premises of the store for the purpose of investigating whether *P* had paid for the groceries. The manager acted on a "hunch." He found that *P* had in fact paid for his groceries. On November 27, 1957, after leaving the store, *P* was again accosted by the store manager, who laid his hand on *P's* shoulder, took the poke out of *P's* arms, examined its contents, and again found that *P* had paid for his purchases. The third