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Criminal Law--Commercial Bribery--The Need for Legislative Reform

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cause requirement in arrest cases; 2) avoiding the necessity of making an arrest; 3) allowing an opportunity for exculpation; and 4) reducing police lawlessness and frustration. The special benefits to be achieved from the frisk are: 1) reducing danger to policemen, and 2) preventing crime by confiscating knives, guns, and other weapons.³³

If the Kentucky legislature sees fit to pass a stop and frisk law, it is recommended that the best points of the New York law be combined with the Model Code of Pre-Arrest Procedure and the best common law provisions found in other jurisdictions. The following proposed statute is the result of just such a combination:

- (1) A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or misdemeanor and may demand of him his name, address, and an explanation of his actions.³⁴
- (2) When a police officer has stopped a person for questioning pursuant to this section and the officer reasonably believes his safety so requires, he may frisk the suspect,³⁵ strictly limiting the frisk to a superficial patting down of the suspects outer garments in search of dangerous weapons.

This writer believes that the suggested statute would be constitutionally acceptable, as the various components have already been tested by the Supreme Court and found not to be in contravention of the guarantees afforded by the fourth amendment. If it is enacted and if the various local enforcement agencies carry on an intense public relations campaign, the statute may serve to eliminate, not cause, tension presently existing between the citizens and police.

Charles D. Weaver, Jr.

CRIMINAL LAW—COMMERCIAL BRIBERY—THE NEED FOR LEGISLATIVE REFORM.—The national economy has exploded by phenomenal proportions in recent years. Big business and its allies are pushing national and local economies to pinnacles of success never before experienced. Speculating as to the cause, one will eventually give partial credit to a nationally competitive life style which envisions material gain as the

³³ Swartz, *Stop and Frisk*, 58 J. CRIM. L.P. & P.S. 433 (1967).

³⁴ N.Y. CODE CRIM. PROC. § 180a (McKinney Supp. 1966).

³⁵ MODEL CODE § 2.02(5).

eventual goal. Yet while this spirit of competition fosters growth in the economy, it sometimes generates corrupt methods among its practitioners, one of which is commercial bribery. The Seventh Circuit Court of Appeals in *American Distilling Co. v. Wisconsin Liquor Co.*¹ defined it as follows: "The vice of conduct labeled 'commercial bribery' . . . is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealings with employees or agents of prospective purchasers."² Although the term commercial bribery is not necessarily restricted to buyers, sellers, and purchasing agents, as this definition implies, the phrase "gaining advantage over competitors via corrupt dealings with employees or agents" reveals the essence of the problem.

Kentucky's statutory power to cope with commercial bribery is practically negligible. Among Kentucky's many bribery laws (dealing mainly with public officials), only two purport to cover commercial bribery: KRS § 435.320 makes it a misdemeanor for an employee to disclose information with the intent to aid a competitor;³ and KRS § 244.600 imposes criminal sanctions on brewers who commercially bribe malt beverage retailers.⁴ The lack of penal sanctions within the general

¹ *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

² *Id.* at 585.

³ KRS § 435.320 (1962) provides as follows:

Disclosure of information obtained during employment to aid competitor of employer.

(1) No person, having obtained or derived information from the books of account or from records, papers, plans, drawings, blueprints, research data or files belonging to, or in the custody of his employer shall publish, circulate or in any manner disclose such information with the intent to aid a competitor without the consent of such employer or aid or encourage such publication, circulation or disclosure. No person, with the intent of aiding a competitor, shall procure or bribe, or attempt to bribe, another person to disclose information obtained in the course of employment of such other person, or derived from the books of account, records, papers, plans, drawings, blueprints, research data, or files belonging to the employer of another person, with intent to use, or cause to be used, the same or the information contained therein, in competition with the employer of such other person.

(2) Nothing contained in this section shall be deemed to be in derogation of the provisions of KRS § 421.100, or to abridge or restrain in any way the freedom of the press.

(3) Any person who violates any provision of this section shall be fined not less than fifty nor more than five hundred dollars or imprisoned for not more than six months, or both. (1962, c. 138, §§ 1, 2, 3).

⁴ KRS § 244.600 (1962) provides:

No brewer shall induce through any of the following means, any malt beverage retailer to purchase any malt beverage products from him to the exclusion in whole or in part of malt beverages sold or offered for sale by other persons, if the brewer engages in the practice of using

(Continued on next page)

area, however, is not as alarming as the fact that criminal prosecution under the two statutes is rare and practically nonexistent.

Nevertheless, Kentucky courts have long recognized that principals and agents owe a duty of utmost good faith in their dealings toward each other.⁵ The penalty for a breach of this duty, however, has been applied only in civil as opposed to criminal liability, and has been imposed under common law rather than the statutory provisions. Normally, the subject arises in the context of contract law where a principal is seeking to rescind a contract or to obtain damages against his agent, who, as a result of a "commercial bribe" procured from a third party, has bound that principal to a contract.⁶ Again, Kentucky decisions are devoid of common law principles dealing precisely with this question. Thus, it becomes evident that Kentucky law is totally inadequate to deal with this increasing problem.

The proposal of the Kentucky Crime Commission "penalizes one who bribes or offers to bribe an employee or fiduciary with intent to influence him in his employment or fiduciary capacity."⁷ This proposal attacks only the briber. Immediately the question is asked, "What about the bribee?" The only sanction imposed against a bribee is KRS § 435.320,⁸ yet this statute does not include the secretive payment from a seller to a buyer's agent. If any law is to be effective, it will have to include the bribee (who may solicit the bribe as actively as any briber).

(Footnote continued from preceding page)

such means, or any of them, to such an extent as substantially to restrain or prevent transactions in malt beverages:

- (1) By commercial bribery; or
- (2) By offering or giving any bonus, premium or compensation to any officer, employee or representative of the retailer; or
- (3) By making or allowing any rebates or refunds to any officer, employee or representative of the retailer.

⁵ See *Georgia Cas. Co. v. Mann*, 242 Ky. 447, 46 S.W.2d 777 (1932); *Eagle Dist. Co. v. McFarland*, 11 Ky. L. Rptr. 905 (1890).

⁶ Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 MINN. L. REV. 599 (1962). This author suggests that the following remedies are available to the principal against the briber and bribee:

The remedies available to the principal of the disloyal agent against the briber are: (1) a right to rescind any contract induced by the agent as a result of the bribe; and (2) a right to sue the briber for damages resulting from the bribe. The remedies available to the principal against the bribee are: (1) a right to recover the amount of the bribe from the disloyal agent; (2) a right to sue the disloyal agent for the damages resulting from the bribe; (3) a right to dismiss the disloyal agent; and (4) a right to withhold compensation for the agent's disloyal service. *Id.* at 600.

⁷ 1 KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION § 1801, Comment (1968).

⁸ KRS § 435.320 (1962). The provisions of this statute are set out fully in note 3, *supra*.

The primary source of the Kentucky Crime Commission proposal is Section 180.00 of the New York Penal Laws.⁹ However, if we are to include the bribee within the purview of criminal liability, New York Penal Law Section 180.05 will have to be enacted as well.¹⁰ Both sections of the New York law became effective Sept. 1, 1967, and no cases have been reported thus far. However, both sections restate two provisions of former New York Penal Law Section 439, "dealing with an intent or understanding that the employee's conduct in relation to his employer's or principal's affairs will be influenced."¹¹ The new law does not carry over those provisions of former Section 439 which "render a seller who gives a present to a purchaser and the purchasing agent thereof guilty of a crime even in the absence of any intent or agreement that the agent's conduct will be influenced."¹²

An investigation of Section 439 is helpful in determining the scope of the law, the frequency and type of litigation thereunder. One researcher found that only seven criminal cases involving the statute have been litigated, giving emphasis to the notion that enforcement in the general area is most difficult.¹³ More recently, North Carolina had a case of first impression after having had a commercial bribery statute on the books for fifty years.¹⁴

The old New York statute has been applied more frequently than similar statutes of other states and has been the primary target of discussion by commentators in the area. Generally, where a purchasing agent is bribed, the contract will not be enforced against the buyer.¹⁵

⁹ N.Y. PENAL LAW § 180.00 (McKinney 1967) provides:

A person is guilty of commercial bribing when he confers, or offers to confer, any benefit upon any employee, agent, or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principle's affairs.

¹⁰ N.Y. PENAL LAW § 180.05 (McKinney 1967) states:

An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement that such benefit will influence his conduct in relation to his employer's or principal's affairs.

¹¹ Ch. 409, § 439, [1930] N.Y. PENAL LAW 1909 (repealed 1967).

¹² *Id.*

¹³ See Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. PA. L. REV. 848, 853 (1960).

¹⁴ *State v. Brewer*, 258 N.C. 533, 129 S.E.2d 262 (1963); 1 A.L.R.3rd 1323 (1965).

¹⁵ *Shemin v. A. Black & Co.*, 32 Misc. 2d 1046, 255 N.Y.S.2d 805 (1962), *reversed in part on other grounds*, 19 App. Div.2d 596, 240 N.Y.S.2d 622 (1963), *motion denied*, 14 N.Y.2d 727, 250 N.Y.S.2d 72, 199 N.E. 2d 169 (1964), *motion granted*, 199 N.E.2d 515, 250 N.Y.S.2d 438 (1964); *Norton v. John T. Clark & Son*, 144 N.Y.S.2d 245 (1955), *reversed and modified on other grounds*, 2 App. Div. 2d 875, 156 N.Y.S.2d 233 (1956), *appeal denied*, 2 App. Div.2d 966, 159 N.Y.S. 2d 742 (1956), *appeal dismissed*, 2 N.Y.2d 853, 140 N.E.2d 917, 160 N.Y.S.2d 4 (1957); *Stone v. Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948); *Kraus v. H. Pactor & Co.*, 134 Misc. 247, 234 N.Y.S. 687 (1929).

Kentucky has shown a tendency to honor this principle by common law ruling.¹⁶ In addition, the buyer may recover the bribe money from either his agent or the briber;¹⁷ he may dismiss the unfaithful employee;¹⁸ and he may withhold remuneration for services rendered.¹⁹

Since the passage of commercial bribery laws by several states, attempts have been made both to expand and restrict them. The Model Penal Code Section 224.8 illustrates the ultimate conclusions.²⁰ The most important provision under newly enacted and proposed laws is one which requires a *conscious* disregard of a known duty of fidelity.²¹ Previous laws, in certain instances, penalized parties to a bribe regardless of their intent or agreement that the employee or agent would be influenced by the bribe. New York Penal Law Section 180.00 expresses this by the phrase, "intent to influence his conduct." The Model Penal Code does not, however, include a provision regarding the employer's knowledge of, or consent to the bribe. The effect of this omission is to completely disallow *any* benefits to be transferred with the knowledge that the employee's behavior will be influenced. This is in opposition to New York's statute which will allow bribes to continue so long as the employer consents.²² Perhaps it would be better if bribery were made illegal regardless of the principal's knowledge

¹⁶ See *Kessler v. Jefferson Storage Co.*, 125 F.2d 108 (6th Cir. 1941).

¹⁷ *Palmer v. Doull Miller Co.*, 233 F. 309 (S.D.N.Y. 1916); *Donemar, Inc. v. Molloy*, 252 N.Y. 360, 169 N.E. 610 (1929).

¹⁸ *Sears, Roebuck & Co. v. Kelley*, 1 Misc. 2d 624, 149 N.Y.S.2d 133 (Sup. Ct. 1956).

¹⁹ *Palmer v. Doull Miller Co.*, 233 F. 309 (S.D.N.Y. 1916).

²⁰ MODEL PENAL CODE § 224.8 (Proposed Official Draft 1962).

(1) A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

- (a) agent or employee of another;
- (b) trustee, guardian, or other fiduciary;
- (c) lawyer, physician, accountant, appraiser, or other professional advisor or informant;
- (d) officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or
- (e) arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal, or criticism.

(3) A person commits a misdemeanor if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under this section.

²¹ MODEL PENAL CODE § 233.10, Comment (Tent. Draft No. 11, 1960).

²² Though this may not technically be called a bribe (in view of the employer's consent), the widespread economic results are the same, *i.e.*, economic waste which results in higher consumer prices and/or lower quality goods.

and consent—this would aid in eliminating those bribes now considered to be accepted business practices.

As evidenced by the Model Penal Code provision, there is an attempt to broaden the categories of employer-employee, and principal-agent to include any and all fiduciary-beneficiary relationships. This extends the statute past the boundaries of business and into all relationships where monetary loss or gain has created a duty of fidelity. New York's statute incorporates this term "fiduciary" while simultaneously changing "principal's business" to "principal's affairs".²³ Both the Model Penal Code and New York Penal Code broaden the scope of fidelity-bound relationships while eliminating the penalization of persons giving or receiving gifts who are unaware of any betrayal.

The major problem in the enforcement of commercial bribery laws is public apathy and the fact that many corrupt practices are considered ethically acceptable and an inevitable cost of doing business. Though many employers do not approve of it, they realize its necessity in maintaining competitive equality. Aside from the moral question presented, the American public suffers definite economic deprivation as a result of large amounts of money added as a cost of business.

Bribery is rampant because people desire economic gain. When, for example, a seller's products are of poor quality, or his ineptness in management results in high manufacturing costs, he may find he cannot compete with good quality lower priced goods. Proponents of the competitive system hope for just this situation—the desire being that this seller will find better methods of production, improve his managerial techniques, raise the quality of his goods, and ultimately lower his prices. Too often, however, this seller will simply bribe his way into the market with inferior, high-priced goods.

A bribe, if it continues, also has the effect of isolating a buyer from an open, competitive market. The result, if bribes are widespread within a particular industry, is a depressurized market which succumbs to the increasing practice of paying bribe money to obtain buyers. The cost of the goods is increased by at least the amount of the bribe; the price of the goods increases, and the consumer ultimately absorbs the cost. Thus, in order to preserve our economic system and safeguard innocent beneficiaries from a breach of trust by those in a fiduciary capacity, criminal statutory provisions are necessary.

It is readily agreed that commercial bribery laws, due to their lack of enforcement, have not been effective deterrents to crime. A

²³ N.Y. PENAL LAW § 180.00 (McKinney 1967).

bribe is difficult to detect and because those parties to it are generally the only persons involved, there is no innocent third part to divulge incriminating evidence. This problem has been handled by several states by statutes (1) granting criminal immunity to persons compelled to testify,²⁴ or (2) granting immunity to the first participant in the bribe to supply evidence which tends to convict the other participants.²⁵ Even more effective is the Massachusetts law which grants both civil and criminal immunity.²⁶

Based on the foregoing, this author proposes the following statute:

(1). A person is guilty of commercial bribing when he confers, or offers to confer, any benefit upon any employee, agent, or fiduciary with or without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.²⁷

(2). An employee, agent or fiduciary is guilty of commercial bribe receiving when, with or without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.²⁸

(3). (a) In any prosecution or any investigation by an examining court or grand jury under (1) or (2), no witness shall be granted exemption from testifying on the grounds that his testimony may incriminate himself. (b) No testimony given in the proceedings stated in subsection (a) shall be used against the testifying witness in any civil or criminal proceedings.²⁹

(4). The first person committing an offense within the purview of (1) or (2) or both, who shall report the facts, under oath, and who shall give evidence tending to convict any other person charged with an offense under this section shall be granted full immunity from liability in any civil or criminal proceedings.³⁰

E. Robert Goebel

²⁴ IOWA CODE § 741.4 (1958); MICH. COMP. LAWS § 750.125 (1948).

²⁵ LA. REV. STAT. § 14.73 (1950); MICH. COMP. LAWS § 750.125 (1948); N. J. STAT. ANN. § 2A: 170-89 (1951).

²⁶ MASS. GEN. LAWS ANN. ch. 271 § 39 (1956).

²⁷ N.Y. PENAL LAW § 180.00 (McKinney 1967).

²⁸ N.Y. PENAL LAW § 180.05 (McKinney 1967).

²⁹ MICH. COMP. LAWS § 750.125 (1931).

³⁰ *Id.*