Litigation Update

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Cases Reported:

ABA-Approved Law Schools

Waiver

In re Anthony, 225 P.3d 198, 2010 WL 346247 (Ut. 2010)

Prospective law school; tenure

In re Husson University School of Law, 989 A.2d 754, 2010 WL 761245 (Me. 2010)

Character and Fitness

Deferred adjudication; rehabilitation; per se disqualification

In re Lazcano, 222 P.3d 896 (Az. 2010)

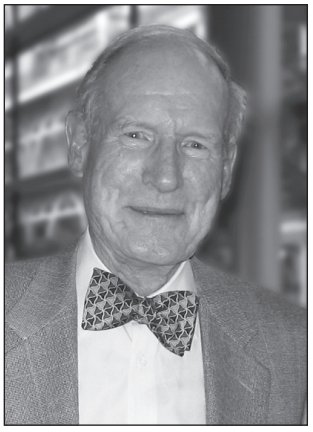
Forging a notary's signature

In re Nathan, 26 So. 3d 146, 2010 WL 200830 (La. 2010)

Miscellaneous

***Rooker-Feldman* doctrine**

El-Shabazz v. State of New York Committee on Character and Fitness for the Second Judicial Department, 2009 WL 4730307 (E.D. N.Y.)



ABA-Approved Law Schools

Waiver

In re Anthony, 225 P.3d 198, 2010 WL 346247 (Ut. 2010)

Thomas Anthony graduated from law school at Western State University in 1980. At that time, Western State was accredited by the California State Bar but not by the ABA. Before enrolling at Western State, Anthony had contacted the Utah Bar to determine his eligibility for admission and had been informed that he would be allowed to sit for the Utah Bar Examination if he graduated from Western State, provided that he passed the California Bar Examination and practiced law in California for at least five years.

Anthony applied for admission to the Utah Bar in 1988 and was authorized to sit for Utah's 1989 Attorneys' Exam, but he did not appear. In 2003, the Utah Bar amended the rules governing admission by adding the requirement that an attorney applicant must have graduated from an "approved law school" (meaning a law school fully or provisionally accredited by the ABA) to sit for the Utah Bar Exam. Anthony moved to Utah in 2008 to care for his ailing mother. He contacted the Utah Bar regarding admission and was informed that he was ineligible to sit for the exam because he had not graduated from an ABA-accredited law school. He nonetheless submitted his application to sit for the July 2009 Attorneys' Exam, which was rejected. Anthony

requested additional information and was told that the Bar was unable to waive any admissions requirements. Rather than pursue the Bar's appeals process, Anthony filed a petition for a writ of extraordinary relief with the Utah Supreme Court.

Rule 65B of the Utah Rules of Civil Procedure authorizes a person, in certain defined circumstances, to petition a court for extraordinary relief when "no other plain, speedy and adequate remedy is available." The Bar argued that Anthony was not entitled to extraordinary relief because the appeals process set forth in admissions rule 14-709 constituted a plain, speedy, and adequate remedy.

Anthony responded that the appeals process was not an adequate remedy in this situation because the Bar had already admitted its inability to waive the ABA accreditation requirement. He contended that the Court should grant him a waiver of the ABA accreditation requirement because it would be unfair and irrational to apply the amended rule to him retroactively, given his extensive experience as a practicing attorney.

The Bar argued that the amended rule was not being applied retroactively because Anthony was a new applicant, not an old applicant whose approval had been placed in abeyance on a previous occasion. The Bar also contended that granting Anthony a waiver would "encourage a deluge of petitions for waiver" and impose a burden on the Court.

The Court stated that it had "no desire to encourage a flood of . . . waiver petitions," but noted that "strict adherence to the rules in every case may undermine" the goal of providing the citizens of Utah with competent attorneys. The Court made it clear that a waiver of the Bar's ABA accreditation requirement may be obtained in an appropriate case but declined to set out any specific standard for evaluating petitions for waiver. It found that where an attorney has actively practiced law, without blemish, for nearly 30 years and comes highly recommended by judges, clients, and fellow attorneys, waiver of the ABA accreditation requirement is appropriate. Recognizing the validity of the Bar's concerns regarding the administrative burden of increasing numbers of waiver petitions, the Court took this opportunity to instruct the Bar and the Court's rules committee to begin work toward revising the rules to grant the Bar authority to make such waivers, subject to discretionary review by the Court.

RECOGNIZING THE VALIDITY OF THE BAR'S CONCERNS REGARDING THE ADMINISTRATIVE BURDEN OF INCREASING NUMBERS OF [ABA ACCREDITATION REQUIREMENT] WAIVER PETITIONS, THE COURT TOOK THIS OPPORTUNITY TO INSTRUCT THE BAR AND THE COURT'S RULES COMMITTEE TO BEGIN WORK TOWARD REVISING THE RULES TO GRANT THE BAR AUTHORITY TO MAKE SUCH WAIVERS, SUBJECT TO DISCRETIONARY REVIEW BY THE COURT.

The Court held that Anthony was entitled to petition the Court for extraordinary relief because the normal appeals process would be futile, and granted his petition for waiver of the ABA accreditation requirement because his long record of successful practice clearly demonstrated his competency to practice law in Utah.

Prospective law school; tenure

In re Husson University School of Law, 989 A.2d 754, 2010 WL 761245 (Me. 2010)

The Supreme Judicial Court of Maine considered Husson University's second request that the Court exercise its original jurisdiction over bar admissions

to permit Husson's future Juris Doctor graduates to sit for the Maine Bar Examination. The first such application was denied by the Court in June 2008.

In October 2007, Husson's first petition disclosed the university's intent to create a law school to provide a low-cost legal education to students in northern and eastern Maine. Three problems precluded a decision in Husson's favor: (1) Husson's law school had not yet opened, and the quality of its legal education could therefore not be determined; (2) Husson had not yet had an opportunity to address the concerns raised by evaluators from the Maine State Board of Education; and (3) Husson had failed to obtain ABA accreditation or some comparable alternative.

THREE PROBLEMS PRECLUDED A DECISION IN HUSSON'S FAVOR: (1) HUSSON'S LAW SCHOOL HAD NOT YET OPENED, AND THE QUALITY OF ITS LEGAL EDUCATION COULD THEREFORE NOT BE DETERMINED; (2) HUSSON HAD NOT YET HAD AN OPPORTUNITY TO ADDRESS THE CONCERNS RAISED BY EVALUATORS FROM THE MAINE STATE BOARD OF EDUCATION; AND (3) HUSSON HAD FAILED TO OBTAIN ABA ACCREDITATION OR SOME COMPARABLE ALTERNATIVE.

In the current petition, Husson submitted the following items: (1) a letter from the dean of Husson Law School to the ABA's Consultant on Legal Education reporting that Husson would not be submitting an application for accreditation from that body; (2) various documents describing the intended curriculum for the school, the education and qualifications of the proposed faculty, and the plan for providing library resources; (3) a comparison of Husson's program to the ABA standards of accreditation; and (4) a proposed order granting the application. These materials detailed a program largely identical to that proposed in Husson's 2007 petition.

The 2007 petition had sought blanket approval for Husson's law school graduates to sit for the Maine Bar Exam. In the current petition, Husson sought only "preliminary approval of a blueprint of its proposed law school program and a ruling from the Court that if this program is faithfully carried out in substantial compliance . . . , it will support eligibility of Husson graduates to take the Maine Bar." Husson's law school still has not opened and has neither ABA accreditation nor any substantially similar alternative.

The Maine Bar Admission Rules require that any applicant seeking to take the Maine Bar Examination shall produce to a board of bar examiners satisfactory evidence establishing, among other requirements, that the applicant graduated from a law school that had "received its provisional or final accreditation from the American Bar Association by the time of the graduation of the applicant."

Husson contended that the Court has the authority to grant exceptions to both the relevant statutes and bar admission rules requiring ABA accreditation. The Court agreed, stating that it has the inherent authority and exclusive jurisdiction over the admission of attorneys to the practice of law in Maine.

Husson has declined to have the ABA itself evaluate Husson's proposed law school to determine if it meets ABA standards, because Husson's faculty voted more than 15 years ago to eradicate a system of faculty tenure. The ABA's accreditation standards require that, in order to "attract and retain a competent faculty," a law school must have an

established academic freedom and tenure policy. In Husson's earlier petition, the Court had agreed that ABA accreditation might not be the only acceptable review process and had invited Husson to identify another existing process to accomplish the same task. In this application, Husson did not identify another existing review process but requested the Court to create a new review process for its benefit.

The Court held that "Husson's decision not to apply for accreditation from the ABA . . . provides an insufficient basis for us to take these extraordinary steps, and therefore we decline Husson's request." Husson conceded that "there is simply no precedent, in this state or nationally, for a state's highest court to grant law students the right to take a bar exam before the law school even exists."

Character and Fitness

Deferred adjudication; rehabilitation; per se disqualification

In re Lazcano, 222 P.3d 896 (Az. 2010)

While an undergraduate student in Texas in 2002, Alejandro Lazcano was arrested and indicted for burglary and sexual assault. Under a plea agreement, he pled no contest to a reduced charge of attempted sexual assault. The Texas court deferred adjudication while Lazcano completed a 10-year term of probation. Under deferred adjudication, the charges will be dismissed if the defendant successfully completes the conditions of probation, but the defendant may be sent to prison without a trial on the underlying charge if he violates any condition of probation. Lazcano later graduated from law school, passed the July 2008 Arizona bar examination, and applied for admission to the Arizona Bar. The Arizona Committee on Character and Fitness, by divided vote, recommended admission.

On review, the Arizona Supreme Court stated that it examines past misconduct to see what it reveals about an applicant's present moral character. While the Committee on Character and Fitness makes recommendations to the Court on admission, the Court independently determines whether the applicant has satisfactorily demonstrated good moral character.

Arizona's rule regulating bar admission creates a presumption that an applicant convicted of a felony or a misdemeanor involving a serious crime should be denied admission. Deferred adjudication, which requires a plea of guilty or no contest, is correctly treated as a conviction for purposes of bar admission. "To rebut the presumption, a convicted felon must provide clear and convincing evidence of rehabilitation." For Lazcano to establish rehabilitation, he must show that he has both (1) accepted responsibility for his past criminal conduct and (2) identified and overcome the weakness that led to the unlawful conduct.

The Court said that the Committee's evaluation of Lazcano's application had focused not on his acceptance of responsibility for his acts and his efforts to overcome weaknesses but instead on the credibility of the witnesses in the Texas case. A majority of the Committee appears to have questioned whether Lazcano engaged in any criminal conduct in the 2002 incident. The Court stated that "the Committee should not re-try or second-guess an applicant's criminal conviction, guilty plea, or other acknowledgement of criminal responsibility. . . . The Committee should instead accept that the defendant has been found guilty beyond a reasonable doubt, either by verdict or plea."

The Court pointed out that cases from across the country uniformly require individuals convicted of

crimes to complete their court-ordered supervision before applying for admission or reinstatement. It noted that because probationers typically behave well while on probation, admissions authorities cannot adequately evaluate rehabilitation until the applicant has successfully completed probation; therefore, an application submitted prior to completion of a probationary term is deemed premature. Most jurisdictions also require significant time to elapse following the end of probation so that the applicant can demonstrate sustained rehabilitation. "It is not enough that [the] petitioner kept out of trouble while being watched on probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation."

Lazcano would not be permitted to apply for membership in the State Bar of Texas, his home state. A person guilty of a felony in Texas is "conclusively deemed not to have present good moral character and fitness" and cannot apply for admission to the bar until five years after completing the probationary term. Lazcano will be ineligible to apply to the Texas Bar until 2018. Significantly, had Lazcano been a member of the Arizona Bar when he pled no contest to the charge, he likely would have been suspended from practice, and the same result would have occurred in Texas.

The good moral character required for admission to the bar "is something more than an absence of bad character; it requires that the applicant has acted as a person of upright character ordinarily would, should, or does." Although the Arizona Supreme Court had previously refrained from announcing per se disqualifications to State Bar admission, the Court held that "an applicant currently on a felony deferred adjudication who remains under court supervision may not be admitted to practice law until the period of supervision has ended." Because Lazcano will not complete his probation until November 2013, he cannot meet his burden of proving his rehabilitation and good moral character. His application for admission was denied.

THE GOOD MORAL CHARACTER REQUIRED FOR ADMISSION TO THE BAR "IS SOMETHING MORE THAN AN ABSENCE OF BAD CHARACTER; IT REQUIRES THAT THE APPLICANT HAS ACTED AS A PERSON OF UPRIGHT CHARACTER ORDINARILY WOULD, SHOULD, OR DOES." ALTHOUGH THE ARIZONA SUPREME COURT HAD PREVIOUSLY REFRAINED FROM ANNOUNCING PER SE DISQUALIFICATIONS TO STATE BAR ADMISSION, THE COURT HELD THAT "AN APPLICANT CURRENTLY ON A FELONY DEFERRED ADJUDICATION WHO REMAINS UNDER COURT SUPERVISION MAY NOT BE ADMITTED TO PRACTICE LAW UNTIL THE PERIOD OF SUPERVISION HAS ENDED."

Forging a notary's signature

In re Nathan, 26 So. 3d 146, 2010 WL 200830 (La. 2010)

Andrea Nathan conditionally failed the Louisiana Bar Examination and made application to take the exam for the second time. Attached to the application was an affidavit she had executed and purportedly signed before a notary public. The Committee on Bar Admissions subsequently learned that she had forged the notary's signature on the affidavit and denied her permission to sit for the bar exam on character and fitness grounds, citing the forged affidavit. The Louisiana Supreme Court granted Nathan permission to sit for the bar exam on condition that if she was successful, she would apply to the court for the appointment of a commissioner to take character and fitness evidence.

Nathan passed the essay portion of the bar exam and applied for a commissioner. The Court remanded the matter to the Committee on Bar Admissions' Panel on Character and Fitness to conduct an investigation and appointed a commissioner to take the character and fitness evidence. Following a hearing, the commissioner filed her report with the Court, recommending that Nathan be denied admission to the practice of law.

The evidence presented at the hearing was that Nathan attempted to file her bar application on the last day of filing for the February 2007 bar exam. She was informed that her application was not properly completed and notarized. She returned to the Committee's office later that day stating that her application had been notarized by a Baton Rouge attorney. The document did not bear a notary seal or bar roll number, and the signature of the notary appeared to be quite similar to Nathan's own signature. The Committee contacted the attorney, who denied notarizing Nathan's application.

. . . NATHAN ATTEMPTED TO FILE HER BAR APPLICATION ON THE LAST DAY OF FILING FOR THE FEBRUARY 2007 BAR EXAM. SHE WAS INFORMED THAT HER APPLICATION WAS NOT PROPERLY COMPLETED AND NOTARIZED. SHE RETURNED TO THE COMMITTEE'S OFFICE LATER THAT DAY STATING THAT HER APPLICATION HAD BEEN NOTARIZED BY A BATON ROUGE ATTORNEY. THE DOCUMENT DID NOT BEAR A NOTARY SEAL OR BAR ROLL NUMBER, AND THE SIGNATURE OF THE NOTARY APPEARED TO BE QUITE SIMILAR TO NATHAN'S OWN SIGNATURE.

The Court held that Nathan demonstrated a lack of candor which reflected adversely on her character and fitness. Nathan attempted to explain that this was a momentary lapse in judgment because of the stress she was under at the time. The Court said that Nathan's conduct was fundamentally inconsistent with a lawyer's duty of truth and honesty, and her admission was denied, with the provision that she may not reapply for admission until one year has passed from the date of the judgment.

MISCELLANEOUS

***Rooker-Feldman* doctrine**

El-Shabazz v. State of New York Committee on Character and Fitness for the Second Judicial Department, 2009 WL 4730307 (E.D. N.Y.)

Wendell El-Shabazz brought this action against the Committee on Character and Fitness for the Second Judicial Department alleging that the committee unfairly applied its rules to excessively delay consideration of his application because of his race, disability, and criminal history. He asserted claims under various federal, state, and municipal statutes. The defendants moved to dismiss.

On November 1, 2007, El-Shabazz was advised that he had passed the July 2007 bar exam. On December 22, 2007, he submitted an application for a license to practice law to the Appellate Division of the New York Supreme Court. As part of the application process, El-Shabazz appeared for a personal interview on April 1, 2008, and was questioned about his financial and criminal history, which included a bankruptcy filing and a felony conviction. El-Shabazz was informed that his application was being referred to a subcommittee for further consideration. El-Shabazz appeared at the subcommittee hearing on June 11, 2008, and answered questions about his criminal record and past drug use. He was advised that he must appear at a second hearing.

El-Shabazz chose not to appear at the second hearing. On December 10, 2008, he filed a petition

with the Appellate Division alleging that the character and fitness committee had unreasonably delayed action on his application. The Appellate Division denied his petition on April 29, 2009. On June 26, 2009, El-Shabazz filed a motion for reconsideration, which motion is now pending.

On May 14, 2009, El-Shabazz filed the present lawsuit, repeating the allegations of discrimination he had made in his petition to the Appellate Division. The defendants moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. The court agreed that it lacks jurisdiction, since federal district courts are empowered to exercise original, not appellate, jurisdiction and may not reverse or modify state-court judgments. El-Shabazz had already filed one lawsuit in New York state court accusing the character and fitness committee of discriminating against him and seeking an order granting him immediate admission to the bar. He lost that case, and the federal district court "lacks jurisdiction to undo his defeat." It did not matter that El-Shabazz asserted in this federal action claims not brought in state court. "The jurisdictional bar to federal district court review of state court judgments—known as the *Rooker-Feldman* doctrine—deprives this [c]ourt of jurisdiction to hear any of El-Shabazz's claims."

The *Rooker-Feldman* doctrine applies to "cases brought by state-court losers complaining of . . . state-court judgments." The Supreme Court has expressly held that such cases include suits brought by plaintiffs explicitly or implicitly seeking federal district court review of state court decisions denying them bar admission. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 (1983). The newly asserted claims are "inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar." If El-Shabazz believes that the ruling of the Appellate Division is in error, he may seek review of its decision in the New York Court of Appeals. The motion to dismiss for lack of subject-matter jurisdiction was granted.

FRED P. PARKER III is the Executive Director of the Board of Law Examiners of the State of North Carolina.