Litigation Update

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Cases Reported:

ABA-Approved Law Schools

Correspondence law schools

In re Batterson, 286 Ga. 352, 687 S.E.2d 477 (Ga. 2009)

ADA

Jurisdiction; Eleventh Amendment immunity; *Younger* abstention doctrine; *Rooker-Feldman* doctrine

Doe et al. v. The Individual Members of the Indiana State Board of Law Examiners, 2009 WL 4841113 (S.D. In. 2009)

Character and Fitness

Failure to disclose; copyright infringement

In re Application of Brown, 125 Ohio St. 3d 354, 928 N.E.2d 445, 2010 WL 1816341 (Oh. 2010)

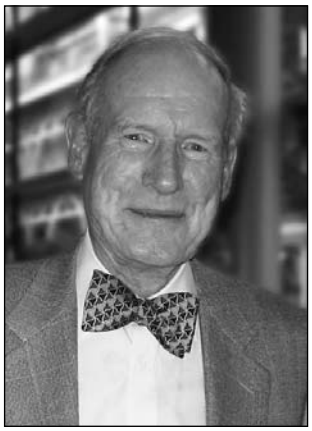
Jurisdiction; ripeness; bar applications in other states

Wilson v. Jacobs, 2009 WL 1968788 (D.N.J. 2009)

Foreign Legal Consultants

Misrepresentation

In re Antoine, 899 N.Y.S.2d 41, 2010 WL 1488584 (NY 2010)



ABA-Approved Law Schools

Correspondence law schools

In re Batterson, 286 Ga. 352, 687 S.E.2d 477 (Ga. 2009)

Joyce Batterson graduated in July 2009 from Northwestern California University School of Law (NWCU), a correspondence law school utilizing Internet-based, online, and recorded instruction. NWCU is approved by the State of California to grant J.D. degrees but is not accredited by the ABA. Also in July 2009 Batterson completed her Master of Laws degree (LL.M.) from Thomas Jefferson School of Law (TJSL), a school offering non-residential online studies.

Batterson's resume reflects that she is a nationally certified paralegal, that she has been employed as a legal assistant and paralegal since 1990, that she passed the California First-Year Law Students' Examination in October 2004, and that she passed the Multistate Professional Responsibility Examination (MPRE) in August 2006. Batterson petitioned for a waiver of the educational requirements for admission to the Georgia Bar based on her educational background, her achievements, and her employment history.

The Georgia Board of Bar Examiners requires proof that a non-accredited law school provides a legal education equivalent to that of an ABA-approved law school. To that end, the board provided Batterson with a copy of the "Waiver Process & Policy" and a two-page "Guidelines for Dean's Letter," stating that such a letter should be from a dean or the dean's designee on the faculty of an ABA-accredited law school and detailing what the analysis of the applicant's legal education should include.

Batterson submitted a letter from the dean of NWCU, the non-accredited law school from which she graduated, and letters from an associate dean of TJSL, which contained only general conclusions that Batterson's legal education was on a par with that of an ABA-accredited school. None of Batterson's submissions complied with the documentation requested by the board. The board refused to waive the requirement that an applicant must have received a first law degree from a law school accredited by the ABA, and Batterson appealed.

Before the Georgia Supreme Court, Batterson argued that the ABA was reviewing its accreditation procedure in light of the increase of education via the Internet and that the standards for admission to the State Bar of Georgia should be changed in order to provide the opportunity for nontraditional students to sit for the bar exam. The Court pointed out that the board's procedure provides the opportunity to show good cause that the traditional educational requirements should be waived. Batterson's petition was denied because she did not provide what the board expressly required and because she failed to show by clear and convincing evidence that the rule requiring a first law degree from an ABA-accredited law school should be waived on her behalf. The denial of the waiver was affirmed.

THE INDIANA STATE BOARD OF LAW EXAMINERS REFERRED HER TO THE JUDGES AND LAWYERS ASSISTANCE PROGRAM FOR A MENTAL HEALTH REVIEW. THE BOARD ALSO REQUESTED THAT DOE SUBMIT MEDICAL RECORDS RELATING TO HER PAST MENTAL HEALTH TREATMENT. INSTEAD OF CONSENTING TO THIS AND PROVIDING THE INFORMATION, DOE WITHDREW HER APPLICATION.

ADA

Jurisdiction; Eleventh Amendment immunity; *Younger* abstention doctrine; *Rooker-Feldman* doctrine

Doe et al. v. The Individual Members of the Indiana State Board of Law Examiners, 2009 WL 4841113 (S.D. In. 2009)

Jane Doe is a member of the Illinois Bar who desired to sit for the Indiana Bar Examination. She was previously diagnosed with mental illness and received treatment for this illness. In 2008 Doe applied to take the February bar examination in Indiana and disclosed her history of mental illness. The Indiana State Board of Law Examiners referred her to the Judges and Lawyers Assistance Program for a mental health review. The board also requested that Doe submit medical records relating to her past mental health treatment. Instead of consenting to this and providing the information, Doe withdrew her application.

She, along with others, filed a suit seeking a declaratory judgment that the board had violated the Americans with Disabilities Act and an injunction preventing the board from asking applicants about their mental health diagnosis or treatment. The defendants filed a motion to dismiss for lack of jurisdiction, raising three arguments: Eleventh

Amendment immunity, the *Younger* abstention doctrine, and the *Rooker-Feldman* doctrine.

The court found the arguments under the *Younger* abstention doctrine and the *Rooker-Feldman* doctrine unconvincing. The gist of the *Younger* doctrine is that federal courts are forbidden to stay or enjoin pending state court proceedings except in special circumstances. The court found that the *Younger* doctrine did not apply to this case because there was no pending state court proceeding. Likewise, the *Rooker-Feldman* doctrine, which provides that lower federal courts do not have subject matter jurisdiction to review state court civil decisions, did not apply to this case because there was no state court civil decision under review.

The District Court found the defendants' most convincing argument to be under the Eleventh Amendment, which shields the states from suit in federal court without their consent. However, Congress may abrogate a state's Eleventh Amendment immunity if it unequivocally expresses its intent to abrogate that immunity and acts pursuant to a valid grant of constitutional authority. The court stated that although the ADA purports to abrogate a state's Eleventh Amendment immunity, the Supreme Court has held that Congress did not validly abrogate the states' sovereign immunity and thus private individuals cannot recover monetary damages for violation of Title I of the ADA. However, following *Garrett*, private individuals can still bring suit for injunctive relief under Title I of the ADA. *Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356 (2001).

Here, the plaintiffs brought suit under Title II of the ADA for prospective relief, a situation which was not addressed in *Garrett.* The court cited a Seventh Circuit opinion, *Bruggeman ex rel. Bruggeman v. Blagojevich,* 324 F.3d 906 (7th Cir. 2003), that "*Ex parte Young* authorizes, notwithstanding the Eleventh Amendment, suits for prospective injunctive relief against state officials who . . . are sued in their official capacity." The court stated that because the plaintiffs in this case have sued members of the board in their official capacity and because the plaintiffs seek only prospective injunctive relief, they have stated a valid claim. The defendants' motion to dismiss was denied.

THE COURT STATED THAT BECAUSE THE PLAINTIFFS IN THIS CASE HAVE SUED MEMBERS OF THE BOARD IN THEIR OFFICIAL CAPACITY AND BECAUSE THE PLAINTIFFS SEEK ONLY PROSPECTIVE INJUNCTIVE RELIEF, THEY HAVE STATED A VALID CLAIM.

CHARACTER AND FITNESS

Failure to disclose; copyright infringement

In re Application of Brown, 125 Ohio St. 3d 354, 928 N.E.2d 445, 2010 WL 1816341 (Oh. 2010)

Kevin Brown applied to register as a candidate for admission to the Ohio Bar in November 2007. However, due to his failure to disclose a copyright-infringement suit brought against him by The Walt Disney Company, the Board of Commissioners on Character and Fitness recommended disapproval of Brown's character, fitness, and moral qualifications, but suggested that Brown be allowed to apply for the July 2010 bar exam. The Supreme Court accepted the board's recommendation to disapprove Brown's application, but stated that Brown may apply for the February 2011 bar exam provided that he submits a new application to register as a candidate for admission and is able to establish his character, fitness, and other qualifications.

Brown's application was received by the Bar Admissions Office on November 15, 2007. Brown

answered "No" to question 20(A), "Have you ever had a complaint filed against you in any civil, criminal, or administrative forum, alleging fraud, deceit, misrepresentation, forgery, or legal malpractice?" He answered "Yes" to question 20(E), "Have you ever been summoned for a violation of any other statute, regulation, or ordinance?" However, the only civil lawsuit he disclosed was a 2005 municipal court action for default on a lease agreement.

Prior to submission, Brown amended his application twice, but still failed to include the Disney suit in his response to question 20(A). On November 12, 2007, he amended his application to correct his date of birth and to provide additional information regarding his current employer, past employers, and several of his references. After verification by a notary on December 28, 2007, Brown further amended his application on March 5, 2008, to provide additional employment information in response to a request from the National Conference of Bar Examiners.

Brown was interviewed by the Akron Bar Association's admissions committee on June 19, 2008, to ascertain whether he possessed the requisite character, fitness, and moral qualifications for admission to the practice of law. During this interview, Brown disclosed for the first time that his response to question 20(A) should be changed or supplemented. Brown advised the committee that in October 2007, The Walt Disney Company had filed a copyright-infringement suit against him relating to certain eBay transactions, but that the matter had been settled in April 2008. Based upon the copyright suit, the bar association's admissions committee issued a preliminary report approving Brown's character and fitness with qualifications. Brown appealed the qualified approval, and a three-member panel of the Board of Commissioners on Character and Fitness conducted a hearing to inquire into his character, fitness, and moral qualifications.

The hearing was held on June 9, 2009. Brown testified that Disney had filed a copyright-infringement action against him in the Western District of California in 2007. Disney filed the action based on Brown's conduct during the summer of 2007. Brown informed the panel that he and a friend had purchased between 300 and 500 unauthorized Disney DVDs from China at the price of $6 to $10 each. They then sold these DVDs on eBay for a profit. Disney agreed to settle the lawsuit in exchange for restitution.

Brown admitted to the panel that he had been served with the copyright-infringement suit before he submitted his application. Brown further admitted that he did not disclose the existence of the lawsuit on the two occasions when he supplemented his application. He justified the omission to the panel by stating that he did not initially disclose the lawsuit because he "kind of wanted to see what transpired" and "figured to wait to see after I settled it so I knew there was a resolution, and then my interview was shortly thereafter and I wanted to bring it up there."

As a result of Brown's testimony, the Board of Commissioners on Character and Fitness recommended that the Court disapprove his character, fitness, and moral qualifications at present, but that Brown be permitted to apply for the July 2010 bar exam. In considering the weight and significance of Brown's conduct, the board noted that both the underlying conduct and the failure to report it were serious and were not "youthful indiscretions" because they occurred while Brown was a law student. Furthermore, Brown had only agreed to make

a payment of restitution in response to the filing of a lawsuit.

In particular, the Board found that Brown's conduct violated Gov. Bar R. I(11)(D)(3)(f) "by showing a pattern of disregard for the laws of the United States in selling pirated intellectual property; (g) by failing to provide complete and accurate information concerning his past; (h) by making an omission in his application and to his employer; and (i) by committing acts involving dishonesty, deceit, and misrepresentation both in the underlying conduct that led to the lawsuit, but more importantly during the admissions process."

In rendering its decision, the Supreme Court of Ohio noted that an applicant to the Ohio Bar must prove by clear and convincing evidence that he or she "possesses the requisite character, fitness, and moral qualifications for admission to the practice of law." The applicant's record must justify "the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." The Court further stated that "[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant."

The Court also pointed to Gov. Bar R. I(2)(F), which imposes a continuing duty upon applicants to promptly report all changes or additions to information in their applications to the Admissions Office. In this case, Brown failed to make such a report. Rather, he chose to rely upon his verbal disclosures to the bar association's admissions committee at his character and fitness interview, and to the board panel at his hearing.

The Court accepted the board's recommendation to disapprove Brown's pending application. However, the Court went on to state that Brown may apply to take the February 2011 bar exam (as opposed to the July 2010 bar exam recommended by the board) provided that he submits a new application to register as a candidate for admission to the practice of law and is able to establish his character, fitness, and other qualifications.

Jurisdiction; ripeness; bar applications in other states

Wilson v. Jacobs, 2009 WL 1968788 (D.N.J. 2009)

Tony Wilson passed the July 2007 New Jersey bar examination. Prior to taking the examination, he submitted his application to the State of New Jersey Committee on Character. The application included the standard release forms. Wilson was notified that a hearing would be scheduled in regard to his application, and he was requested to provide additional information, including the status of his bar applications in other states.

During the review process, the committee received information from the Florida Board of Bar Examiners (FBBE) and the Connecticut Bar Examining Committee (CBEC). Wilson then advised the committee that he was revoking his authorization and release for it to receive information from any outside sources, and particularly from the FBBE.

It was determined that Wilson, after passing the Florida Bar Examination, was denied admission in July 2008. Wilson contended that the denial of his application was based on false allegations. In June 2008 Wilson was also denied admission to the Connecticut Bar after passing that state's bar examination. Wilson claimed that the Connecticut committee denied his application because he had stated that his Florida application was pending and

because of concerns about his credibility and his criminal and work history.

Wilson filed his complaint in September 2008 and amended it in October 2008, requesting that the chief counsel of the committee, Sahbra Smook Jacobs, be enjoined from using the Florida and Connecticut bar admission information as a basis for denying his New Jersey application. In December 2008 he provided the committee with another authorization and release for it to receive information from outside sources, including the FBBE and the CBEC.

The committee has not held a hearing on Wilson's New Jersey application or made a decision or recommendations as to the status of the application. The defendant filed a motion to dismiss, arguing that the amended complaint was based on the assumption that Wilson's New Jersey application would be denied, was not ripe for adjudication, and should be dismissed for lack of jurisdiction.

The District Court stated that Wilson's claims were not yet ripe for judicial action and that, while he contends that he was denied admission to the Connecticut and Florida Bars on the basis of certain information and has a "credible fear" that New Jersey will follow the lead of the FBBE and CBEC, no evidence has been produced to demonstrate that he will be denied admission in New Jersey. The New Jersey committee has not held a hearing because Wilson revoked his authorization for the committee to complete its review. The court said that a judgment in this case would be similar to an advisory opinion based on a hypothetical set of facts rather than a conclusive determination of the parties' rights. Wilson's prospective claim of harm is a future event contingent upon the committee's denial of his New Jersey application, which has not occurred. Because Wilson's claims are premature and not ripe for review, the court does not have jurisdiction to review them. The court granted the defendant's motion to dismiss the amended complaint, denied the plaintiff's cross motion for injunctive relief, and dismissed the amended complaint.

THE COURT SAID THAT A JUDGMENT IN THIS CASE WOULD BE SIMILAR TO AN ADVISORY OPINION BASED ON A HYPOTHETICAL SET OF FACTS RATHER THAN A CONCLUSIVE DETERMINATION OF THE PARTIES' RIGHTS. WILSON'S PROSPECTIVE CLAIM OF HARM IS A FUTURE EVENT CONTINGENT UPON THE COMMITTEE'S DENIAL OF HIS NEW JERSEY APPLICATION, WHICH HAS NOT OCCURRED.

FOREIGN LEGAL CONSULTANTS

Misrepresentation

In re Antoine, 899 N.Y.S.2d 41, 2010 WL 1488584 (NY 2010)

On May 3, 2006, Haitian lawyer Max D. Antoine was admitted to practice as a licensed "legal consultant" in the State of New York. On April 15, 2010, his license was revoked. The New York Supreme Court, Appellate Division, found that Antoine misrepresented the limitations of his license and falsely held himself out as a member of the New York State Bar. The court found that Antoine lacked the good moral character and general fitness requisite for a member of the bar.

New York Court of Appeals Rule 521.3 places specific limitations on the services that may be provided by an individual licensed as a "legal consultant." A legal consultant cannot represent others in court, cannot render professional legal advice on the laws of New York or of the United States except on the basis of advice from someone duly qualified

to render professional legal advice in New York, and cannot in any way hold himself out as a member of the bar of New York. If a legal consultant wishes to use a title authorized in the foreign country of his or her admission to practice, that title may only be used in conjunction with the name of such country.

Immediately after his licensure as a legal consultant in New York, Antoine began to intentionally misrepresent his license on various applications and forms submitted to courts. On May 10, 2006, Antoine applied for admission to the U.S. Supreme Court. In response to the application question, "State court(s) of last resort to which you are admitted to practice, and date(s) of admission," he answered, "May 3, 2006, New York Supreme Court, Second Department, New York State." To further support his application, Antoine attached copies of membership cards from various state and other bar associations.

Antoine also applied for admission to the U.S. Court of Appeals for the Armed Forces. In response to the application question asking for the "highest State court in which applicant has been admitted to practice," Antoine answered, "Supreme Court of New York." When asked where he was presently engaged in the practice of law, Antoine answered, "Licensed by the Supreme [Court] of New York." He attached letters of reference to his application stating that he was an "active member in good standing of the following law societies and state authorities," including four bar associations. One letter included the following text: "Licensed by the New York Supreme Court, Second Department, New York State Bar Association NYSBA Bar no. 69-2242(518)463 3200." This number appears on Antoine's New York State Bar Association membership card, but Antoine's use of the number misleadingly suggested that it was an official number assigned to him by the Office of Court Administration.

In April 2007, the Departmental Disciplinary Committee sought revocation of Antoine's license to practice as a legal consultant based on the aforementioned acts. On October 23, 2007, the Supreme Court, Appellate Division, suspended Antoine's license to practice as a legal consultant pending conclusion of disciplinary proceedings before the Disciplinary Committee.

The Disciplinary Committee filed six charges against Antoine (all of which he denied):

1. That by repeated efforts to represent himself as a New York lawyer rather than as a legal consultant, Antoine engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4).

2. That by repeatedly holding himself out as a New York attorney, and by directly disobeying the court's restriction on his practice, Antoine engaged in conduct that was prejudicial to the administration of justice in violation of DR 1-102(A)(5) and 22 NYCRR 521.3(f).

3. That by failing to timely file an affidavit of compliance, Antoine engaged in conduct that was prejudicial to the administration of justice in violation of DR 1-102(A)(5) and 22 NYCRR 603.13(f).

4. That by continuing to use the corporate name "American Corporate Society" in connection with his own, Antoine used a trade name in violation of DR 2-102(B) and 22 NYCRR 521.3(g).

5. That by using a business card listing his practice as being specialized in several areas, Antoine represented his "practice" as being specialized in particular fields of law, in violation of DR 2-105(A).

6. That by violating the above disciplinary rules, Antoine demonstrated a lack of good moral character and general fitness required for a member of the bar of this State and therefore provided grounds for revocation of his license under 22 NYCRR 521.1(a)(3).

A two-day hearing was held in July 2008. Antoine testified that he had included the words "foreign legal consultant" on his applications before they were submitted, but that they had been altered by someone else without his knowledge. However, Antoine was unable to produce any copies of the original (allegedly correct) versions of the documents. The referee noted that Antoine had provided a different explanation during prior questioning, at which time he had stated that he had omitted the words "legal consultant" because the forms did not leave sufficient space to include them.

The referee sustained Charge One and Charge Six, finding that Antoine had committed intentional fraud and had demonstrated a lack of good moral character and general fitness required for a member of the bar of New York. The referee stated that Antoine's actions went "beyond mere hype," that "his efforts were informed by an intent to mislead and deceive," and that Antoine had deliberately avoided "any references to the limitations imposed on his license." The referee further noted that Antoine had repeatedly sought to delay the hearing, had filed an application to the Appellate Division challenging the proceedings, and had claimed that his medical condition prevented him from proceeding (but failed to provide any documentation). Thus, the referee found that while Antoine had been suspended for a year, he did not seem "to have learned any lessons from that interim penalty," and that revocation of his license appeared to be the only appropriate sanction.

The referee did not sustain Charge Two, which alleged that Antoine had engaged in conduct that was prejudicial to the administration of justice. However, the hearing panel recommended modifying the report to sustain the violation of 22 NYCRR 521.3(f), which prohibits a legal consultant from "in any way holding himself or herself out as a member of the bar of this State." The panel stated that it did not find this charge duplicative of Charge One, but found it to be a separate and distinct violation for purposes of liability and sanction.

The Supreme Court, Appellate Division, found that the record supported sustaining Charges One, Two, and Six as found by the hearing panel. Antoine intentionally misrepresented his license to practice and falsely held himself out as a member of the New York State Bar. The court revoked Antoine's license as a legal consultant, finding that Antoine "lacks the good moral character and general fitness requisite for a member of the bar of this State."

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