Litigation Update

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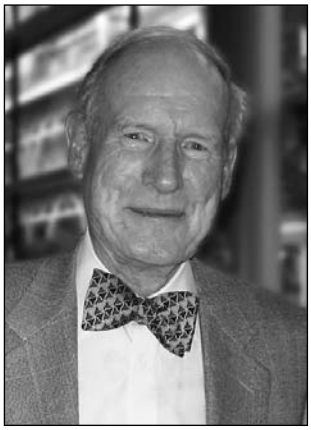

Admission Through Reciprocity

In the Matter of the Application of Ryan D. Lapidus,
SC S058745 (OR 2010)

In June 2010, Attorney Ryan D. Lapidus applied for admission through reciprocity in the State of Oregon pursuant to Rule 15.05 of the Supreme Court for the State of Oregon's Rules for Admission of Attorneys (RFA 15.05). The Board of Bar Examiners denied Lapidus's application for reciprocal admission. In response, Lapidus filed a petition in the Supreme Court of the State of Oregon arguing that RFA 15.05 is unconstitutional on three grounds:

1. the Equal Protection Clause of the 14th Amendment;
2. the Privileges and Immunities Clause of Article IV; and
3. the Commerce Clause of Article I.

The Court rejected Lapidus's arguments and ruled in favor of the board.

Ryan Lapidus graduated from the University of Michigan Law School on May 15, 1998. In July 1998 he passed the California Bar Exam, and he was admitted in the State of California on November 25, 1998. Through reciprocity, he was subsequently admitted in the District of Columbia on May 1, 2009, and in the State of New York on December 8, 2009. He was admitted to the Supreme Court of the United States in July 2009.

Rule 15.05 of the Rules for Admission of Attorneys of the Supreme Court of the State of Oregon sets forth the requirements for admission through reciprocity. RFA 15.05 provides:

> (1) Attorneys who have taken and passed the bar examination in another qualifying jurisdiction, who are active members of the bar in that qualifying jurisdiction, and who have lawfully engaged in the active, substantial and continuous practice of law for no less than five of the seven years immediately preceding their application for admission under this rule may be admitted to the practice of law in Oregon without having to take and pass the Oregon bar examination, subject to the requirements of this rule.
>
> (2) For purposes of this rule, a "qualifying jurisdiction" means any other United States jurisdiction which allows attorneys licensed in Oregon to become regular members of the bar in that jurisdiction without passage of that jurisdiction's bar examination.
>
> (sections 3 through 9 omitted)

Although New York and the District of Columbia are "qualifying jurisdictions" under RFA 15.05, Lapidus had not taken and passed the bar exam in either of those jurisdictions. The board also noted that even though Lapidus had practiced for at least five of the last seven years in California, the State of California is not considered a qualifying jurisdiction under RFA 15.05.

LAPIDUS CHALLENGED RFA 15.05 ON THE GROUNDS THAT IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT BY IMPERMISSIBLY AND UNCONSTITUTIONALLY DISCRIMINATING AGAINST QUALIFIED, LICENSED, OUT-OF-STATE ATTORNEYS WHO HAVE PASSED THE BAR EXAMINATION IN A JURISDICTION THAT IS NOT AMONG THE 37 "QUALIFYING JURISDICTIONS" REFERENCED IN THE RULE.

Lapidus challenged RFA 15.05 on the grounds that it violates the Equal Protection Clause of the 14th Amendment by impermissibly and unconstitutionally discriminating against qualified, licensed, out-of-state attorneys who have passed the bar examination in a jurisdiction that is not among the 37 "qualifying jurisdictions" referenced in the rule. Lapidus argued that RFA 15.05 is unconstitutional because it waives the bar examination requirement only for experienced lawyers from states that allow Oregon lawyers the same privilege, rather than waiving it for experienced lawyers from all states. Lapidus contended that the "qualifying jurisdiction" requirement bears no rational relationship to any legitimate interest of the State of Oregon and that his application should be evaluated on the same terms as the applications of other similarly situated attorneys who have passed the bar exam in a qualifying jurisdiction.

The Board of Bar Examiners disagreed. In defense of its position that a state has a legitimate interest in

allowing admission on motion only for lawyers whose home states grant the reciprocal lawyers the same privilege, the Board of Bar Examiners cited the case of *Hawkins v. Moss*, 503 F.2d 1171, 1176–78 (4th Cir. 1974):

> State reciprocity statutes or regulations . . . are not unusual. In fact, they have been adopted by the vast majority of the states and apply particularly in the field of professional licensing. They represent a state's undertaking to secure for its citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant. To secure for her citizens the reciprocal rights and advantages obtained under such statutes or rules is manifestly a legitimate interest and goal on the part of a state just as it is a legitimate interest of one nation to secure reciprocal property rights for its citizens in other nations. It is true [that] these statutes and rules treat differently those individuals admitted to practice their profession in states extending reciprocal rights and those from states not so granting those rights. But the mere fact that they affect some groups of citizens differently than others or that they result in incidental individual inequality will not render such statutes or rules invalid. Reciprocal statutes or regulations, it has been uniformly held, are designed to meet a legitimate state goal and are related to a legitimate state interest. For this reason, they have been found invulnerable to constitutional attack on equal protection grounds.

To advance his Privileges and Immunities argument, Lapidus argued that the State of Oregon impermissibly and unconstitutionally burdens the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. He argued that Rule 15.05 impermissibly distinguishes among residents—making the arbitrary distinction between those who have passed the bar examination in a qualifying jurisdiction and those who have not.

The Board of Bar Examiners countered Lapidus with three points. First, that the Privileges and Immunities Clause is meant to prohibit discrimination between residents and nonresidents. Oregon requires both to take the bar exam, so Lapidus was at no disadvantage vis-à-vis Oregon residents. Second, the board argued that the right to practice law in Oregon without passing the Oregon bar examination (in contrast to the broader right to practice law) is not a right that is "fundamental to national unity." Third, the board argued that RFA 15.05 bears a substantial relationship to the state's objective of ensuring competency and it is clearly rationally related to the state's interest in gaining all the advantages of comity with other qualifying jurisdictions.

Finally, Lapidus argued that RFA 15.05 is unconstitutional under the dormant Commerce Clause. He stated that Oregon's qualifying jurisdiction requirement discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated.

The Board of Bar Examiners countered that RFA 15.05 does not discriminate between in-state and out-of-state interests, but between qualifying and nonqualifying out-of-state jurisdictions, and that the State of Oregon, as shown above, benefits from waiving the bar examination requirement only for lawyers from reciprocal jurisdictions. The correct question for analysis under the dormant Commerce Clause is whether the "qualifying jurisdiction"

limitation is "clearly excessive" when compared to the benefits it is intended to procure. Courts that have applied this analysis to similar bar admission issues have concluded that rules such as RFA 15.05 are not "clearly excessive" and do not violate the dormant Commerce Clause.

The Supreme Court of the State of Oregon agreed with the Board of Bar Examiners and denied Lapidus's application for admission. The Court did not address the arguments in detail. Rather, it issued a short Order Denying Application for Admission stating only that

> Ryan D. Lapidus has applied for admission to the practice of law in Oregon pursuant to Rule for Admission (RFA) 15.05. The Board of Bar Examiners has recommended that the application be denied. The [C]ourt accepts the [b]oard's recommendation. Applicant's petition for admission to the practice of law in Oregon is denied.

Bar Examination

Laptop; uploading answers within a specified time

McBride v. Utah State Bar, 2010 UT 60, 242 P.3d 769 (UT 2010)

Ryan McBride sought review of the Utah State Bar's decision disqualifying him from the bar examination for failure to upload his typed essay exam answers within the required time frame. He claimed that the bar acted unconstitutionally, denying him procedural and substantive due process and equal protection of the law, and that the bar examiners enforced an unreasonable rule. McBride petitioned the court to waive the examination requirement and admit him to the bar or to compel the bar to grade his completed essay answers and admit him if his answers were passing.

McBride took the July 2009 Utah Bar Examination. He used a laptop computer and the computer program SofTest, which allows the examinees to upload their essay answers to the SofTest server. In 2007, the Utah State Bar had moved its testing location and had determined that it would be prohibitively expensive to provide sufficient wireless Internet capacity for all examinees to upload their answers at the test site. The bar therefore declared that examinees would be responsible for locating Internet access and uploading their answers within a specified time following the examination. Applicants who elect to use laptops sign a participation form stating that they agree to upload their answers and that failure to upload their answer files by 10:00 p.m. on the day of the written examination may result in the disqualification of their answers. 10:00 p.m. was selected because technical support for SofTest is available only until that time.

After arriving at the testing center on the second day, McBride was asked by a proctor if he had uploaded his answers, and he told the proctor he had not. The proctor advised him that he would not be allowed to take the Multistate Bar Examination on that day. McBride and all applicants using laptops received a number of notifications prior to the examination stating the uploading deadline and the consequences of failure to meet it. At the examination, the

announcing instructions also reminded applicants of the 10:00 p.m. deadline. McBride received seven separate notices that failure to timely upload his answers could result in his disqualification. Of the 243 examinees who took the July 2009 examination with a laptop, only 2 failed to upload their answers.

In August 2009 McBride filed a request with the bar for a review of his disqualification, which was denied by the Admissions Committee in September. He then filed a supplemental request for a review, and the committee upheld his disqualification. In October 2009 McBride filed a petition for review with the Utah Supreme Court. During the time the case was under advisement, McBride took the February 2010 examination, passed it, and was admitted to the Utah Bar.

MCBRIDE'S HAVING PASSED THE BAR EXAMINATION WOULD NORMALLY RENDER HIS CASE MOOT, BUT THE COURT ELECTED TO ADDRESS THE ISSUES OF THE CASE UNDER THE PUBLIC INTEREST EXCEPTION TO THE MOOTNESS DOCTRINE BECAUSE THE ISSUES COULD REPEAT THEMSELVES EACH TIME THE EXAMINATION IS ADMINISTERED AND COULD EVADE REVIEW IF THE DISQUALIFIED EXAMINEE, LIKE MCBRIDE, WERE TO PASS THE NEXT EXAMINATION FIVE OR SEVEN MONTHS AFTER BEING DISQUALIFIED.

McBride's having passed the bar examination would normally render his case moot, but the Court elected to address the issues of the case under the public interest exception to the mootness doctrine because the issues could repeat themselves each time the examination is administered and could evade review if the disqualified examinee, like McBride, were to pass the next examination five or seven months after being disqualified. Because it is unlikely that such a claim could be litigated from start to finish within the period between exam sittings, the Court exercised its discretion to address the issues raised by McBride.

The Court held that the bar had provided McBride with adequate procedural due process because he received seven separate notices of the consequences of failing to upload his answers and that an evidentiary hearing was not required to provide due process. The Court stated that while McBride's interest in taking the examination was great to him, it was not so great as to require that he be given a full hearing prior to disqualification from the examination. "A bar applicant may have an interest in taking the [e]xam, but an individual does not have an absolute right to practice law." McBride was not denied the ability to practice law in Utah; he could and did retake the exam. The exam proctors properly applied the standard test-taking procedures to McBride. He was not singled out; he simply failed to comply with the standard test-taking procedures. The Court pointed out that if an examinee fails to upload his or her answer file because of technical difficulties rather than simple forgetfulness, the bar allows the examinee to sit for the second day of the exam while technicians determine if the examinee attempted to upload the answers the night before. This process ensures that an examinee who tries to follow the exam procedures but cannot upload his or her answers for technical reasons is not unfairly disqualified from taking the second day of the examination.

The Court said that the administrative burden of providing a pre-disqualification hearing to every examinee who failed to abide by testing protocol would be significant. "The [b]ar's strong interest in the efficient administration of the [e]xam outweighs . . . McBride's private interest and the low risk of

erroneous deprivation." The Court concluded that McBride's procedural due process rights did not require the bar to provide him with a full hearing prior to his disqualification.

The Court also held that the bar's procedures satisfied substantive due process. The Court pointed out that McBride was disqualified because he failed to comply with the requirements imposed by the bar as a part of its effort to efficiently administer the exam. "To ensure the efficient administration of the [e]xam, the [b]ar must establish reasonable deadlines for receipt of bar applications, background check completion, and the uploading of exam answers. It would be intolerably burdensome to force the [b]ar to accept every application, background check, and set of exam answers submitted after the established deadlines." The Court added that the bar has a legitimate interest in preventing cheating and in ensuring that there is technical support available during the upload time frame.

The Court further held that the bar did not deny McBride equal protection when it required laptop examinees to submit their answers after leaving the testing center while it allowed examinees who had handwritten their exams to turn in their answers immediately. The court was not persuaded by McBride's equal protection claim, as the cost to provide an Internet connection on-site would have been extremely high. Since the testing software that the bar used made it more difficult for examinees to change their answers after leaving the exam, the bar had concluded that the risk associated with a short delay in uploading answers was acceptable. This may have been an inconvenience to examinees, but it was not a violation of equal protection.

McBride contended that the bar acted in an unfair, unreasonable, and arbitrary manner when it applied Rule 14-709 of the Rules Governing the Utah State Bar to him. Rule 14-709 deals with incomplete applications. McBride contended that the bar should have applied Rule 14-715, which addresses review of bar exam failure, including failure "because of a substantial irregularity in the administration of the examination that resulted in manifest unfairness." However, the Court said that the bar had acted reasonably in the application of its rules and that McBride had failed to clearly demonstrate that he was treated in an unfair, unreasonable, or arbitrary manner.

McBride's petition for relief was denied.

Conditional Admission/Probationary License

Revocation

In the Matter of the Conditional Admission of Bar Applicant No. E01523, James D. Beckley, 926 N.E.2d 485 (IN 2010)

James Beckley was conditionally admitted to the Indiana bar in June 2009 pursuant to the terms and conditions established in a consent agreement that he signed in March 2009, which was approved by the Board of Law Examiners. The consent agreement required among other things that Beckley have

no arrests or incidents related to the use of alcohol during his period of conditional admission, that he enter into a monitoring contract with the Judges and Lawyers Assistance Program (JLAP), and that he provide sworn statements to the board by January 1, March 1, June 1, and October 1 of each year, but no earlier than two weeks before each of those due dates.

Two months after signing the agreement, in May 2009, Beckley reported to the board that he had been arrested in New Orleans for Driving While Intoxicated about two weeks earlier. Even though the Louisiana criminal matter was pending, Beckley was admitted to the practice of law in Indiana in June 2009. The next day Beckley notified JLAP's clinical director that a recent urine screen that he had undergone as part of his monitoring might reveal the presence of marijuana because he had smoked marijuana near the time of his arrest in New Orleans.

The board ordered Beckley to appear before it, which he did in July 2009. The board discussed with Beckley his commitment to sobriety and the peril in which his behavior was placing his Indiana law license. Beckley admitted to committing an illegal act, namely smoking marijuana, and made "extensive and effusive" assurances that his future conduct would conform to the law and to the consent agreement. At that time an amendment to the consent agreement was entered into containing additional conditions, including that Beckley's license to practice law would remain in good standing during the entire period of his conditional admission and that he could not place it on "inactive" status. He was warned that the board would have zero tolerance for any violations of the agreement, no matter how small, and Beckley assured the board that he understood.

In August and November 2009 Beckley provided sworn statements to the board well before the allowable two-week period before each due date. In addition, in October 2009 Beckley placed his license on "inactive" status, but he did not report this in his November report. Because of Beckley's failure to abide by the terms of his conditional admission, the board filed a petition with the Supreme Court seeking revocation of Beckley's conditional admission and recommending that he not be allowed to submit a new application for five years. The matter was presented to the Court in February 2010, and Beckley responded in March 2010.

The Court noted that Beckley's response, while showing some progress in his attempt to achieve lasting sobriety, did not contradict the board's findings of noncompliance. The Court stated that because Beckley had been given repeated opportunities to conform his behavior to the standards required of those seeking admission to the bar and had failed to meet those standards, a majority of the Court found that his conditional admission to practice law should be revoked. However, a majority of the Court also found that Beckley had made positive strides toward lasting sobriety, including regular attendance at Alcoholics Anonymous meetings and maintaining complete compliance with the requirements of his JLAP monitoring agreement after the April 2009 incident, and suggested that a three-year waiting period to reapply, rather than the five-year waiting period, would be more appropriate.

The Court revoked James Beckley's license to practice law in Indiana and ordered that he shall not submit a new application for admission to the bar for a period of three years.

MISCELLANEOUS

Requiring an out-of-state attorney to maintain an office in the state

Schoenefeld v. State of New York, et al., 2010 U.S. Dist. Lexis 10639 (NY 2010)

Ekaterina Schoenefeld is admitted to practice law in New York, New Jersey, and California. She is a solo practitioner with a residence and law office in Princeton, New Jersey. She learned through a continuing legal education course about § 470 of the New York Judiciary Law that requires any nonresident New York attorney to maintain an office in New York in order to practice there. Since learning of the law, Schoenefeld has refrained from accepting cases that would require her to practice in New York courts.

Schoenefeld appeared pro se before the U.S. District Court for the Northern District of New York and filed a suit for injunctive relief against 37 defendants, including the State of New York; the Supreme Court of New York, Appellate Division, Third Judicial Department and the clerk and all justices of that court; the Committee on Professional Standards and all 21 of its members; and the state Attorney General. She alleged that § 470 violates her right to enjoy the privileges and immunities of citizenship as guaranteed in Article IV, Section 2, of the Constitution of the United States. She also alleged that § 470 violates her 14th Amendment equal protection rights by imposing different requirements on resident and nonresident attorneys, namely that only nonresident attorneys are required to maintain a New York office in order to practice in the state. Finally, Schoenefeld alleged that § 470 places burdens on interstate commerce in violation of the dormant Commerce Clause of the Constitution. The defendants moved to dismiss the complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), claiming that the case was not ripe for adjudication and that the defendants did not qualify as "persons" within the meaning of 42 U.S.C. § 1983 and had not been shown to be sufficiently linked to the alleged constitutional violations.

SCHOENEFELD CORRECTLY NOTED THAT SHE NEED NOT VIOLATE AND BE PROSECUTED FOR VIOLATING THE STATUTE IN ORDER TO MAINTAIN AN ACTION CHALLENGING ITS CONSTITUTIONALITY, AND SHE STATED THAT SHE HAD REFUSED TO TAKE CASES THAT WERE OFFERED TO HER ONLY BECAUSE SHE DID NOT HAVE A NEW YORK OFFICE AND DID NOT WISH TO VIOLATE THE STATUTE.

In reviewing the motion to dismiss for lack of ripeness, the court found that Schoenefeld's claim was ripe because it involved "a real and substantial controversy admitting of specific relief through a decree of conclusive character." The defendants argued that because Schoenefeld had failed to show any likelihood of her practicing in New York and having § 470 enforced against her, she had failed to demonstrate the existence of any real, substantial dispute. Schoenefeld correctly noted that she need not violate and be prosecuted for violating the statute in order to maintain an action challenging its constitutionality, and she stated that she had refused to take cases that were offered to her only because she did not have a New York office and did not wish to violate the statute. The court rejected the defendants' claim that the case was not ripe.

The defendants' motion to dismiss because Schoenefeld had named as defendants parties who

were not "persons" under the relevant law and who were not personally involved in the alleged violations was partially granted and partially denied. Schoenefeld admitted that her claims against the State of New York, the Appellate Division, and the Committee on Professional Standards were barred by the Eleventh Amendment; those claims were therefore dismissed. However, individual state agents acting in their official capacity and attempting to enforce an unconstitutional statute are not entitled to Eleventh Amendment immunity (*see Ex Parte Young*, 209 U.S. 123). In order to be found liable under § 1983, state agents must be personally involved in the constitutional deprivations alleged. The court stated that an official "whose office is tasked with an express or general duty to enforce a statute alleged to be unconstitutional" is sufficiently connected to that statute to make him or her a proper party to a suit for injunctive relief. The court therefore found that the justices of the Appellate Division and the members of the Committee on Professional Standards were proper parties to Schoenefeld's suit.

The court then discussed Schoenefeld's privileges and immunities claim, noting that although courts have long given great deference to states in their regulation of the practice of law, "a state's discretion in this area is not absolute." The court noted that "a nonresident attorney . . . who passes a state's bar exam and otherwise qualifies to practice law within that state . . . has an interest in practicing law that is protected by the Privileges and Immunities [C]lause." The case of *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, held that the New Hampshire rule excluding nonresident attorneys from the state bar violated the Privileges and Immunities Clause, and the case of *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, held that the Virginia rule allowing attorneys to be admitted on motion on condition that they were permanent residents also violated the clause. Virginia got around the residency requirement in the Friedman case by stating that nonresident attorneys who had not passed the state bar examination (i.e., were admitted on motion) were required to practice full-time and maintain an in-state office. Schoenefeld claimed that § 470 imposes the equivalent of a residency requirement on the practice of law and that such requirements have been held to be unconstitutional. Because § 470 is a state rule that applies to all nonresident attorneys, "even those who have shown their commitment to service and New York law through attending CLE courses and passing the state bar exam," and because "[t]he state has offered no substantial reason for § 470's differential treatment of resident and nonresident attorneys nor any substantial relationship between that differential treatment and State objectives," the court denied the defendants' motion to dismiss the claim that § 470 violates the Privileges and Immunities Clause.

The court granted the defendants' motion to dismiss the equal protection claim because Schoenefeld was neither a member of a suspect class nor invoking a fundamental right. The court also granted the defendants' motion to dismiss the claim under the Commerce Clause because Schoenefeld had "raised no theory by which New York's office requirement for nonresident attorneys can be said to be 'clearly excessive' to the substantial interest New York has in ensuring that nonresident attorneys are familiar with New York law and maintain a stake in their New York license and interest in the integrity of the state bar."

While the U.S. District Court has allowed Schoenefeld to move forward with her claim on the Privileges and Immunities Clause, nothing further has transpired in the case. Subsequently, a state court

(*In Re Garrasi,* 2010 N.Y. misc. Lexis 4391 (2010)), in discussing § 470, stated that in *Lichtenstein v. Emerson,* 251 A.D.2d 64, the First Department had found that the New York office requirement of Judiciary Law § 470 does not violate the Privileges and Immunities Clause of the U.S. Constitution and is accordingly constitutional. The First Department noted the state's legitimate interest "in ensuring that a lawyer practicing within its boundaries is amenable to legal service and to contact by his or her client" and said that "a state may, therefore, reasonably require an attorney, as a condition of practicing in this jurisdiction, to maintain some genuine physical presence therein." The state court further noted that the decision in the Schoenefeld case found that the plaintiff's privileges and immunities claim could go forward but did not present any binding authority on that court to endorse the challenge to § 470.

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