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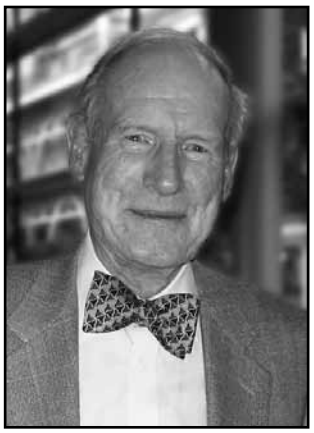

Bar Examination

Cheating

In the Matter of Rose Dewitt v. New York State Board of Law Examiners,
90 A.D.3d 1457, 935 N.Y.S.2d 726 (NY 2011)

This is a proceeding under Civil Practice Law and Rules Article 78 to review a determination of the New York State Board of Law Examiners which found that Rose Dewitt was guilty of misconduct on the July 2009 bar examination.

After taking the examination in July 2009, Dewitt was charged with violating the board's misconduct rule by copying or seeking to copy another examinee's answers on the multiple-choice questions on each day of the examination. Following a hearing, the board sustained the charges and nullified Dewitt's exam results. She then filed this Article 78 proceeding.

Dewitt claimed that the findings were not supported by substantial evidence. However, the Court stated that during the hearing, a proctor had

testified that she had observed Dewitt repeatedly craning her neck to look at the exam of the examinee seated next to her during the multiple-choice session on the first day of the examination. The same proctor and her three supervisors had testified that they all had observed Dewitt doing the same thing on the second day. The board had also offered expert proof of strong statistical evidence that Dewitt had succeeded in copying answers from the other examinee. Dewitt had denied the copying and had presented her own expert proof challenging the statistical evidence. The Court stated that the resolution of conflicting evidence and determination of the witnesses' credibility were within the sole province of the board and would not be disturbed.

Dewitt also claimed that she was denied due process because she was not provided with the address of the other examinee and the data underlying the report of the board's expert. The Court stated that because Dewitt had not sought a ruling on either issue at the hearing, they would not review those matters.

The determination by the board was confirmed, and the petition was dismissed.

Copyright infringement of secure test materials

National Board of Medical Examiners, et al. v. Optima University, LLC, et al.,
2011 U.S. Dist. LEXIS 143645 (W.D. Tenn.)

On February 23, 2009, the National Board of Medical Examiners (NBME) and the Federation of State Medical Boards ("the Federation") filed a copyright infringement action against Optima University, LLC ("Optima") alleging that Optima had violated the United States Copyright Act by using copyrighted questions from the United States Medical Licensing Examination (USMLE) in its test preparation courses. NBME and the Federation moved for summary judgment, and Optima failed to respond to the motion. The U.S. District Court for the Western District of Tennessee (Eastern Division) found in favor of NBME and the Federation, granted summary judgment against Optima, and awarded $2,400,000 in damages.

NBME and the Federation own and sponsor the USMLE, a standardized examination used to evaluate applicants for medical licensure in the United States. The USMLE is a "secure" test. Examination questions are confidential, and NBME and the Federation own copyrights to USMLE tests and test questions.

In 2007, NBME began an investigation into a confidentiality breach of USMLE examination questions. The investigation began when NBME noticed unusual answer patterns from individuals taking the exams in Bucharest, Romania, and Budapest, Hungary. NBME suspected that these individuals were taking the exams in order to acquire test content, rather than for the purpose of passing the exams. Video recordings of testing sessions revealed some individuals photographing examination questions from their computer screens.

NBME's investigation led to the discovery that Optima was coordinating the effort to steal examination questions and using the exam materials for a test preparation program. NBME arranged for an individual to attend Optima's preparation program, where this individual was able to review materials and confirm that at least 50 questions on the Optima computer network were identical to, or substantially similar to, secure USMLE questions.

In February 2009, NBME filed suit against Optima, and the District Court directed the United States Marshal Service to seize and impound all USMLE-related materials used by Optima. In response, Optima interfered with efforts to seize materials, deleted data from its computer network, and attempted to hide computer equipment. However, NBME was still able to recover handwritten notes reconstructing secure questions, typed copies of questions, and computer screen shots from actual USMLE examinations.

The court found that the acts of Optima infringed on the test owners' copyrights and were clearly willful. The court further found that the owner of Optima, Eihab Mohamed Suliman, either knew or acted in reckless disregard of the fact that USMLE questions were copyrighted and that reproducing them was unlawful.

The court's order granting summary judgment affirmed the role of secure examinations in protecting the public interest. The court stated that "the need to deter conduct such as that of Optima and Suliman is vital. USMLE scores are relied upon by state medical boards when licensing doctors. The disclosure of secure, copyrighted test questions undermines the integrity of the USMLE and presents the threat that persons without the skill and knowledge required to practice medicine will be licensed as [doctors]."

The court awarded the maximum statutory damages allowable of $2,400,000 ($150,000 per violation for 16 copyrighted works). NMBE and the Federation were also awarded attorney's fees and costs. Optima and Suliman were permanently enjoined from engaging in further infringing activity and were ordered to turn over all copyrighted materials for destruction within 30 days.

Disclosure of bar examination questions; computer-based testing

Jonathan Bolls v. Virginia Board of Bar Examiners, 2011 WL 4102286 (E.D. Va.)

On September 14, 2011, the United States District Court for the Eastern District of Virginia held that the Virginia Board of Bar Examiners was not required to provide a bar applicant with a copy of his answers to the 2008 Virginia bar examination. The court found that post-examination access to bar examination papers is beyond the process due under the Fifth and Fourteenth Amendments.

In July 2008, Jonathan Bolls sat for the Virginia Bar Examination using a computer. After being informed that he had failed the exam, Bolls notified the Virginia Board of Bar Examiners that he had encountered a "computer glitch" during the exam, and he requested a copy of his answers to the essay portion. This request was denied.

After an exchange of correspondence, W. Scott Street III, secretary-treasurer of the board, informed Bolls that his essay answers had been reevaluated by the board and that there was "no doubt" that he had failed the exam, as he had failed not only the essay portion but also the MBE. Street stated that these results were final.

Unsatisfied with the board's denial, Bolls filed a petition for emergency injunctive relief in the Circuit Court of Fairfax County, Virginia. The Fairfax Circuit Court denied the petition based on lack of jurisdiction.

Bolls then filed a petition in the Supreme Court of Virginia seeking a writ of mandamus directing the

board to release his examination answers. The Court denied the petition on August 11, 2009. Bolls asked the Court for a rehearing, which was likewise denied.

Following rejection by the Supreme Court of Virginia, Bolls sought a writ of certiorari from the United States Supreme Court. The petition was denied on February 22, 2010.

Apparently undiscouraged, Bolls continued his quest in the United States District Court for the Eastern District of Virginia, where he challenged the constitutionality of the procedures of the board with respect to his bar exam results. Bolls argued that Virginia Code § 54.1-108(1) was unconstitutional because it gave the board unbridled discretion to determine what circumstances warrant disclosure of bar examination answers. However, the U.S. District Court dismissed Boll's complaint for lack of subject matter jurisdiction.

Bolls followed up with the District Court by filing a motion to alter judgment, which was also denied by the court. Both District Court orders were subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.

Bolls then tried a new tactic and filed again with the U.S. District Court for the Eastern District of Virginia—this time as a public service to all prospective Virginia bar applicants. Bolls claimed that he was no longer seeking individual relief but was "merely acting in the capacity of a concerned citizen of Virginia." Bolls argued that future bar applicants had a due process right to gain access to their examination answers so that they could determine whether their failure to pass the bar examination was the result of their performance or that of the computer software. Bolls stated that the board's policy was "outmoded and technically improper given the recent transition to computer-based testing in Virginia."

The board countered with a motion to dismiss for lack of federal jurisdiction and failure to state an actionable claim.

The District Court stated that federal courts have uniformly rejected claims based upon a state's policy of denying access to bar exam results. Citing the case of *Brewer v. Wegmann*, the court noted that "due process is not offended by a bar-examination procedure that does not allow failing applicants to secure review of a determination that the applicant has failed, 'primarily because an unqualified right to retake the examination at its next regularly scheduled administration both satisfies the purpose of a hearing and affords it protection.'"

The court granted the board's motion to dismiss and stated that bar applicants who fail the examination have three options: they can present their grievance to the Supreme Court of Virginia, petition the Supreme Court of the United States for certiorari, or simply take the bar exam again.

IMMUNITY

Absolute immunity; quasi-judicial absolute immunity

Stoddard v. Carlin, et al., 799 F. Supp. 2d 57 (DC 2011)

Philip Stoddard filed this action against a number of individuals involved in the denial of his license to practice law in the District of Columbia. This action was Stoddard's fourth lawsuit seeking redress for rejection of his application for bar membership; none of these suits, including their appeals, had been successful. In this case, the defendants moved to dismiss for lack of jurisdiction and for failure to state a claim.

Stoddard first applied for admission in the District of Columbia in May 1999, but the Committee on Admissions (COA) declined to certify him for admission because of his failure to comply with court-ordered child support obligations from 1979 to 1988 and his refusal to appear and testify before the COA. In November 1999, Stoddard applied for admission to the Florida Bar and passed the February 2000 Florida bar examination. The Florida Board of Bar Examiners declined to certify his admission based on character and fitness grounds, and it opened a formal investigation.

Stoddard's Florida Bar application became outdated in November 2002. Then he filed a lawsuit in federal district court against the Supreme Court of Florida and the individual justices. The federal district court dismissed this suit, Stoddard appealed, and the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal, noting in an unpublished opinion that Stoddard "admitted that his bar application showed a 25-plus-year history of physical and mental illnesses, a complete financial collapse in 1979, a bitter divorce, three hospitalizations for acute psychosis in 1978–1980, and a 1996 bankruptcy involving 20 years of financial instability and sporadic employment." (This case was reported in the August 2003 issue of the *Bar Examiner*, Vol. 72, No. 3.)

Stoddard reapplied for admission to the Florida Bar in 2004, and the board re-opened its character and fitness investigation. Prior to the character and fitness hearing, Stoddard filed another suit in federal district court against several persons, including the Chief Justice of the Florida Supreme Court. That suit was dismissed; Stoddard appealed, and the dismissal was affirmed by the Eleventh Circuit. In January 2008 Stoddard filed a petition for a writ of habeas corpus against the Supreme Court of Florida and the Governor of Florida. This suit was also dismissed, and the court denied Stoddard's motion for reconsideration.

Meanwhile, in 2006 Stoddard re-applied to the D.C. Bar for admission. The COA re-opened its character and fitness investigation and requested documents relating to the Florida board's refusal to certify Stoddard's admission in Florida. Stoddard then filed a petition of review with the D.C. Court of Appeals asking the Court to review his bar application file. The COA filed a response citing multiple character and fitness issues raised by this application. The D.C. Court of Appeals denied Stoddard's petition. The COA proceeded with its investigation and advised Stoddard in August 2008 that it was again unwilling to certify him for admission to the bar. A formal hearing was held at Stoddard's request in October 2009, with the same result.

Stoddard then brought this action in February 2010 against the COA and others, including Mark S. Carlin, chairman of the COA. The COA filed its findings of fact, conclusions of law, and recommendations with the D.C. Court of Appeals in February 2010, and Stoddard filed a response. The D.C. Court of Appeals issued an order in March 2010 directing Stoddard to show cause why his bar application should not be denied. Stoddard then filed an amended complaint alleging violations of his constitutional rights to due process and equal protection, the tort of invasion of privacy, violations of Title II of the Americans with Disabilities Act, violations of the Sherman Antitrust Act, and others. He also alleged that he was harmed by an allegedly libelous letter sent by his ex-wife from Maryland to the COA in the District of Columbia, but the Court ruled that it lacked personal jurisdiction over the ex-wife and dismissed that claim.

Three of the persons Stoddard sued were judges on the D.C. Court of Appeals, and the U.S. District Court held that because these defendants were being sued for conduct performed in their official judicial capacity, they were shielded by absolute immunity. The court held that because the remaining defendants—the COA, its chairman, and its general counsel—performed the functions of bar officials, the doctrine of absolute immunity also applied to them. The court pointed out that "[a]bsolute immunity is defined by the *functions* it protects and not by the person to whom it attaches" and that "courts have extended absolute immunity to a wide range of persons playing a role in the judicial process. These persons include prosecutors, law clerks, probation officers, a court-appointed committee monitoring the unauthorized practice of law, a psychiatrist assisting a trial judge, arbiters, and persons performing dispute resolution."

The court pointed out that "denying absolute immunity for bar admissions officers would almost certainly result in repetitious litigation by those candidates aggrieved by the COA's determinations." The fact that Stoddard had "initiated four suits against multiple admissions officials in different states . . . demonstrates first-hand the endless challenges that would ensue if [such officials] were not entitled to absolute immunity." The court also pointed out that safeguards built into the judicial process are sufficient to eliminate the need for private damage actions as a means of curbing unconstitutional conduct. The court added that "[t]he COA's determination that [Stoddard] did not meet the character and fitness standard is not analogous to an officer at common law obtaining an arrest warrant. More importantly, [Stoddard] fails to demonstrate that [the COA's] actions were malicious and without probable cause. [Stoddard] has been denied bar membership multiple times in this jurisdiction and elsewhere for a host of well-documented reasons."

The court concluded that the D.C. Court of Appeals and the three judges of the D.C. Court of Appeals are entitled to absolute judicial immunity while the COA and its officers are entitled to quasi-judicial absolute immunity. Their motion to dismiss for failure to state a claim was granted.

MISCELLANEOUS

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

Schoenefeld v. State of New York, et al., 2011 WL 3957282 (N.D. NY 2011)

This case was reported in an earlier issue of the *Bar Examiner* (Vol. 80, No. 1, March 2011). The following summarizes the latest developments in the case.

Ekaterina Schoenefeld filed this action for equitable relief alleging that New York Judiciary Law Section 470 is unconstitutional on its face and as applied because it violates Article IV section 2 of the U.S. Constitution (Privileges and Immunities Clause), the Equal Protection Clause of the Fourteenth Amendment, and Article 1 section 8 of the Constitution (the Commerce Clause). Both the plaintiff and the defendants filed motions for summary judgment.

Schoenefeld is a 2005 graduate of Rutgers University School of Law and is licensed to practice law in New York, New Jersey, and California. She lives and practices law in Princeton, New Jersey. Section 470 states that nonresident attorneys may not practice law in the state of New York without

maintaining an office located in that state. Section 470 does not apply to attorneys who reside in the state of New York.

As reported in the March 2011 *Bar Examiner*'s summary of the early stages of this case, Schoenefeld learned about Section 470 through a continuing legal education course and has since refrained from accepting cases that would require her to practice in New York courts. She brought this suit against 37 defendants, including the New York Supreme Court, Appellate Division, Third Judicial Department, and the Committee on Professional Standards. The defendants moved to dismiss because the claims were not ripe for review, but the court found that they were ripe. The court dismissed Schoenefeld's claims under the Fourteenth Amendment and the Commerce Clause and dismissed all claims with respect to some of the defendants, but it permitted Schoenefeld to proceed with her claims against the remaining defendants, including the State of New York, under the Privileges and Immunities Clause.

WHILE SCHOENEFELD CLAIMED THAT SECTION 470 INFRINGES ON HER RIGHT TO PRACTICE LAW IN NEW YORK IN VIOLATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE, THE DEFENDANTS ARGUED THAT "THE STATE HAS A SUBSTANTIAL INTEREST IN ENSURING THAT NONRESIDENT ATTORNEYS ARE AMENABLE TO IN-STATE SERVICE OF PROCESS AND [ARE] AVAILABLE FOR COURT PROCEEDINGS AND CONTACT BY INTERESTED PARTIES . . . . "

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Supreme Court has traditionally interpreted the Privileges and Immunities Clause to prevent a state from imposing an unreasonable burden on citizens of other states (1) to conduct business or pursue a common calling within the state, (2) to own private property within the state, and (3) to gain access to the courts of the state. However, the Privileges and Immunities Clause is "not an absolute" and is implicated only if a state infringes on "a fundamental right or privilege which promotes interstate harmony" and does so on the basis of state residency. If a state does deprive nonresidents of a fundamental right, it must demonstrate that the discrimination is based on a substantial interest of the state and that the means used bear a close or substantial relation to that interest.

While Schoenefeld claimed that Section 470 infringes on her right to practice law in New York in violation of the Privileges and Immunities Clause, the defendants argued that "the state has a substantial interest in ensuring that nonresident attorneys are amenable to in-state service of process and [are] available for court proceedings and contact by interested parties," and that "Section 470 bears a substantial relation to this state interest because it employs the least restrictive means of achieving this interest."

The court pointed out that "[t]he practice of law has long been held to be a fundamental right within the meaning of the Privileges and Immunities Clause because the profession has both a commercial and noncommercial role in the United States." It further noted that the U.S. Supreme Court has found that states' statutes violated the Privileges and Immunities Clause "where such statutes either discriminated against nonresidents by placing an additional cost on conducting business in-state or prevented nonresidents from obtaining employment in-state."

The court added that Section 470 places an additional cost on all nonresident attorneys wishing to practice law in New York which resident attorneys are not required to incur. A resident attorney in New York may operate his office out of his home, while a nonresident attorney must maintain both a residence in another state and an office in New York, which means that the nonresident attorney may be required to pay property taxes and rent or mortgage payments on a home and on a New York office (and potentially on an office maintained in the home state), where New York resident attorneys may only be required to pay taxes on the home. The court said that Section 470 imposes a financial burden on nonresidents and is therefore discriminatory under the Privileges and Immunities Clause.

The defendants countered that Section 470 advances three substantial state interests: "(1) the need for efficient and convenient service of process such that attorneys are readily available for court proceedings, (2) the ability to observe and discipline nonresident attorneys, and (3) the remedy of attachment." However, the court found that as a matter of law these justifications do not constitute substantial state interests for Section 470 under the Privileges and Immunities Clause, because Section 470 is not the least restrictive means of achieving these interests. The court said that requiring a nonresident attorney to have an appointed agent for service of process in New York "is a simple and less restrictive means of ensuring that a nonresident attorney will be subject to personal jurisdiction in-state and to contact by the court, clients, and opposing parties."

The court also said that there are simpler and less restrictive means to achieve the other two interests, including personally interviewing nonresident applicants to the New York Bar and requiring nonresident attorneys to maintain malpractice insurance. The court held that the "[d]efendants have failed to establish either a substantial state interest advanced by Section 470, or a substantial relationship between the statute and that interest," and concluded "as a matter of law that [Section 470] infringes on nonresident attorneys' right to practice law in violation of the Privileges and Immunities Clause."

The defendants' motion for summary judgment was denied, and Schoenefeld's motion for summary judgment was granted.

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

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