

LITIGATION UPDATE

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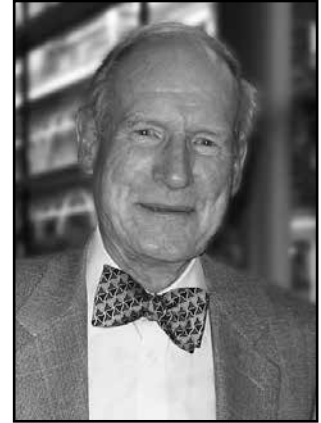
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ADMISSION ON MOTION; ADA

Active practice requirement

Timothy William Spencer v. Utah State Bar, 2012 UT 92

The Supreme Court of the State of Utah recently considered whether to allow admission to practice on motion for an attorney who had substantial legal experience in Idaho, but who could not satisfy the active practice requirement because he had voluntarily ceased practice during periods when he suffered from depression and anxiety. This further caused the Court to consider whether waiver of the

active practice requirement was required under the Americans with Disabilities Act (ADA) and whether the active practice requirement violated the Equal Protection Clause of the U.S. Constitution.

The Court declined to waive the active practice requirement and found that the ADA did not require such a waiver. The Court also concluded that the

active practice requirement did not violate the Equal Protection Clause.

Attorney Timothy Spencer was admitted to practice in Idaho in 1983 and actively practiced until 1995, at which time he ceased practice for two years due to depression and anxiety. Spencer resumed practice in 1997 but again ceased in 2001. In 2004, he moved to Utah, changed his status with the Idaho bar to “inactive,” and began working as a law clerk. Spencer changed his status with the Idaho bar back to “active” in 2009 after receiving clearance from his physician.

In 2010, Spencer submitted an application for admission to the Utah Bar by motion under rule 14-705, which permitted an application on motion if the lawyer had been actively engaged in the practice of law in Idaho for at least three of the five years immediately preceding the date of the application. The Bar denied Spencer’s request because he had not practiced law in Idaho for the required period. In support of its decision, the Bar noted that admission rules “play a critical role in protecting the public” and that admission on motion is based on the premise that “a practicing lawyer does not need to reestablish his competency by passing another examination because he has already demonstrated competency through his *current* history of professional practice.” The admissions committee reaffirmed the decision. Spencer appealed.

The Supreme Court of the State of Utah was adamant in its defense of the active practice requirement. The Court stated that the rules governing

admission to the Bar “stand as important safeguards against incompetent and unethical representation.”

The Court noted Spencer’s significant legal experience but emphasized that at the time of his application for admission, his experience was not current. Rule 14-705 permits admission on motion “only if the lawyer’s legal experience is *both* current and substantial.” Significant legal experience is not enough.

The Court also rejected Spencer’s ADA argument. Spencer argued that denial of his application was impermissible because it was “based on factors stemming from his disability.” Spencer concluded that tolling the computation of his practice time during the period of his disability was a reasonable accommodation. The Court disagreed.

The Court found that it was irrelevant whether Spencer was a qualified individual with a disability under the ADA because even if he was, he would still not be entitled to a waiver of the active practice requirement. In its opinion, the Court stated:

The ADA requires that “[a]ny person that offers examinations or courses related to applications [or] licensing” for professional purposes “shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” Further, the federal regulations promulgated under the ADA provide that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from

participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”

Applying this standard, the Court found that the Utah Bar was required to administer the bar examination in a non-discriminatory manner, but that “the ADA does not require the Utah Bar to waive the active practice requirement for disabled lawyers who seek to be admitted on motion.” The Court stated that waiving the active practice requirement would allow admission of an applicant who has not demonstrated competence by either satisfying the active practice requirement or passing the bar examination, which would “fundamentally alter

the nature” of the bar admission program and is not required under the ADA.

Finally, the Court considered whether the active practice requirement violated the Equal Protection Clause. In defense of rule 14-705, the Court noted that the rule distinguishes only between lawyers who satisfy the active practice requirement and those who do not, regardless of disability. The Court concluded that there is a reasonable basis for this distinction because it ensures that lawyers who are admitted on motion have current and substantial legal experience.

Because Spencer had failed to demonstrate that the Bar had treated him in an “unfair, unreasonable[,] or arbitrary manner,” his appeal was denied.

CHARACTER AND FITNESS

Mental health issues

In re Application of Zimmerman, 134 Ohio St. 3d 268, 2012-Ohio-5644

Brenda Zimmerman graduated from law school in 2011 and applied to take the Ohio Bar Examination. The Dayton Bar Association approved her to sit for the July 2011 bar exam, but she was unsuccessful. Based on her unresponsive answers to the questions on that exam, the Board of Bar Examiners expressed concern about her fitness to practice law. The Board of Commissioners on Character and Fitness exercised its power to sua sponte investigate Zimmerman’s character, fitness, and moral qualifications.

Zimmerman did not pass the July 2011 bar exam because her answers were not responsive to the questions. Instead of analyzing the fact patterns, she expounded upon God, her religion, and her belief that the United States and the legal system had strayed from the laws of God and defiled his name. At a hearing by a panel of the Board of Commissioners on Character and Fitness, Zimmerman testified that

she no longer wanted to practice law, that she did not like the way the country was being run, and that she was upset with the U.S. Supreme Court’s ruling in the Kelo case, which allowed a city to condemn private property for economic development.

She further testified that she was unemployed and owed \$223,000 in student loans that she could not pay. While her dean had recommended that she seek help from the Ohio Lawyers Assistance Program (OLAP), she said that the idea of talking with someone from OLAP scared her.

In her rambling testimony, Zimmerman touched on cloud seeding, biological warfare testing on American military personnel, the Bay of Pigs invasion, and the assassinations of the Kennedys and Martin Luther King Jr. When asked whether she was or had ever been on medication, she said she

was not on medication even though a counselor had prescribed Paxil and Trazodone. She added that she had never before answered exam questions in this manner, but that prior to the exam “the signs were there and led [her] to answer the questions in that manner.” She reported that she had prayed very hard and tried to communicate with God and Jesus because she did not want to write these answers and throw away the time and effort that she had put into law school, but that the Lord forbade her to practice law. The panel was sympathetic but was concerned about her mental health issues and attitude.

Following the hearing, the panel recommended that Zimmerman’s character and fitness not be approved. However, the panel recognized that she may one day be able to demonstrate that she possesses the character, fitness, and moral qualifications to practice law. The panel therefore recommended that Zimmerman be permitted to apply for the July 2013 exam with the following conditions: she must

submit to a mental health evaluation by a licensed professional selected by the board, show compliance with any treatment recommendations, submit a new application for admission, and complete a new character and fitness investigation, including an NCBE background investigation. The board adopted the panel’s recommendations.

The Ohio Supreme Court agreed that there was evidence that a mental or psychological disorder was present and that Zimmerman’s inability to analyze and cogently address the bar exam questions raised issues about her ability to analyze her clients’ problems, research applicable law, and advocate for her clients in a competent and professional manner.

The Court adopted the board’s findings and recommendations; however, because applying for the July 2013 bar exam would not allow Zimmerman sufficient time to obtain professional help and comply with recommended treatment, she would be allowed to apply for the July 2014 exam.

Mental health issues; lack of candor; attitude

In re Application of Burch, 133 Ohio St. 3d 82, 2012-Ohio-3935

Robin Burch graduated from law school in 2010 and applied to take the July 2011 Ohio bar exam. In June and November 2010, she was interviewed by two teams from the Cincinnati Bar Association admissions committee. The questions at those interviews focused on a report submitted to the National Conference of Bar Examiners by the University of Cincinnati College of Law, detailing several instances of conduct that the teams believed reflected poorly on Burch’s fitness to practice law, including (1) failing to comply with requirements in courses taken during two semesters in law school and withdrawing from the courses without authorization,

and failing to submit a paper and acceptable work in another class; (2) making comments in open court during a judicial externship that were critical of the court process and its participants; (3) failure to disclose to a dean that she had not completed course work from the previous semester when requesting permission to exceed the credit-hour limit for the last semester of law school; and (4) signing an attorney instructor’s name to a court document without authorization. Both sets of interviewers were concerned about Burch’s attitude that the rules did not apply to her, her failure to accept responsibility for her actions, her compulsive need to excuse her

behavior, and her difficulty being forthright when asked direct questions. Both teams recommended that Burch's application not be approved.

Burch then appeared before an eight-member review panel to answer additional questions about her conduct in law school, as well as her diagnoses of depression and attention deficit disorder and how those conditions contributed to her conduct or would affect her fitness to practice law. Based on Burch's testimony and that of her supervisor at an internship program, the review panel recommended that her application be approved, and in May 2011 the admissions committee certified Burch's character and fitness. However, the Board of Commissioners on Character and Fitness exercised its authority to further investigate Burch's qualifications in light of her mental health issues and the concerns expressed in the law school report sent to NCBE.

The panel assigned to hear the case identified the following critical issues: (1) whether Burch had become more willing to recognize that rules apply to her even if she does not agree with them, (2) whether Burch had become more willing to meet all of her obligations instead of only those she wants to meet, and (3) whether Burch had become more willing to accept responsibility for her actions instead of attempting to justify her behavior.

There was favorable testimony at the hearing from Burch's treating psychiatrist, a representative of the Ohio Lawyers Assistance Program (OLAP), and Burch's supervisor at the internship program. However, Burch's own testimony gave credence to the concerns of the law school and the admissions committee. In summarizing that testimony, the panel said that Burch "vacillated from acknowledging that she had these issues to attempting to justify her right to, for example, not attend class or complete certain assignments because she was paying for law

school and if she wanted to spend her time on what she considered more productive activities, she was entitled to do that. She also indicated that she was not aware that there would be such serious consequences for her actions, with the implication being that the consequences were unfair because she had no warning of them. Disturbingly, [Burch] did not seem to exhibit any insight into her behavior or to express any recognition that her actions may not have been proper."

Based on these findings, the panel found that Burch had not proven by clear and convincing evidence that she presently possesses the requisite character and fitness to be admitted to the Ohio bar. Expressing hope that with more time to mature, Burch will one day be able to meet her burden, the panel recommended that she be allowed to apply for the July 2012 exam.

In considering the panel's action, the board observed, "[T]hroughout the entire process from her initial interviews through to this panel's hearing, [Burch] continued on one hand to say . . . 'I'm responsible' but followed always by 'I was treated too harshly' and 'I got on the wrong side of the wrong people.' At best, the applicant's attitude makes for an unattractive presentation; at worst it calls into question fitness to undertake professional responsibilities."

The board adopted the panel's findings and recommendations but recommended that Burch be permitted to apply for the February 2013 exam.

When the Ohio Supreme Court considered the board's decision, Burch objected to the board's recommendation and argued that she had proven that she possesses the character, fitness, and moral qualifications to practice law. She said that the board had placed undue weight on the mistakes she made

in law school and had not given her credit where she contended she had earned it. The Court stated that Burch's pattern of reckless conduct occurred while she was in law school and did not involve mere "youthful indiscretions." While Burch had been candid with the admissions committee and board, had substantially complied with her OLAP contract, and had excelled in her recent employment as an in-home tutor, the Court agreed with the board that "these rehabilitation efforts and positive social contributions do not overcome the cumulative effect

of Burch's errors in judgment during her law-school career." The Court pointed out that her repeated excuses for her conduct and attempts to deflect the blame away from herself show that she has not matured and accepted responsibility for her past conduct. Finding that she had not met her burden of proof, the Court disapproved Burch's application but allowed her to submit a new application for the February 2013 exam accompanied by an updated report from OLAP.

Violation of laws; loss of pharmacy license; failure to accept responsibility

In re Application of Poignon, 132 Ohio St. 3d 395, 2012-Ohio-2915

Daniel Poignon applied to take the July 2011 Ohio bar exam. He met with the Toledo Bar Association admissions committee, which recommended that his application not be approved. He appealed, and the Board of Commissioners on Character and Fitness appointed a panel to conduct a hearing.

The following evidence was heard by the panel: Poignon obtained his pharmacist's license in 1984 and worked at a hospital in Toledo for several years. In 1990 he began working at a hospital in South Carolina and during this employment he was accused of drug use. He claimed he had been cleared of drug use but was asked to resign because he allegedly self-prescribed medication. He also claimed that an intern had written the prescription, but the intern denied it. Poignon then moved to another hospital in South Carolina and then returned to Ohio to work in a community hospital and then Tiffin Mercy Hospital, where he was terminated for abusing drugs. His career ended with his employment at a pharmacy in Toledo. After an investigation, a discrepancy was found in the pharmacy's narcotics supply, and Poignon was indicted and pled no contest to two counts of drug theft, both fourth-degree felonies. In

1999 he was sentenced to six months in a correctional treatment facility and five years of community control. He completed the treatment program, and the community control was terminated early in 2001. Poignon had his criminal record expunged, but his pharmacy license was revoked because of his conviction.

Poignon claimed to accept responsibility for his crimes and for the loss of his license, but he offered excuses for his conduct, leading the board to doubt his sincerity. He claimed that he had entered the no-contest plea because he faced a contempt charge for missing his court date and because his lawyer had mishandled his case. He blamed his supervisor for the missing drugs and claimed that all the pharmacists working at that pharmacy were stealing and using drugs. He also blamed his attorney for the loss of his pharmacy license. The record shows that his use and abuse of drugs spanned at least seven years.

The panel was also concerned about Poignon's seeming ignorance of and indifference to his family's financial problems. At his May 2011 hearing, he testified that he had not worked since April 2008.

He had worked for a lawyer while in law school and had reported on his bar application that he left for lack of work, but the employer reported that he was terminated for lack of experience. Poignon then claimed that the employer's response was because of a personality conflict with the employer's mother, who was the office manager. Poignon claimed that his wife was the family's primary wage earner, but he also admitted that she had filed for bankruptcy in 2010. He testified that he had no knowledge of the bankruptcy proceeding because it was his wife's filing and she was handling it. A summons and complaint served on Poignon in a foreclosure proceeding identified him as a party defendant, but he testified to the panel that he did not believe he was a party to the action and did not file an answer, resulting in a default judgment.

Because of his criminal convictions, the revocation of his pharmacy license, his lack of attention to his family's current financial affairs, and his failure to seek gainful employment for over three years, the panel recommended that Poignon's application not be approved but that he be permitted to reapply for the July 2013 exam.

The board adopted the panel's findings of fact and agreed that Poignon did not presently possess the requisite character and fitness to practice law. However, the board did not adopt the panel's recommendation that he be permitted to reapply. The board concluded that Poignon's dishonest and unethical behavior demonstrated such an absence of honesty and integrity that he should be permanently precluded from reapplying for admission to the bar. In making this recommendation, the board stated its belief that the public would lose confidence in the

integrity of the legal profession if persons who had been permanently removed from other professions for disciplinary reasons were admitted to practice law.

On review by the Court, Poignon conceded that he had failed to prove he currently possesses the character, fitness, and moral qualifications to practice law in Ohio, but he objected to the board's recommendation that he be forever barred from seeking

admission to the bar. The Court stated that Poignon had presented no evidence that his most recent problems were the result of a psychological disorder, substance abuse, inexperience, or youthful indiscretion. He continued to blame co-workers, an alleged culture of drug use and abuse in the pharmacy profession, and poor legal representation in his criminal and licensure matters, rather than his

own failings, for his criminal convictions and the loss of his pharmacy license. He did not demonstrate full rehabilitation and had made no appreciable efforts to obtain sustained, gainful employment. He had not kept up with his financial obligations and when served with a complaint to foreclose on his family home had inexplicably denied that he was even a party to the action. In light of this pattern of behavior, the Court agreed with the board's conclusion that the legal profession would not be served by allowing his admission. The Court adopted the board's findings and recommendation that Poignon's application be denied and that he be forever precluded from reapplying to practice law in Ohio. ■

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