Litigation Update

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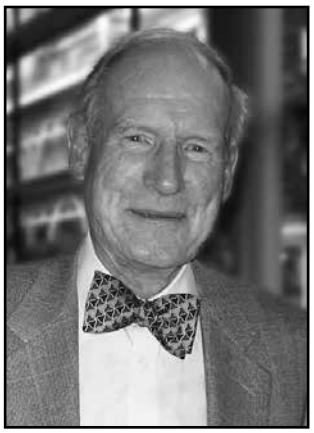

ABA-Approved Law School

Waiver of educational requirement; admission without examination

In re Petition of JaneAnne Murray, 821 N.W.2d 331 (MN 2012)

In March 2012, JaneAnne Murray filed a petition with the Minnesota Supreme Court seeking a waiver of the rules for admission to the bar. She did not qualify to apply to take the bar exam under Rule 4 or for admission without exam under Rule 7 because her law degrees were from universities in Ireland and England.

Murray graduated first in her class from University College Cork with a bachelor's degree in civil law. Her undergraduate program included

courses in constitutional, criminal, contract, property, evidence, family, torts, and administrative law. Murray subsequently earned a Masters of Laws (LL.M.) from the University of Cambridge in England, graduating fourth in her class.

After graduation she moved to New York to practice with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP. When she applied to take the New York Bar Examination, her foreign legal education qualified her because it was based on principles of English common law and was equivalent to a course of study at an ABA-approved law school in the United States. She passed the bar exam on her first attempt and was admitted to the New York Bar in March 1991.

Murray left Paul, Weiss in 1993 to become a trial attorney in the Criminal Defense Division of the Legal Aid Society of New York. Between that position and others, she had an active practice. Beginning in 2005, she maintained a solo law practice in New York specializing in criminal defense. She served on the Board of Directors of the New York State Criminal Defense Lawyers Association and the Irish American Bar Association of New York, was a member of the New York Council of Criminal Defense Lawyers, and was on the Board of Editors of the *White Collar Crime Reporter*, among other positions.

In 2011 Murray's husband accepted a position at the University of Minnesota and the family relocated there; Murray was appointed as a Practitioner in Residence at the University's law school. She then filed her petition seeking a waiver of the Minnesota rules for admission to the bar.

The Minnesota Supreme Court discussed Rules 4A(3)(a), 4A(3)(b), and 7A as they apply to bar admission. Murray was not eligible under Rule 4A(3)(a) or (b) because her law degree was not from an ABA-approved law school and her undergraduate degree was not from an institution that is accredited by an agency recognized by the U.S. Department of Education. Because of this, Murray petitioned under Rule 7, which provides for admission without examination "if the applicant otherwise qualifies for admission under Rule 4." In order to qualify for admission under Rule 4, she sought a waiver of the educational requirement.

The Court reviewed past waiver cases in Minnesota and noted that a high standard for waiver had been set; the educational requirement had been waived only once, in a 1955 case involving an attorney named Milton Schober. The Court said that it was satisfied that Murray had exceeded this high standard. In the Court's opinion, "Murray's legal education at University College Cork and the University of Cambridge—universities that teach the law in the same English common-law tradition upon which our own laws are based—are the equivalent, both in subject matter and in duration, to a law degree from a law school that is accredited by the ABA. Moreover, as in Schober's case, Murray's degrees are from colleges that cannot be accredited by the ABA. Finally, as in Schober's case, given Murray's passage of another state's bar examination, her many years of practicing law, her demonstrated knowledge of the law, and her professional accomplishment, we conclude that it would be an extreme, and unnecessary, hardship to require Murray to now enroll in, and graduate from, an ABA-accredited law school."

Murray's petition sought not only waiver of the educational requirement under Rule 4 but also admission without examination under Rule 7, which allows applicants with significant practice experience to be so admitted. The Court found the question of whether to waive the requirement that Murray

take the Minnesota Bar Examination "a much closer question than was waiver of the educational requirement."

First, the Court noted that Murray had passed the New York Bar Examination, which is similar to the Minnesota Bar Examination in that it is a two-day exam consisting of the Multistate Bar Examination (MBE) and essay questions on topics covered by the MBE and on other topics such as family law, the Uniform Commercial Code, and the law of wills and estates.

Second, the Court said that "Murray has clearly demonstrated her legal proficiency by practicing law in New York" for more than 22 years, having successfully worked in several demanding legal positions and having served the legal profession through her membership and leadership in numerous law-related professional organizations.

Finally, the Court concluded that "to require Murray's successful completion of the Minnesota Bar Examination" would "pose a significant hardship for her." The next administration of the bar exam would be in February 2013, and the results of that exam would not be available until May 2013. In the meantime, Murray would be allowed to practice law only in New York. The Court said that "Murray credibly contends that the nature of her practice—criminal defense—makes it impracticable for her to maintain a practice in New York while living in Minnesota with her husband and two school-aged children."

For the foregoing reasons, the Court concluded that "we deem it appropriate under the unusual circumstances presented here to allow petitioner JaneAnne Murray to be admitted to the practice of law in Minnesota upon compliance with Rule 7, Rules on Admission to the Bar, except that instead of compliance with Rule 4A(3)(a), Murray shall provide satisfactory evidence of graduation with a bachelor's degree in civil law from University College Cork and graduation with a Masters of Laws degree from Cambridge University."

Admission on Motion

Multijurisdictional practice; unauthorized practice of law; active practice requirement

Schomer v. Board of Bar Examiners, 465 Mass. 55, 987 N.E.2d 588 (MA 2013)

The Massachusetts Supreme Judicial Court recently decided that a New Jersey–licensed attorney's work as a contract attorney in New York before he was admitted to the New York Bar counted toward the five-year active practice requirement for admission on motion in Massachusetts.

After receiving his law degree from the University of Notre Dame Law School, Jesse Daniel Schomer sat for the New Jersey Bar Examination in July 2004 and passed. He was admitted to the New Jersey Bar on December 14, 2004. From mid-2005 to late 2008, Schomer worked as a full-time contract attorney in New York for the law firm of Sullivan & Cromwell LLP. During this time, Schomer was supervised by attorneys licensed to practice in New York. Schomer did not appear in any New York courts on behalf of any clients, nor did he otherwise hold himself out as licensed to practice in New York.

Schomer sat for the New York Bar Examination in July 2008 and passed; he was admitted to the New York Bar on October 7, 2009. In March 2009, Schomer had accepted a new position as an associate attorney

in New York at the law firm of Newman Ferrara LLP. However, prior to his admission to the New York Bar, Schomer was supervised at Newman Ferrara by lawyers admitted to practice in New York. He did not appear in any New York court and did not hold himself out as a New York–licensed attorney.

On September 19, 2011, Schomer petitioned the Massachusetts Board of Bar Examiners for admission on motion. Pursuant to Supreme Judicial Court Rule 3:01, § 6.1, applicants who apply for admission without taking the Massachusetts bar exam are required to have been "engaged in the active practice or teaching of law in a state, district or territory of the United States for five out of the past seven years immediately preceding the filing of the petition for admission on motion." The Board denied the petition after determining that Schomer had not satisfied S.J.C. Rule 3:01, § 6.1, because he had not been engaged in the active practice of law in a jurisdiction in which he had been admitted to the bar for five of the past seven years. Schomer appealed, and the Supreme Judicial Court reversed.

The Court reasoned that implicit in the active practice requirement "is the principle that such practice must have been authorized by the State where the applicant had been working as an attorney." The Court then noted that New York, the State where Schomer had been working as an attorney, has an unauthorized practice statute, N.Y. Jud. Law § 478, which makes it unlawful for a person to practice law, appear as an attorney, or hold him- or herself out to the public as being entitled to practice law, without being licensed and admitted to practice in New York. Notably, Schomer represented to the Court during oral argument that he had fully disclosed the nature of his work at Sullivan & Cromwell during the admission process to the New York Bar, and the Board of Bar Examiners did not challenge this representation.

Based on the foregoing, the Court stated that it was "not prepared to conclude that Schomer was engaged in the 'unauthorized' practice of law where the New York bar has seen fit to admit him to practice, thereby determining that his work at Sullivan & Cromwell and at Newman Ferrara did not constitute a violation of N.Y. Jud. Law § 478." The Court dismissed the Board's argument that Schomer's work in New York prior to his admission was "illegal" or "unauthorized," stating that the Board "should have sought legal clarification of the matter from its counterpart in New York when these proceedings commenced." Finally, the Court noted that "[a]t this time, we do not adopt the [B]oard's interpretation of S.J.C. Rule 3:01, § 6.1, that an attorney's practice must be physically located in the jurisdiction where the attorney is admitted to the bar in order to be credited toward meeting the active practice requirement." The Court therefore reversed the Board's decision, concluding that Schomer's work in New York before October 7, 2009, counted toward the five-year active practice requirement despite the fact that he was only licensed and admitted to practice in New Jersey during that time.

In rendering its decision, the Court stated that "[t]his case highlights the legal and ethical complexities surrounding the multijurisdictional practice of law by lawyers who may not be licensed in every State where they need to work." The Court then emphasized the "burgeoning need" for regulatory "clarification of the boundaries of multijurisdictional practice vis-à-vis the unauthorized practice of law."

ATTORNEY DISCIPLINE

Multijurisdictional practice; jurisdiction

State ex rel. York v. W. Virginia Office of Disciplinary Counsel, 744 S.E.2d 293 (WV 2013)

The West Virginia Supreme Court of Appeals held that the State had jurisdiction to investigate and potentially prosecute a patent attorney's alleged misconduct despite the fact that the patent attorney was not licensed by the West Virginia State Bar and his practice consisted entirely of federal matters. In so holding, the Court also concluded that the State's attorney disciplinary authority under the West Virginia Rules of Lawyer Disciplinary Procedure was not preempted by federal law authorizing the United States Patent and Trademark Office (PTO) to regulate the conduct of patent attorneys.

Olen York was admitted to the Ohio bar in July 2002 and was subsequently admitted to practice before the PTO in January 2003. York was a resident of Milton, West Virginia, and worked as an independent contractor for the Waters Law Group in Huntington, West Virginia. He was not a member of the West Virginia State Bar, and his practice with the Waters Law Group was limited to patent and trademark issues before the PTO. York represented clients from West Virginia but did not appear before any State courts.

In September 2012, the Investigative Panel of the West Virginia Lawyer Disciplinary Board (LDB) filed a Statement of Charges with the West Virginia Office of Disciplinary Counsel (ODC) alleging that York had violated the State's Rules of Professional Conduct. Around the same time, the PTO also started an investigation into the allegations contained within the Statement of Charges.

On November 29, 2012, York petitioned the Supreme Court of Appeals for extraordinary relief, arguing that the ODC and LDB lacked jurisdiction to investigate or potentially prosecute him for his alleged misconduct. York put forth two main arguments in support of his petition, both of which were ultimately rejected by the Court.

First, York argued that the ODC and LDB lacked jurisdiction under Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure, which gives the LDB authority to investigate alleged misconduct by "those admitted to the practice of law in West Virginia or any individual admitted to the practice of law in another jurisdiction who engages in the practice of law in West Virginia." York asserted that Rule 1 coupled with case law precedent supported his position "that only attorneys capable of practicing law in state courts located in West Virginia are subject to the jurisdiction of the ODC and LDB." York therefore argued that the ODC and LDB lacked jurisdiction in the present case because his practice consisted entirely of federal matters before the PTO.

In rejecting the argument, the Court stated that the term "the practice of law" includes both the conduct of cases before courts and services rendered outside of court. Based in part on this definition, the Court held that Rule 1 governs "the conduct of an attorney who practices law in [West Virginia] or provides or offers to provide legal services in [West Virginia], even where such attorney's practice consists entirely of federal matters." In such circumstances, the Court stated, the ODC and LDB "have jurisdiction to investigate the alleged misconduct

and recommend disciplinary action against the attorney regardless of whether the attorney is a member of the West Virginia State Bar."

Second, York argued that the jurisdictional authority of the ODC and LDB under Rule 1 was preempted by federal law in that the State's "attempt to impact [his] ability to practice law directly contradicts the authority he has been granted by the [PTO]." Again, the Court disagreed.

The Court explained that federal laws authorizing an agent to practice before a federal tribunal preempt a state's licensing requirements only to the extent that the state's requirements interfere with the goals of the federal laws. Specifically with regard to attorney disciplinary rules, the Court stated that federal regulations do not necessarily preempt state action if a state has properly asserted disciplinary jurisdiction over an attorney. Quoting the first paragraph of the PTO's regulations governing the conduct of patent practitioners, the Court observed:

> This part governs solely the practice of patent, trademark, and other law before the Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its Federal objectives.

In the present case, the ODC and LDB contended that no conflict existed between the simultaneous federal and state disciplinary investigations because the state was not seeking to suspend or expel York from his federal practice. The Court agreed that federal law did not preempt West Virginia's disciplinary proceedings against York and, as a result, denied the petition for extraordinary relief.

Character and Fitness

Dishonesty; neglect of financial obligations; failure to cooperate in the admissions process

In re Application of Wilson, 134 Ohio St. 3d 168, 980 N.E.2d 1018 (OH 2012)

Eric Wilson graduated from the University of Dayton School of Law in May 2009. He applied to register for admission to the Ohio Bar and on April 1, 2009, filed his application to take the July 2009 bar exam along with a supplemental character questionnaire. An admissions committee of the Dayton Bar Association interviewed him in June 2009. Wilson was asked to provide additional information about (1) his failure to disclose in his 1992 application to the Detroit College of Law that he had been dismissed from Golden Gate University School of Law for poor academic performance and (2) his default on his significant student-loan debt. Wilson did not provide all the information the committee requested; his application was not approved, and he was not allowed to take the July 2009 exam.

In December 2010, Wilson filed to take the February 2011 exam. He was again interviewed by the committee in January 2011, and he again did not provide the requested information. His application was not approved, and he appealed to the Board of Commissioners on Character and Fitness. After a hearing, a panel of the Board recommended that Wilson's application not be approved because of his failure to disclose his dismissal from Golden Gate, his failure to make any effort to pay his student loans, his failure to hold a full-time job from August 2003 to September 2011, and his lack of cooperation in the admissions process. No recommendation was made as to when he should be allowed to reapply. The Board adopted the panel's findings and

recommendation, but recommended that Wilson be allowed to file for the February 2016 exam.

The Board's decision was then reviewed by the Ohio Supreme Court. Wilson objected to the Board's report but did not challenge the findings of fact, stating only that they were incomplete. He pointed out that the false statements on his Detroit application had been made 20 years earlier and that he had not concealed them from the admissions committee. The Court said that while this was true, the committee felt that he had not been entirely candid in explaining this failure to disclose his previous law-school experience.

Wilson first claimed that the Detroit application had a statement to the effect that "any matriculation of 5 years or older would not be counted." However, the Detroit application had no such statement.

Wilson then claimed that the omission was caused by his rushing through the application process, but the committee also questioned the veracity of this claim because in the same application Wilson had submitted a personal statement that indicated that he had never before applied to law school. Following the 2009 committee interview, Wilson was asked to provide documents submitted to other law schools, but he did not provide the requested materials in 2009 or at his 2011 hearing even though he knew that they would be relevant to the assessment of his character and fitness.

Regarding his student loans, Wilson never made any payment on the $32,300 student-loan debt that he had accumulated as an undergraduate from 1980 through 1987 and as a first-year law student at Golden Gate from 1987 to 1988. He admitted that after he discovered that the loans were not listed on his credit report, he paid no attention to them and made no attempt to pay them. At the University of Dayton School of Law, he accumulated four more loans totaling $120,000 and has made no effort to pay them; two of these, totaling $60,000, are now in default and he has no plans to repay them, claiming that he has no money.

The Court stated that Wilson's statement that he is financially responsible is not credible in light of his complete failure to address his default. Additionally, Wilson's claim that the default was "a one-time event 25 years ago" is false; the default is an ongoing situation that has persisted for 25 years. The Court also found that Wilson's claims that he had attempted to find full-time employment at various points in the last 10 years are likewise untrue. Wilson had been relying on his family for support while he worked seasonal jobs and ran—unsuccessfully—for public office. The Court concluded that "[h]is complete disregard of his financial obligations does not inspire confidence" that he is worthy of trust.

Wilson's application was disapproved by the Court. While the Board had recommended that he be allowed to file for the February 2016 exam, the Court allowed him to reapply for the July 2014 exam with the provision that he must maintain full-time employment, devise a plan to satisfy his debts, and fully cooperate in the admissions process. Wilson must also show that he has accepted responsibility for his past actions, that he is committed to honoring his financial obligations, and that he is capable of exercising good judgment. When he reapplies, he shall submit to a full character and fitness investigation by the appropriate bar association admissions committee.

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