

# LITIGATION UPDATE

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## CASES REPORTED

### ADMISSION ON MOTION

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**Disbarment; failure to pay back taxes; lack of candor on bar application**

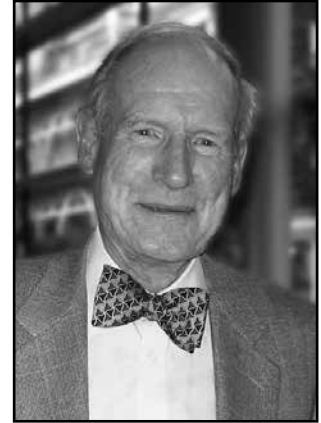
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*In re Application of Worthy*, 136 Ohio St. 3d 142, 991 N.E.2d 1131 (OH 2013)

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## ADMISSION ON MOTION

**Standing; the First Amendment; the Privileges and Immunities Clauses; the Dormant Commerce Clause; equal protection; due process**

*National Association for the Advancement of Multijurisdiction Practice v. Berch*, 2013 WL 5297140 (AZ 2013)

The U.S. District Court for the District of Arizona upheld the constitutionality of Arizona's admission on motion rule, Arizona Supreme Court Rule 34(f)(1)

(the Rule), which grants reciprocal admission to lawyers from states providing the same privilege to Arizona attorneys but requires lawyers from

non-reciprocal states to take the Uniform Bar Examination to gain admission to the Arizona Bar.

The Rule was challenged by the National Association for the Advancement of Multijurisdiction Practice (NAAMJP) and three individual attorneys licensed in other states but denied admission to the Arizona Bar. Plaintiff NAAMJP is a nonprofit corporation that promotes reciprocal bar admissions recommendations. NAAMJP has filed numerous lawsuits to challenge state and federal bar admission requirements on a variety of grounds.

Plaintiff Mark Kolman is licensed in Maryland and resides in Arizona. He applied for, but was denied, admission on motion to the Arizona Bar because Maryland does not have reciprocity with Arizona.

Plaintiff Allison Girvin is licensed in California and also resides in Arizona. She failed the July 2012 Arizona UBE by one point and asserted that “this failing score is the result of retaliation against [her] by agents of the defendants” for filing this lawsuit.

Plaintiff Mark Anderson is licensed in Montana. He alleged that the admission on motion Rule has deterred him from moving to Arizona but that he will move to Arizona “if Arizona abrogates its tit-for-tat bar admission Rule.”

At the time of filing, the admission on motion Rule provided as follows:

1. An applicant who meets the requirements of (A) through (H) of this paragraph (f)(1) may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

- A. have been admitted by bar examination to practice law in another jurisdiction allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule;

...

- C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed.

Before addressing the substance of the plaintiffs’ arguments, the court first held that NAAMJP did not have standing to challenge the admission on motion Rule. The court noted that the Rule does not infringe on NAAMJP’s political speech or First Amendment rights. The court also rejected NAAMJP’s argument that the organization may assert claims on behalf of unnamed members that allegedly are “stigmatized, slandered, and humiliated by the Rule,” concluding that “NAAMJP fail[ed] to show how these attorneys are unable to protect their own interests.”

However, the court found that various jurisdictional requirements and immunity doctrines did not bar the individual attorney plaintiffs from bringing their facial challenges to the Rule. It also concluded that it had subject-matter jurisdiction to decide Girvin’s claim that she failed the July 2012 Arizona UBE “after counsel for defendants communicated [that defense counsel] had the connections, power, and ruthless intent to retaliate for filing this lawsuit.”

Turning first to the merits of the retaliation claim, the court rejected Girvin’s assertion that unidentified, non-party “agents” of defendants failed her by one point to ruin her career and the career of her attorney. “Girvin fail[ed] to show an affirmative link between the alleged injury and the conduct of the named Defendants,” the court stated. It further noted that failing the UBE by a one-point margin did not create a material dispute of fact.

The court then addressed each of the constitutional challenges to the admission on motion Rule

brought by all of the individual attorney plaintiffs. First, the court held that the Rule's reciprocity requirement does not unconstitutionally infringe on attorneys' First Amendment rights to free speech and association, and to petition in a public forum. In so holding, the court rejected the plaintiffs' arguments that the Rule is overbroad and discriminates on the basis of viewpoint because it "permits attorneys from reciprocity states to obtain a license and petition the courts and speak; whereas it categorically prohibits attorneys from non-reciprocity states the same precious freedoms." "Admission on motion is not the only method of admission to the Arizona Bar," the court stated. The court noted that even if the Rule "could be considered a restriction on an attorney's ability to express himself in the form of litigation, [it] contains objective standards that are amenable to judicial review and does not permit licensing decisions at the 'whim' of the Arizona Supreme Court." It also rejected the plaintiffs' claim that the Rule "arbitrarily and irrationally assumes that . . . lawyers from non-reciprocity states will file sham petitions for an anti-competitive purpose . . . unless they take another entry level bar exam." The court explained that the Rule "does not deny Plaintiffs 'meaningful access to the courts' because they 'may still bring their claims in [Arizona] courts as litigants; they simply may not bring claims as lawyers without first satisfying [Arizona's] rules for admission to the state bar.'"

Second, the court rejected the assertion that the Rule violates the Privileges and Immunities Clauses. The plaintiffs had argued that the Rule prevents

attorneys from non-reciprocal states from "pursuing professional pursuits" in Arizona and punishes them by forcing them to take the Arizona UBE despite the fact that they have already passed another state's bar examination. The court noted that the Rule applies "equally to Arizona residents and non-residents who seek admission to the Arizona Bar on motion" and "does not require Arizona residency as a prerequisite to admission on motion to the Arizona Bar."

THE PLAINTIFFS HAD ARGUED THAT THE RULE PREVENTS ATTORNEYS FROM NON-RECIPROCAL STATES FROM "PURSUING PROFESSIONAL PURSUITS" IN ARIZONA AND PUNISHES THEM BY FORCING THEM TO TAKE THE ARIZONA UBE DESPITE THE FACT THAT THEY HAVE ALREADY PASSED ANOTHER STATE'S BAR EXAMINATION.

Third, the court dismissed the plaintiffs' argument that the Rule violates the Dormant Commerce Clause by disqualifying certain attorneys from admission on motion depending on prior state licensing. The court stressed that "states have a legitimate, substantial interest in regulating the practice of law for public protection purposes" and that the Rule overcomes any minimal burden on interstate commerce that might exist because it "effectuates a legitimate local public interest of encouraging other states to admit Arizona attorneys on similar terms of reciprocal admission."

Fourth, the court rejected the plaintiffs' assertion that Arizona's "hop-scotch licensing classifications violate the Equal Protection Clause." It concluded that the Rule "is rationally related to Arizona's legitimate interest in regulating its bar and seeking to ensure that attorneys licensed in Arizona will be treated equally in states having reciprocity with Arizona."

Finally, the court denied the plaintiffs' due process claims, noting that "[e]ach state is free to

prescribe the qualifications for admission to practice for those lawyers who appear in its courts.” It also rejected Girvin’s assertion that she “was not provided a meaningful opportunity for judicial review of her [UBE] examination results,” stating that “the

rules governing admission to the Arizona Bar provide that an unsuccessful applicant may petition the Arizona Supreme Court for review of a grade assessed on the bar exam.”

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## CHARACTER AND FITNESS

### **Criminal conduct; failure to disclose on law school application; retroactive admission denial**

*Matter of Powers v. St. John’s University School of Law*, 110 A.D.3d 888, 973 N.Y.S.2d 285 (NY 2013)

The New York Supreme Court, Appellate Division, Second Department, upheld St. John’s University School of Law’s decision to retroactively rescind the admission of a third-semester student after discovering that he did not fully disclose the extent of his prior criminal background in his application for admission.

David Powers filed his application for admission to St. John’s in November 2005. The application contained the following question:

Have you ever been charged with, pleaded guilty to, or been found guilty of any crime, offense, or violation (other than a minor traffic violation), or is any such action pending or expected to be brought against you?

Powers responded “yes.” The application then asked:

If yes, please explain in a supplementary statement or electronic attachment the relevant facts, including the nature of the

offense, the dates and courts involved, and the penalty imposed, if any. *Note: Although a conviction may have been sealed or expunged from the record by an order of the court, it nevertheless should be disclosed in answer to this question.*

[Italics in original.]

THE NEW YORK SUPREME COURT,  
APPELLATE DIVISION, SECOND  
DEPARTMENT, UPHELD ST. JOHN’S  
UNIVERSITY SCHOOL OF LAW’S DECI-  
SION TO RETROACTIVELY RESCIND THE  
ADMISSION OF A THIRD-SEMESTER STU-  
DENT AFTER DISCOVERING THAT HE  
DID NOT FULLY DISCLOSE THE EXTENT  
OF HIS PRIOR CRIMINAL BACKGROUND  
IN HIS APPLICATION FOR ADMISSION.

Powers submitted a three-page “Background Disclosure” that explained that he had been arrested in New Jersey in July 1999 “by [the] police shortly after a drug deal,” and that he ultimately “accepted a plea bargain to attend an inpatient rehabilitation program and complete probation.” He

detailed that he “was convicted of third degree possession of a controlled dangerous substance” and “successfully completed all facets of the [rehabilitation] program and [his] probation.”

Powers certified on his application that his answers were complete and accurate, and that he understood that his failure to provide truthful answers could “result in denial of admission, dismissal, or rescission of an awarded degree.” At

the time Powers submitted his application, he was unaware that his petition in New Jersey to have his record expunged had been granted.

St. John's reviewed the application and admitted Powers without requiring any additional information or documentation regarding his criminal history. Powers began taking classes as a part-time student in fall 2006.

After completing his fall 2007 semester, Powers requested and was granted a leave of absence from St. John's to pursue an employment opportunity abroad. While on leave, Powers petitioned the Appellate Division, Second Judicial Department, for an advance ruling on his application for admission to the New York State Bar.

Powers sought a letter from St. John's to submit with his petition for an advance ruling. His submissions to St. John's included a copy of a letter he intended to submit to the Appellate Division in which he explained that he was initially charged with distribution of a controlled dangerous substance, but that the charge was reduced pursuant to the plea deal. Powers also stated in the letter that he had a drug problem when he was between 16 and 21 years old, and that to "support [his] habit, [he] sometimes would sell drugs to others."

St. John's refused to provide the requested letter and told Powers that his failure to disclose the initial charges and past drug dealing in his application for admission was "a potential misconduct issue." Powers was informed that if he wanted "to continue at St. John's School of Law," he was required to "amend [his] application" to "provide a full accounting of the criminal activity at issue," including "the exact charge, disposition, relevant court dates, and the facts of the crime."

Powers complied and submitted additional documentation such as a presentence report that included the specific statutes he was charged with violating after arrest. Powers subsequently appeared alone before four deans and was questioned about additional aspects of his arrest, including the weight of the controlled substance and its estimated street value.

On September 10, 2010, St. John's informed Powers via letter that his initial application for admission contained "material omissions and misrepresentations involving criminal charges that had been brought against [him]." In particular, the letter noted that Powers did not disclose in his initial application that he "sometimes would sell drugs" and that he had originally been charged with distribution of a controlled dangerous substance. The letter noted that Powers had admitted to St. John's that he was in fact guilty of the distribution charge, even though he ultimately pled guilty to a lesser crime pursuant to the plea deal. Based on the foregoing, the letter informed Powers that St. John's had rescinded his admission pursuant to the provision in the initial application stating that "the failure to provide truthful answers to any of the application questions . . . may result in . . . dismissal . . . from St. John's University [School] of Law."

Powers petitioned the Queens Supreme Court for review of St. John's decision, arguing that rescinding his admission after he had completed three semesters of law school was arbitrary and capricious, irrational, and in violation of lawful procedure. The court denied the petition and dismissed the action. Powers appealed, and the Appellate Division, Second Department, upheld the decision by a 3-1 majority.

In a two-page opinion, the majority concluded that St. John's decision—which retroactively denied

Powers's admission and took away the credits he had earned—was not arbitrary or capricious and did not warrant judicial intervention under the circumstances presented “and in light of the true nature of [Powers's] prior criminal activity.” The majority explained that the penalty imposed was not “so disproportionate to the offense . . . as to be shocking to one's sense of fairness” because Powers “disclosed, subsequent to his admission, that he was originally charged with and was guilty of distributing, and possessing with intent to distribute, a controlled dangerous substance.” The majority rejected Powers's argument that he was entitled to invoke St. John's grievance procedure detailed in the school's student handbook and dismissed Powers's remaining contentions as without merit.

However, Justice Robert J. Miller disagreed and in a 12-page dissent explained that the rescission should be voided and the matter remitted to St. John's for a new determination. Miller reasoned that Powers's failure to disclose that he “sometimes would sell drugs” was not a misrepresentation or omission because the application for admission required disclosure of *charged* offenses, not uncharged crimes. Furthermore, Miller stated, the application did not require Powers “to take a position as to whether he was actually guilty of charges that were later dropped or of which he was later acquitted.” “The fact that four deans of St. John's Law School were able to elicit such information from Powers at a subsequent meeting does not render his failure to provide such information in his application a misrepresentation or omission,” Miller stated. Although Miller agreed that the original distribution charge was not clearly disclosed, he nevertheless concluded that St. John's decision should be remitted because it was partially based on the impermissible conclusion that Powers's subsequent acknowledgment that he “sometimes would sell drugs” consti-

tuted a misrepresentation or omission on his initial application for admission.

Furthermore, Miller went on to conclude that St. John's decision would still be arbitrary and capricious and in violation of lawful procedure even if Powers's failure to disclose the distribution charge constituted an omission on his initial application. Citing the language in the application, Miller found that “[a]s an admitted student in the midst of his studies, the appropriate remedy for Powers'[] omission, if any, would have been dismissal.” Instead, Miller stated that St. John's “decided to impose a much more serious penalty” that would “void his entire academic existence” at the school. Miller also noted that there was “no indication in the record” as to whether Powers was reimbursed for any tuition or expenses related to the voided credits.

Finally, Miller agreed with Powers's contention that St. John's was required to follow its grievance procedure set forth in the student handbook. Miller noted that St. John's “routinely” permitted students to amend or supplement their admission applications “to include criminal convictions involving alcohol or controlled substances.” Miller concluded that St. John's reliance on its “unwritten policy” that it “does not admit applicants whose history includes a criminal record for drug dealing” was an attempt to distinguish Powers from other students who failed to disclose criminal convictions on their initial applications. “The only omission made in [Powers's] application pertained to a criminal *charge* of distributing a controlled dangerous substance,” Miller wrote. He stated that “[t]here is nothing in the record to indicate that St. John's . . . categorically denies admission to any student who has ever been *accused* of distributing controlled substances,” noting that “[s]uch a policy would, in all likelihood, be arbitrary and capricious since it would be based solely on accusations rather than fact.”

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### **Disbarment; failure to pay back taxes; lack of candor on bar application**

*F. Lee Bailey v. Board of Bar Examiners, Bar-12-14 (ME 2013)*

F. Lee Bailey was disbarred in both Florida (in 2001) and Massachusetts (in 2003) over his handling of \$6 million worth of stock for a client charged with drug possession. It was reported that Bailey, who is now 80, had all but abandoned the idea of ever working as a lawyer again after he was sanctioned. According to an article in the *Portland Press Herald*, he was, he said, disillusioned about the profession. His views changed after visiting Maine. "I got up to Maine and got a look at the lawyers and judges here, and found a completely different atmosphere. I thought this might be a good place to practice, so I'd give [it] a try," said Bailey, who moved to Maine in 2010. In February 2012 he took and passed the Maine bar exam and applied for admission to the bar. The Maine Board of Bar Examiners, after a hearing, concluded that, because of his disbarments in Florida and Massachusetts, his failure to acknowledge the wrongfulness of his past misconduct, conflicting statements he had given regarding his state of residence between 2002 and 2010, concern about his possible avoidance of state and federal income taxes in the years before and after his disbarment, and incomplete answers on his bar admission application regarding past disciplinary actions, past and pend-

ing civil litigation, corporations in which he held an interest, and defaults on debts, Bailey had not demonstrated sufficient good character and fitness to qualify for admission to the Maine bar.

Bailey then petitioned the Court for review. Pursuant to Maine rules, a single justice of the Maine high court reviewed the matter. In an opinion filed in April 2013, Supreme Judicial Court Justice Donald G. Alexander cleared the way for Bailey to once again practice—if he pays nearly \$2 million in back taxes he owes the federal government. Litigation is pending with regard to Bailey's tax debt. Federal court records show that the 1st Circuit U.S. Court of Appeals is considering Bailey's appeal of a 2012 U.S. Tax Court ruling ordering him to pay \$1.93 million in unpaid taxes and penalties to the Internal Revenue Service. Bailey's tax issues are all that stand in the way of the state's highest court issuing a certificate declaring him of "good character and fitness to practice law" in Maine. In June, however, the Board of Bar Examiners appealed the decision to the full Court. As a result, no law license is forthcoming.

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### **Felony theft; academic misconduct**

*In re Application of Worthy, 136 Ohio St. 3d 142, 991 N.E.2d 1131 (OH 2013)*

Michele Worthy of Beavercreek, Ohio, is a January 2013 graduate of the University of Dayton School of Law who applied to sit for the February 2013 bar exam. She was convicted of a fifth-degree-felony theft offense and also failed to disclose an incident of academic misconduct on both her law school and bar exam applications. Specifically, during Worthy's

senior year of college at the Ohio State University, while she was supporting herself and putting herself through school, she fell short of funds following an illness that caused her to miss work. She and a friend planned to shoplift designer jeans from a store and then sell them, but they were caught shoplifting by the store's security officers. Worthy was represented

by a public defender and, as a first-time offender, entered into a diversion program. She was sentenced to community service and one year of community control and was ordered to pay restitution of \$1,100. She completed 80 hours of community service, made restitution within one year, and was released from community control. The offense has been expunged.

Worthy fully disclosed the felony conviction on both her application to law school and her application to register as a candidate for admission to the practice of law. She testified that she had never before done anything like that and only later learned that her accomplice had previously shoplifted at the same location and was on the store's watch list. The panel found that Worthy was so ashamed of the incident that she lost her composure at times during her testimony. She testified that she had not done anything wrong in the three and a half years since that incident and that she had tried to give back to the community by participating in philanthropic and community-service activities, including going to Panama to assist with HIV testing and educational workshops. Worthy stated that if she is faced with

financial difficulties in the future, she will not do something "crazy" like this. She also made it clear that her actions had greatly disappointed her family and that she would never want to repeat them.

As an undergraduate, Worthy submitted a paper for one of her courses that included material plagiarized from a website. When asked why she had not reported this incident on her application to register as a candidate for admission to the bar, she explained that she had not answered yes to the question about warnings, academic probations, and similar occurrences because answering yes would require her to answer follow-up questions regarding the incident and she had been unable to obtain detailed information about the sanction imposed by the school. The Ohio Supreme Court concluded that she had failed to prove that she possessed the requisite character, fitness, and moral qualifications for admission and disapproved her application. However, she will be permitted to reapply for the July 2014 bar exam, at which time she will be subject to a new character and fitness investigation.

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### **Misrepresentation to bar admission authorities**

*Attorney Grievance Commission of Maryland v. Cristine A. Kepple*, 432 Md. 214, 68 A.3d 797 (MD 2013)

Cristine Kepple graduated from the University of Maryland at College Park in 1989. During her time as an undergraduate student, Kepple, a lifelong Maryland resident prior to beginning her undergraduate studies, received in-state tuition as a Maryland resident. In 1990, she moved to Terra Alta, West Virginia, where she was employed with the City of Morgantown as an Assistant City Planner and became engaged to Barry Sweitzer, a co-worker. After taking the LSAT in mid-1990, she decided to apply for admission to the West Virginia University College of Law. Question 6 of the law school appli-

cation noted that "if you graduated from an out of state college, or had been a resident of West Virginia for less than one year, you may be asked to furnish acceptable proof of residency to be admitted as a West Virginia resident." On the last page of the application, appearing above her signature, was the following: "Furnishing or causing to be furnished false information for the purpose of your law school application constitutes grounds for disciplinary action, including, but not limited to, expulsion or revocation of one's acceptance *ab initio*. I certify that the information herein is complete and accurate and that I




will inform this law school promptly of any material change in any of the information given in response to the questions above.” In May 1991, Kepple moved from West Virginia to a home that she purchased in Oakland, Maryland. She and Sweitzer were married the following August.

Shortly thereafter, Kepple began law school at West Virginia University in Morgantown, West Virginia. She surrendered her West Virginia driver’s license to the Maryland Motor Vehicle Administration in late 1991 and obtained a Maryland license, which listed her Maryland address. Kepple paid income taxes to West Virginia for 1991 and part of 1992, but thereafter paid state tax obligations only to Maryland. Although she left West Virginia before commencing law school and was a permanent resident of Maryland throughout her law school career, she did not inform West Virginia University or the law school of her change of residence. Rather, she maintained the post office box in Terra Alta, West Virginia, as her address on file with the University. Kepple received her law school tuition bills, correspondence from her undergraduate school and former employers, magazines, periodicals, and miscellaneous mail at the post office box in West Virginia, but she also received utility bills, tax bills, bank statements, and other correspondence at her Maryland address. She continued to utilize the Terra Alta post office box, located approximately 18 miles from her Oakland home, throughout her law school career.

Because West Virginia University assumed that she was a West Virginia resident, Kepple benefitted by paying the reduced in-state tuition rate throughout her tenure there. She paid tuition, per semester, of \$973 in 1991, \$1,017 in 1992, and \$1,068 in 1993. Non-resident tuition was at the time, per semester, \$2,628 in 1991, \$2,877 in 1992, and \$3,078 in 1993. Thus, Kepple would have paid an additional \$11,050 to West Virginia University over those three years had the University been aware of her true

residency status. When she applied to law school, she was aware of the price differential between in-state and out-of-state tuition. She stated, however, that she assumed that the difference was merely a policy decision made by the University, and that her residency for tuition purposes was determined and became fixed as of the date of her application for admission.

Kepple received a law degree from West Virginia in 1994 and thereafter applied for admission to the bar in Maryland. Question 17 of the Maryland bar application asked whether there had been any “circumstances or unfavorable incidences” in her life, whether at school, college, law school, business, or otherwise, which might have a bearing upon her character or fitness. She answered no to Question 17. She was admitted to the Bar of Maryland in December 1994.

The Attorney Grievance Commission received a grievance in 2007 from Kepple’s by-then ex-husband, Barry Sweitzer, bringing to its attention Kepple’s manipulation of her residency status in law school. Formal charges were filed. A hearing judge concluded that Kepple had violated Rule 8.1(a), finding that her actions were intentional. The judge found her argument—that she believed her residency was fixed for purposes of tuition upon her admission to law school—unreasonable. The Court of Appeals agreed. The Court noted that, historically, disbarment would be appropriate for a misrepresentation to bar admission officials. Balancing the gravity of the 1994 misconduct against Kepple’s subsequent behavior and good conduct as a practicing attorney, however, indefinite suspension, with the right to apply for reinstatement after no less than 30 days, was deemed appropriate. 

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