HINSHAW

Alerts

Trio of Recent Decisions Address Lawyer Mobility

May 4, 2010
Lawyers for the Profession® Alert

New York State Bar Ass'n Professional Ethics Comm. Op. 835 (Dec. 24, 2009)
Schoenefeld v. State of New York, 09-CV-504 (N.D.N.Y. Feb. 11, 2010)
In re Anthony, No. 20090576, 26 Law. Man. Prof. Conduct 125 (Utah, Feb. 2, 2010)

Brief Summary
Three recent opinions address lawyer mobility between jurisdictions. An opinion from the New York State Bar Committee for Professional Ethics issued a strong plea urging the New York Assembly or the Appellate Divisions to develop rules to address the issue of whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York. A federal district court opinion discusses the challenge to New York's requirement of non-resident New York licensed lawyers (but not resident New York lawyers) to maintain an office in New York. The court found that the restriction could give rise to a challenge under the Comity Clause. In a third case, a long-practicing lawyer from California challenged Utah's admission policy requiring out-of-state lawyers to have graduated from ABA-accredited law schools. The Utah Supreme Court found that a lawyer's unblemished record can outweigh the educational accreditation requirements.

Complete Summary
In a recent Ethics Opinion, The New York State Bar Association Committee on Professional Ethics issued a plea to the New York Assembly to develop rules to address whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York:

"The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers - especially in-house lawyers who provide services solely to a corporate employer - are authorized to practice law in New York."

In *Schoenefeld,* the United States District Court for the Northern District of New York ruled that the Comity Clause ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.") could provide

Service Areas

Counselors for the Profession
Lawyers for the Profession®
Litigators for the Profession®

the basis for a suit challenging a provision of the New York Judiciary Law (the Residency Provision). The Residency Provision required only non-resident lawyers to have offices in New York. A New Jersey-based lawyer claimed that the law damaged her when she refrained from accepting New York legal cases, although she was otherwise fully credentialed, purely on the basis of not having an office in the state. She argued that the law impermissibly imposed differing requirements on resident and non-resident attorneys. The court dismissed two of her three claims that the law violated various provisions of the U.S. Constitution, and concluded that New York has an interest in insuring that non-resident attorneys are familiar with New York law, are accessible to New York clients, courts and other parties, and maintain a stake in the integrity of the New York state bar. But the court allowed the third claim — that the Residency Provision allegedly violated the Comity Clause — to proceed. Here, the out-of-state attorney was able to establish sufficient facts, if taken as true, that she had a protected interest in practicing law in New York while a resident of New Jersey. At this preliminary stage however, the state offered no substantial reasons for the Residency Provision's different treatment of residents and non-residents. Nor did it show any substantial relationship between that treatment and the state's objectives. The court did not expressly find that the Residency Provision was constitutional or not.

In the case *In re Anthony,* another lawyer mobility restriction was lifted for a meritorious California attorney in Utah. The Utah Supreme Court waived the state's rule requiring a lawyer to have graduated from an ABA-accredited law school. In 1980, Thomas Anthony graduated from Western State University College of Law, which was then a state-accredited but not ABA-accredited law school. (It eventually received full accreditation in 2009). Anthony applied to sit for the Utah bar in 1988, which at the time accepted his educational background. But he did not ultimately take the exam that year. Twenty years later, Anthony again applied for admission to Utah. In the interim, however, the state had changed its rules to require that an applicant must have graduated from an ABA-accredited school. As such, Anthony's 2008 application was denied by the bar. Anthony petitioned the Utah Supreme Court for extraordinary relief. He supplemented his petition with proof of his 28-year unblemished professional history and support from judges, clients and fellow attorneys. The Court took three steps. First, it agreed that appealing the bar's denial of admission through its internal structure would have been a futile exercise. Second, it waived Anthony's particular barrier of graduating from a non-accredited law school. Finally, it directed the Utah bar to implement a waiver process for non-resident attorneys who have graduated from non-accredited law schools. The Court was influenced by the primary goal of the admission process — to protect the citizens of Utah by ensuring that licensed attorneys are competent and ethical. Having proven he met both goals, Anthony was therefore eligible for admission to take the Utah bar exam.

Significance of Opinions
These three matters reflect the growing push toward greater acceptance of the mobility of lawyers, in a world where restrictions based solely on state boundaries correspond less and less to the realities of law practice.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.