Western New England Law Review

Volume 7 7 *(1984-1985)*
Issue 2

Article 7

1-1-1984

In re Jadd, 391 Mass. 227, 461 N.E.2d 760 (1984)

Bruce Cheriff

IN RE JADD

I. INTRODUCTION

In February of 1984, in *In re Jadd*,[1] the Supreme Judicial Court of Massachusetts concluded that a residency requirement for attorneys seeking admission to the Massachusetts bar on motion violates the United States Constitution.[2] Accordingly, the court struck down its rule[3] requiring applicants for admission to the bar on motion to have

---

1. 391 Mass. 227, 461 N.E.2d 760 (1984).

2. *Id.* at 228, 461 N.E.2d at 761. If the court grants the motion, the Commonwealth admits the attorney to the bar. The attorney, therefore, does not have to pass an examination. *Id.* at 227 n.1, 461 N.E.2nd at 761 n.1.

3. Sup. Jud. Ct. R. 3:01 § 6.1.1, *as amended*, 382 Mass. 698, 755-56 (1981), embodied the requirement.

> Section 6. Admission Without Examination.
>
> 6.1 Attorneys Admitted in Other States. A person who has been admitted as an attorney of the highest judicial court of any State, district or territory of the United States may apply to the Supreme Judicial Court for admission, without examination, as an attorney in this Commonwealth. The Board of Bar Examinations may, in its discretion, excuse the applicant from taking the regular law examination on the applicant's compliance with the following conditions:
>
> 6.1.1 The applicant's principal residence is in the Commonwealth of Massachusetts.
>
> 6.1.2 The applicant shall have been admitted in the other State, district or territory, for at least five years prior to applying for admission in the Commonwealth, and shall provide the court with a certificate of admission from the highest judicial court of such State, district or territory.
>
> 6.1.3 The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.
>
> 6.1.4 The applicant shall submit to the Board of Bar Examiners letters of recommendation for admission from three members of the bar of the Commonwealth, or of the State, district or territory of prior admission, or of the bar of the State, district or territory in which the applicant has last resided.
>
> 6.1.5 The applicant shall have graduated from high school, or shall have received the equivalent education, in the opinion of the Board, completed work for a bachelor's degree at a college or university, or its equivalent, and graduated from a law school which at the time of graduation, was approved by the American Bar Association.

Following its decision in *In Re Jadd*, the supreme judicial court amended the rules. The amended rules require applicants to pass the Multi-state Professional Responsibility Examination and a limited written examination on Massachusetts practice. Sup. Jud. Ct. R. 3:01 §§ 6.1.1-6.1.6, reprinted in 12 MASS. LAW. WEEK. 1541 (1984) (effective January 1, 1985). The rules now provide:

their principal residences in the Commonwealth.[4]

Robert I. Jadd, a resident of New York and a member of the Florida and New York bars, challenged the former rule.[5] He sought admission on motion but the Board of Bar Examiners denied his application because he was not a Massachusetts resident.[6]

Jadd argued that the residency requirement violated the privileges and immunities clause of Article IV of the United States Constitution.[7] The court agreed, basing its decision on two factors. First, it

---

6.1.1 The applicant shall have been admitted in the other state, district or territory, for at least five years prior to applying for admission in the Commonwealth, and shall provide the court with certificate of admission from the highest judicial court of such state, district or territory.

6.1.2 The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.

6.1.3 The applicant shall submit to the board of Examiners letters of recommendation for admission from three members of the bar of the Commonwealth, or of the state, district or territory of prior admission, or the bar of the state, district or territory in which the applicant last resided.

6.1.4 The applicant shall have graduated from high school, or shall have received the equivalent education, in the opinion of the Board, completed work for a bachelor's degree at a college or university, or its equivalent, and graduated from a law school which at the time of graduation was approved by the American Bar Association.

6.1.5 The applicant shall pass the Multi-state Professional Responsibility Examination if he or she has not previously passed that examination in another jurisdiction.

6.1.6 The applicant shall pass a limited written examination in Massachusetts practice and procedure which shall be administered by the Board of Bar Examiners.

Id.

Justices Wilkins and O'Connor dissented from the adoption of the amendment, voicing concern about the restrictiveness of the rules. *Id.*

The supreme judicial court is vested with authority to make and promulgate rules in order to regulate the practice of law in the Massachusetts judicial system. *See* MASS. GEN. LAWS ANN. ch. 213, § 3 (West 1958); Raymond, *Massachusetts State Court Organization Profile*, 1979 A.B.A. PUB. at 13.

4. *In re* Jadd, 391 Mass. at 237 n.13, 461 N.E.2d at 766 n.13. For amended rule, see *supra* note 2.

5. *Id.* at 227, 461 N.E.2d at 760-61.

6. *Id.* at 228, 461 N.E.2d at 761. The Board of Bar Examiners did not advise the court whether Jadd met the other requirements of Rule 3:01 section 6. *Id.* at 228 n.3, 461 N.E.2d at 761 n.3. *See supra note* 2. Jadd had only petitioned for a hearing before a single justice (Abrams) of the supreme judicial court. Justice Abrams, however, reported the matter to the court for decision. *Id.* at 228, 461 N.E.2d at 761.

7. *Id.* at 226, 461 N.E.2d at 761. The court expressed confidence that Jadd's rights "probably would be no greater under the commerce clause," so it did not discuss that issue. *Id.* at 228 n.2, 461 N.E.2d at 761 n.2. In Hicklin v. Orbeck, 437 U.S. 518 (1978), the Supreme Court stated that a "mutually reinforcing relationship [exists] between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause." *Id.* at 531. The

reasoned that the practice of law constituted a fundamental right for purposes of an analysis under the privileges and immunities clause.[8] Second, it found that a sufficient state interest for requiring residency for admission to the bar did not exist.[9] The court noted that many state courts had determined that their own residency requirements were unconstitutional.[10] From its analysis of these factors, the court eliminated the residency rule.[11] The court also concluded that it was unnecessary to determine whether an attorney admitted on motion was required to take a state bar examination as well as fulfill a residency requirement.[12]

II. ANALYSIS

In addressing the plaintiff's claim that the rule violated the Constitution, the court in *In Re Jadd* focused on the privileges and immunities clause of Article IV which states, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[13] The court followed the two-step analysis developed

---

relationship "stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Id.* at 531-32 (footnote omitted). The Fourth Article of the Articles of Confederation afforded persons of different states the same privileges of trade and commerce. Hence, Jadd could have argued that the commerce clause under *Hicklin* requires persons from jurisdictions outside Massachusetts to be afforded the same privileges as those held by citizens of Massachusetts regarding admission to the Massachusetts bar.

8. *In re* Jadd, 391 Mass. at 228-29, 461 N.E.2d at 761.

9. *Id.* at 234-36, 461 N.E.2d at 763-65.

10. *In re* Jadd, 391 Mass. at 230-33, 236, 461 N.E.2d at 762-64. *See, e.g.*, Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982), *rev'd*, 723 F.2d 98, *withdrawn, aff'd. on reh'g.*, 723 F.2d 110 (5th Cir. 1983), *prob. juris. noted*, 104 S. Ct. 2149 (1984); Stalland v. South Dakota Bd. of Bar Examiners, 530 F.Supp. 155, 158 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F.Supp. 173 (N.D. Ala. 1981); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440 (W. Va. 1982); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980); *In re* Gordon, 48 N.Y.2d 266, 399 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

11. *In re* Jadd, 391 Mass. at 237 & n.13, 461 N.E.2d at 766 & n.13. For amended rule see *supra* note 2.

12. *Id.* at 236-37, 461 N.E.2d at 765-66.

13. U.S. CONST. art. IV, § 2, cl. 1. The privileges and immunities clause analyzed in *In Re Jadd* should not be confused with the privileges and immunities clause of the fourteenth amendment which pertains to those rights protected under national citizenship. Article IV, section 2, clause 1, provides protection to citizens in states in which they do not reside. Professor Tribe refers to this provision as the "interstate privileges and immunities clause." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-32, at 404 (1978). *See* Note, *Constitutional Law—The Privileges and Immunities Clause of Article IV: Fundamental Rights Revived—Baldwin v. Fish & Game Commission*, 436 U.S. 371 (1978), 55 WASH. L. REV. 461, 463 n.19 (1980). Although the language of the privileges and immunities clause only mentions citizens, for the purposes of analysis " 'citizen' and 'resident' are 'essentially interchangeable,' " Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978) (quoting Austin v. New

by the Supreme Court.[14] First, the court must find that the privileges and immunities clause is protecting a fundamental right denied to non-residents.[15] Second, the court must decide that "the state has a sufficient interest in requiring residency so as to justify the discrimination."[16] If a fundamental right is jeopardized, and the state has a substantial reason for the discrimination, then the Constitution allows the requirement.[17]

The court in *In Re Jadd* determined that the practice of law is a fundamental right since it constitutes "an important commercial activity."[18] The court based its assessment on conclusions of the United States Supreme Court and courts of other jurisdictions.[19] A careful examination of Supreme Court interpretations of the privileges and immunities clause reveals that a person's right to practice a trade is a fundamental right.[20] In *Bates v. State Bar of Arizona*,[21] the Supreme Court recognized that the legal profession may be equated with the

---

Hampshire, 437 U.S. 656, 662 n.8 (1975)). *See also* Toomer v. Witsell, 334 U.S. 385, 397 (1948).

14. *See* Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 383-84, 388 (1978). The *Baldwin* court held that neither the privileges and immunities clause of art. IV section 2, nor the equal protection clause of the 14th amendment protect a non-resident's right to recreational big-game hunting in Montana. *Id.* at 388, 391. *See* Note, *supra* note 13, at 463.

15. Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 383-384 (1978); *see* Austin v. New Hampshire, 420 U.S. 656, 660-61 (1975); Ward v. Maryland, 79 U.S. (12 Wall) 418, 430 (1870).

16. Toomer v. Witsell, 334 U.S. 385, 395-96 (1948).

17. *Id.* at 396.

18. *In re* Jadd, 391 Mass. at 230, 461 N.E.2d at 762.

19. Although the United States Supreme Court has not explicitly stated that the practice of law is a fundamental right, an inference that it is can be drawn from the Court's analysis in various cases. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 368-72 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975); *In re* Griffiths, 413 U.S. 717, 723-24 (1973). *See* Piper v. Supreme Court of New Hampshire, 539 F.Supp. 1064, 1071 (D.N.H. 1982), *rev'd.*, 723 F.2d 98, *withdrawn, aff'd. reh'g.*, 723 F.2d 110 (5th Cir. 1983), *prob. juris. noted*, 104 S.Ct. 2149b (1984); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 158 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D.Ala. 1981); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 444 (W.Va. 1982); Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 643 (Ala. 1980); *In re* Gordon v. Commission on Character and Fitness, 48 N.Y.2d 266, 272, 397 N.E.2d 1309, 1312, 422 N.Y.S.2d 641, 644-45 (1979); *But see*, Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1469 & n.45 (1979) (discussing dicta from late nineteenth century cases that state that the practice of law is not a fundamental right).

20. *See* Hicklin v. Orbeck, 437 U.S. 518 (1978) (right to employment in the oil and gas industry); Toomer v. Witsell, 334 U.S. 385 (1948) (right to fish); Ward v. Maryland, 79 U.S. (12 Wall) 418 (1870) (right to market produce). *See* Note, *supra* note 19, at 1468-70.

21. 433 U.S. 350 (1977).

practice of a trade.[22] In *Bates*, the Court reasoned that the legal profession, though a learned one, does not differ substantially from work in which a crafts-person plies a trade.[23] Logically, therefore, the practice of law acquires the status of a fundamental right.[24]

Similarly, in *Gordon v. Committee on Character & Fitness*,[25] the Court of Appeals of New York declared:

> [T]he right to pursue one's chosen occupation free from discriminatory interference is the very essence of the personal freedom that the privileges and immunities clause was intended to secure. . . . It is now beyond dispute that the practice of law, despite its historical antecedents as a learned profession somehow above that of the common trades, is but a species of those commercial activities within the ambit of the clause. . . . From the standpoint of both the public and the legal profession itself, the practice of law is analogous to any other occupation in which an independent agent acts on behalf of a principal.[26]

The court in *In Re Jadd* qualified its finding of a fundamental right, however, by stating that challenges to the residency requirements for admission to the bar have not focused on the question of the existence of a fundamental right but rather on whether a sufficient state interest exists.[27]

There are various arguments on behalf of the state interest: the residency requirement cultivates knowledge of state law; it allows the community to observe moral character; it promotes community responsibility; and it furthers administrative convenience in attorney-client communication, service of process, and administration of the bar admission process.[28] Courts have found, nevertheless, that the articulated interests provide insufficient grounds for discrimination against nonresidents seeking admission to the bar.[29]

---

22. *Id.* at 371-72.

23. *See Bates*, 433 U.S. at 371-72.

24. *Id.*

25. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

26. *Id.* at 272, 397 N.E.2d at 1312, 422 N.Y.S.2d at 644-45 (citations omitted).

27. *In re* Jadd, 391 Mass. at 231-32, 461 N.E.2d at 763 (1984). *See* Hicklin v. Orbeck, 437 U.S. 518 (1978). The Court did not discuss whether a fundamental right had been violated. Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064, 1071 (D.N.H. 1982), *rev'd.* 723 F.2d 98, *withdrawn, aff'd. on reh'g.*, 723 F.2d 110 (5th Cir. 1983), *prob. juris. noted*, 104 S.Ct. 2149 (1984).

28. *See infra* notes 30-32 and accompanying text. *See also* Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 665, 776-77 (1981).

29. *See infra* notes 30-32 and accompanying text. Special Project *supra* note 28, at 770. A substantial reason exists if "something to indicate that noncitizens constitute a peculiar source of the evil . . ." can be found. Toomer v. Witsell, 334 U.S. 385, 398 (1978).

Residency, for example, does not necessarily promote knowledge of local law.[30] Courts have also rejected the argument that the states have a substantial interest in observing the ethical character of applicants since less restrictive alternatives exist such as the nationwide investigatory service operated by the National Conference of Bar Examiners.[31] Additionally, courts have decided that administrative convenience is an insufficient state interest.[32] The court in *In Re Jadd* considered each interest and found it to be insufficient. It therefore struck its residency rule.[33]

After concluding that the practice of law is a fundamental right and that the state did not have sufficient interest to override the right, the court turned to the final consideration of whether "the fact that an attorney admitted on motion need not take and pass [the] state's bar examination make[s] a difference in an analysis of the validity of a residency requirement?"[34] The court concluded that it does not make a difference that nonresident applicants to the Massachusetts bar are not required to take a test[35] since courts have determined that passing a bar examination does not represent "an essential means in assessing . . . knowledge of local law or any other qualification for admission to the bar."[36] In fact, not one recent court opinion that found a residency requirement unconstitutional considered the distinction an important factor in its analysis.[37]

III. CONCLUSION

Massachusetts by striking down its residency requirement for admission to the bar on motion followed precedents set down by the Supreme Court and other state courts. By focusing on the residency requirement as a violation of the privileges and immunities clause, the supreme judicial court followed the lead of other courts: thus, it

30. *See* Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 159-60 (S.D. 1982); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 445 (W. Va. 1982).

31. *See* Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1360 (E.D.N.C. 1970); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 445-46. *See* Note, *supra* note 19, at 1488.

32. *See* Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 160-61 (D.S.D. 1982); Noll v. Alaska Bar Ass'n, 649 P.2d 241, 245-46 (Alaska 1982); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 445 (W. Va. 1982).

33. *In re* Jadd, 391 Mass. at 236, 237 n.13, 461 N.E.2d at 765, 766 n.13.

34. *Id.* at 236, 461 N.E.2d at 765. *Cf. supra* note 3 and accompanying text.

35. *Id.* at 236-37, 461 N.E.2d at 765-66.

36. *Id.* at 236, 461 N.E.2d at 766. *But cf. supra* note 3.

37. *See* Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 MISS. L.J. 1, 39 n.131 (1983).

joined the many states that had already set aside their residency requirements.

Many states still impose residency requirements on applicants to their bars. As of March, 1983, twenty-eight states still required some form of residency for admission on motion,[38] and as of January, 1984, twenty-nine states required residency of an original applicant to the bar.[39] In light of the statistics, litigation on the constitutionality of residency requirements will continue.

The highest state courts that have addressed the issue have indicated their disfavor with the various forms of residency requirements. By litigating the issue to the highest possible state courts, many in the legal profession have also voiced their preference for striking down residency requirements judicially. *In Re Jadd* is one such example. The Supreme Judicial Court of Massachussetts, following the majority, struck down its residency requirement. The trend gathers strength in favor of the abolition of the rules because of their unconstitutionality. The time has arrived for the United States Supreme Court to decide the issue.[40]

Bruce Cheriff

---

38. *Id.* at 44-47. The following states require residency upon application: Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, North Dakota, Oklahoma, Rhode Island, Tennessee, Virginia and Wisconsin. States that require residency from sixty days to six months before application are Connecticut, Mississippi, Montana, North Carolina, Texas, and Vermont. Illinois, Ohio, and Oregon require residency upon admission to the bar. New Mexico requires residence ninety days before admission. *Id.*

39. *See* COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2, 3 (1984).

40. On October 31, 1984, the United States Supreme Court heard oral arguments on whether a state can prohibit non-residents from becoming members of the state bar. Davis, *N.H. Bases Residency Requirements Faces a Constitutional Challenge*, NAT. L. J., Nov. 12, 1984, at 24, col. 3 (discussing Sup. Ct. of New Hampshire v. Piper, No. 83-1466). On March 4, 1985, the Supreme Court decided *Piper*, Sup. Ct. of N.H. v. Piper, 53 U.S. Law Week 4238 (March 5, 1985). The Court concluded that New Hampshire's bar residency requirement violated the privileges and immunities clause of Art. IV, § 2, of the Constitution. *Id.* at 4232. The Supreme Court first decided that the practice of law was a fundamental right protected by the privileges and immunities clause. *Id.* at 4240. *Cf. supra* note 15 & 18-19 and accompanying text. Because the practice of law is a fundamental right, the Court stated that the state could discriminate against nonresidents only if it had "substantial" reasons for its disparate treatment of those nonresidents. *Piper*, 53 U.S. Law Week at 4242. *Cf. supra* note 16 and accompanying text. Justice Powell writing for the majority found that the Supreme Court of New Hampshire concerns, as to nonresident familiarization with local rules and procedures, ethical behavior, availability for court proceedings, and willingness to perform *pro bono* work, did not substantially "bear the necessary relationship to the State's objectives" to justify discrimination against nonresidents. *Piper*, 53 U.S. Law Week at 4242. *Cf. supra* notes 28-32 and accompanying text. Thus, the Supreme Court concurred with the sound reasoning of the Supreme Judicial Court of Massachusetts.