

Attack On Pa. Bar Reciprocity Rules Faces Uphill Battle

By **Dan Packel**

Law360, Philadelphia (August 14, 2014, 4:49 PM ET) -- With a key date in sight in a federal lawsuit challenging Pennsylvania rules denying bar admission to attorneys from states lacking reciprocity agreements, experts said that the plaintiffs — who view the suit as a bellwether — have a tough case to prove even amid a clear trend toward growing lawyer mobility.

U.S. District Judge Gerald McHugh on Tuesday set oral arguments for September in the National Association for the Advancement of Multijurisdictional Practice's suit against the justices of the Pennsylvania Supreme Court. The California-based group alleges that Pennsylvania's "tit-for-tat" bar reciprocity rules violate the U.S. Constitution.

Joe Giannini, the NAAMP attorney leading the Pennsylvania lawsuit, emphasized that the suit was intertwined with a larger effort challenging federal bar local rules that limit admissions, which is the subject of pending multidistrict litigation. He noted that a ruling would have a major impact on those lawsuits and on the other state supreme courts that impose similar reciprocity restrictions.

"It's almost equivalent to Brown versus Board of Education for lawyers," Giannini told Law360. "A victory would be taking the chains off them that they now wear as a result of being licensed in their state."

The justices and the NAAMP have agreed on the facts in the case, stipulating that the substance of the dispute turns on the legality of Pennsylvania Bar Admission Rule 204. The rule allows attorneys from 37 other states and the District of Columbia that hold reciprocity agreements with Pennsylvania to gain bar admission by motion, while denying admission by motion to attorneys from the 12 remaining states.

A representative for the Supreme Court and the Pennsylvania Board of Bar Examiners, which regulates admissions, declined to comment on the case.

Both sides have filed for summary judgment, but the case had been in scheduling limbo since late May, after oral arguments were canceled a day before they were set to occur and the case was transferred to Judge McHugh, who was confirmed to the bench in March.

The NAAMP — which has lost a similar suit challenging Arizona's reciprocity rules — has categorized the rules as a violation of out-of-state attorneys' constitutionally protected privileges, as well as their First and Fourteenth amendment rights, using a football metaphor in the complaint.

"Assume the owner of the Philadelphia Eagles wants to retain the best quarterback," the complaint said. "He chooses either San Francisco 49er Colin Kaepernick or Baltimore Raven Joe Flacco to be his quarterback, the representative face of his franchise."

"Joe Flacco and Colin Kaepernick are free to play for the Eagles or the Pittsburgh Steelers or any other professional football team. But if they are lawyers by profession, they cannot play or represent clients in the Keystone State under Pa. B.A.R. 204."

Giannini also presented the issue as an unfair restriction on competition.

"What it boils down to is the disqualification [of out-of-state lawyers] has nothing to do with competence and everything to do with preserving a monopoly," he said.

Some attorneys were skeptical of that argument, noting there were no absolute restrictions on external access, and that anyone intent on entry could still qualify by passing the Pennsylvania bar exam.

"The fact of the matter is, if you come into Pennsylvania as a quarterback from San Francisco, you may be subject to a tax in Pennsylvania," said Abraham Reich, co-chair at Fox Rothschild LLP. "I don't think it's as simplistic as saying, 'It's monopoly power.'"

Just as states can impose taxes on football players, they hold the right to regulate the attorneys that practice there, according to this line of argument. Otherwise, Pennsylvania might lose its ability to enforce rules of professional conduct and protect citizens, according to Peter Russ, the managing shareholder of Buchanan Ingersoll & Rooney PC's Pittsburgh office.

"These rules and regulations have traditionally been reserved for the states, and I think there's a good rationale for that to continue," he said.

But Ellen Brotman, a partner at Montgomery McCracken Walker & Rhoads LLP, emphasized that the flourishing of reciprocity agreements undermined arguments that strict vetting by individual states is in the public interest.

"This restraint of trade doesn't really protect the consumer," she said. "Instead, it makes legal services scarcer and more expensive."

Brotman also credited the lawsuit with making lawyers acknowledge that the geographical realities of the profession were in flux.

"This is all against the backdrop of a world in which I can sit in my house in Pennsylvania and easily work on a case anywhere in the country," she said. "My ability to do that should not be hampered by a protectionist process, which does not serve the public's interest in access to qualified and affordable legal services."

Reich and a colleague on the American Bar Association's Board of Delegates, Cozen O'Connor member Tom Wilkinson, both agreed with Brotman that the profession was trending toward greater mobility.

"Over time, these practice barriers are going to come down," said Wilkinson, who is also the past president of the Pennsylvania Bar Association. "To some degree, clients are demanding that their lawyers be able to access jurisdictions where they don't keep offices."

The NAAMP has pointed to recent favorable signs from the ABA, including a Commission on Ethics 20/20 report from 2012 that encouraged states to adopt model rules allowing admission by motion and to eliminate additional restrictions like reciprocity.

But they still need to persuade Judge McHugh that the restrictions violate the Constitution, which is likely to be a challenge, with some lawyers questioning the cohesiveness of their arguments and others pointing out the high bar to their constitutional claims.

“The tricky part for the plaintiffs is that they have to prove that this is based on residency or citizenship,” said Steve Harvey, a former Pepper Hamilton LLP partner who now leads Steve Harvey Law LLC.

He added that lawyers’ inherent conservatism — at least with regard to the profession — posed another obstacle, even considering the ABA’s comments and a growing discussion over the prospect of a national bar exam.

Brotman, however, suggested that the plaintiffs, even if they come up short, are ahead of their time.

“In 10 years, you’ll have a national law license,” she said. “I think, ultimately, we’ll look back on this system of states keeping lawyers out of their jurisdictions as very quaint.”

The plaintiffs are represented by Joe Giannini.

The justices are represented by Michael Daley of the Administrative Office of the Pennsylvania Courts.

The case is National Association for the Advancement of Multijurisdictional Practice et al. v. Honorable Chief Justice Ronald D. Castille et al., case number 2:13-cv-07382, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Jeremy Barker and Philip Shea.