Bar Misc. 4186
S202512

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE SERGIO C. GARCIA ON ADMISSION

Order to Show Cause to the Committee of Bar Examiners in re Motion for Admission to the State Bar of California

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SUPPLEMENTAL AMICUS CURIAE BRIEF IN OPPOSITION TO ADMISSION

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I. INTRODUCTION

A. Background of Amicus

Amicus Larry DeSha is a retired former prosecutor for the State Bar of California, and has represented the Committee of Bar Examiners (the "Committee") several times in moral character proceedings in State Bar Court. He is permitted to file this brief in opposition to the Committee because the issues and this brief involve no confidential information obtained from his prior employment by the Committee or the State Bar. (Rules of Professional Conduct, rule 3-310(E).)

Amicus has more than 12 years experience in protecting the public from attorney misconduct, and has observed the top priority given by the Court at all times to the protection of the public. He was the initial or final evaluator for more than 10,000 formal complaints to the State Bar about attorney misconduct. He was the trial attorney (but not the attorney on appeal) for the State Bar in *In re Silverton* (2005) 36 Cal.4th 81, which is the Court's most important decision concerning attorneys during the past two decades, and arguably for all time to date. (The Court disbarred Silverton on its own motion by a unanimous vote,

after the Chief Trial Counsel of the State Bar did not contest the short suspension recommended by State Bar Court.)

This supplemental brief is filed in the interests of protection of the public and the integrity of the courts and legal profession. Amicus also presents two erroneous statements of fact or law in Applicant's Reply Brief, both in Applicant's favor, which need to be brought to the Court's attention.

B. Procedural History

On May 16, 2012, the Court issued an Order to Show Cause to the Committee of Bar Examiners ("Committee") to show cause why its pending motion for admission to the State Bar of an illegal immigrant, Sergio C. Garcia ("Applicant"), should be granted. The Committee and Applicant filed opening briefs by June 18, 2012. Seventeen amicus briefs were filed as of August 16, 2012, including a brief from the California Attorney General supporting admission and a brief from the Attorney General of the United States ("USDOJ") strongly opposing admission. Only two other amicus briefs opposed admission, including the brief of this amicus.

Reply briefs were filed by the Committee and Applicant by September 14, 2012. Oral argument was heard on September 4, 2013, and the matter was taken under submission. The overwhelming consensus among the legal press and bloggers was that admission would be denied by a vote of 7-0.

The California legislature was quick to respond, and passed legislation (AB 1024) on September 12, 2013, adding section 6064(b) to the Business and Professions Code, permitting the practice of law in California by persons not legally present in the United States. The bill was signed into law on October 5, 2013, effective January 1, 2014.

On October 16, 2013, the Court issued an order vacating submission of this matter and requesting supplemental briefs from the parties and interested amici addressing the effects of the new legislation on this proceeding. The initial supplemental briefs must be filed by November 15, 2013, and supplemental reply briefs may be filed by December 2, 2013.

C. Overview of Amicus Brief

First, the new statute adds nothing to the legal landscape of this proceeding. Section 6060.6 of the Business and Professions Code, passed eight years ago, already purports to permit the admission to practice law of persons "not eligible for a social security account number." This was properly briefed in Applicant's Opening Brief and in the initial brief of this amicus.

Second, the new statute does not change any existing statute or judicial precedent. In particular, it does not alter California's statutory obligation for attorneys to "support all federal laws to the best of one's ability" nor alter the obligation to take an oath to that effect.

Third, amicus presents two erroneous statements of fact or law in Applicant's Reply Brief, both in Applicant's favor. This is to help avoid invited judicial errors in this landmark proceeding.

Fourth, since the briefs presently filed total about 100,000 words, the vast majority of which allege unfairness of present laws to aspiring immigrants, amicus will attempt to assist the Court in focusing its

attention on three legal issues, as opposed to political issues, still pending in this matter. This is somewhat akin to the benefits derived from a special verdict in a complicated jury trial

II. RESPONSES TO THE COURT'S INQUIRY

A. What Effect Does New Statute Section 6064(b) of the Business and Professions Code Have on This Proceeding?

New section 6064(b) provides in pertinent part as follows:

> "Upon certification by the examining committee that an applicant *who is not lawfully present in the United States* has fulfilled the requirements for admission to practice law, the Supreme Court may admit the applicant as an attorney at law in all courts of this state." (italics added.)

The new subsection is virtually identical to section 6064(a), with the insertion of "who is not lawfully present in the United States." The legislative history shows that it was passed to benefit Mr. Garcia in this proceeding by allowing admission to practice law "regardless of immigration status," thus removing the ban of 8 U.S.C. § 1621(a). The

legislative history states that the new law "does not modify or displace any requirement for admission to practice law."

1. New Bus. & Prof. Code Section 6064(b) Adds Nothing to the Legal Landscape Since Section 6060.6 Similarly Purports to Permit the Admission of Undocumented Immigrants to the Practice of Law

The override of the restrictions of 8 U.S.C. § 1621 by Bus. & Prof. Code § 6060.6 was correctly argued in the DeSha Initial Amicus Brief at page 16, Applicant's Opening Brief at pages 20-21, and Applicant's Reply Brief at page 14.

Bus. & Prof. Code § 6060.6 provides in pertinent part that the Committee "may accept for registration, and the State Bar may process for an original or renewed license to practice law, an application from an individual containing a federal tax identification number, ... in lieu of a social security number, *if the individual is not eligible for a social security account number* at the time of application." (italics added.)

There are only two categories of individuals old enough to pass the bar examination who are not eligible to obtain a social security number. They are (1) persons not lawfully present in the United States,

including Mr. Garcia, and (2) persons lawfully present without the right to work. (See 42 U.S.C. § 405(c)(2)(B)(i).) The new statute merely duplicates part of § 6060.6 and is legally redundant.

2. Assembly Bill 1024 Does Not Modify or Delete Any Requirement for Admission to Practice Law

Reading the new statute shows nothing other than the new provision allowing the practice of law by persons unlawfully present in the United States. The present (and continuing) requirement that attorneys not be unlawfully present in the United States is not statutory, but arose by necessary implication because all attorneys are required by Bus. & Prof. Code § 6068(a) "to support the Constitution and laws of the United States," which includes the immigration laws.

Violation of this duty is an ethical offense prosecutable by the State Bar and most likely to lead to discipline and probation. One of the conditions of all probations, which the Court imposes several hundred times per year, is to file quarterly reports under penalty of perjury that the attorney, among other things, has complied with the State Bar Act, which includes the duty to support all federal and State laws. The Court disbars several attorneys each year for repeated violations of probation

imposed for minor ethical offenses. The maintenance of this high ethical standard is an essential factor in the public's trust and confidence in attorneys, courts, justice, and democracy.

In addition to the continuing requirements of § 6068(a)'s "duties of an attorney," Bus. & Prof. Code § 6067 states in pertinent part, "Every person on his admission shall take an oath … faithfully to discharge his duties of an attorney at law to the best of his knowledge and ability."

The very first prescribed "duty of an attorney" is only two sentences further, in the very first sentence of § 6068(a), which reads, "It is the duty of an attorney to … support the Constitution and *laws of the United States* and of this state." (italics added.)

If attorneys are allowed to be unlawfully present in the United States, that raises the legal question of what happens to their oath and duty to support all federal laws. The clear implication is that California now allows attorneys to fail to support immigration laws, and § 6068(a) is repealed at least with regard to supporting federal immigration laws.

However, § 6064(b) does not repeal any part of § 6068(a) by implication. This Court long ago promulgated the method for handling a conflict of laws created by the legislature by accident or, as in this case, by design.

There is no repeal of the old law by the new law by implication if the two laws are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." Implied repeal "should not be found unless the later provision gives *undebatable evidence* of an intent to supersede the earlier. (Citations.)" (italics in original.)

Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist (1989) 49 Cal.3d 408, 419-420.

The two statutes are clearly irreconcilable in their calls to support and not support federal immigration laws. They are "repugnant" in both its meanings of "hostile" and "distasteful" in that attorneys would be allowed, for the first time ever in California, to violate a statute which was created for the sole purpose of protection of the public. As for evidence of legislative intent to supersede any part of § 6068(a), the legislative history shows explicit intent against such modification. Bus. & Prof. Code § 6068(a) thus remains in full force and effect.

III. SERIOUS ERRONEOUS STATEMENTS IN APPLICANT'S REPL BRIEF

1. The *Bhakta* case does not assist self-employed aliens who are professionals.

At the top of page 19 of Applicant's Reply Brief, *Bhatka v. INS* (9th Cir. 1981) 667 F.2d 771 is cited for the proposition that "unauthorized employment" does not include a self-employed person who hires other people to work for him.

However, *Bhatka* does not pertain to Applicant. Mr. Bhatka was a motel owner. The case was resolved in his favor because customers were paying him for lodgings and not professional services. The Court explicitly distinguished him from an optometrist, the professional who "competes directly with all other professionals similarly employed in such practice. Labor, not capital, is the mainstay of his profession. ... Bhatka, to the contrary, is an entrepreneur, not a professional."

Id., at p. 771-772.

2. The *Rafaelli* decision did not depend upon his intent to apply for citizenship.

At the top of page 23 of Applicant's Reply Brief, it states that the *Rafaelli* case was decided on the facts that existed when the Committee first denied admission, i.e., "when he was an undocumented immigrant." The arguments are then made that admission was granted solely because Mr. Rafaelli intended to apply for citizenship when eligible in the future, and that Applicant should be admitted now because he similarly intends to apply for citizenship when eligible.

This is fiction of the highest order. The *Rafaelli* decision gave no weight to his former immigration status or intentions. It is clearly based on his already accrued constitutional rights as a legal resident.

Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288.

By striking down the citizenship requirement, the Court made intent to apply for citizenship irrelevant to admission.

Applicant repeated this erroneous holding on page 25 of Applicant's Reply Brief, stating that the Court held that Rafaelli could take the oath because he intended "to seek citizenship and legal status."

Rafaelli could take the oath because there was no rational basis to believe a legal alien was more likely than a citizen to violate that oath. Rafaelli was legally present when he took the oath.

IV. THREE IMPORTANT SUB-ISSUES

A. Does Business and Professions Code Section 6067 Preclude Admission of Undocumented Immigrants Due to Their Failure to Uphold All Federal Laws by Their Unlawful Presence in the United States?

This topic is thoroughly briefed in the initial brief of this amicus, at pages 13-14, which is not repeated here. As discussed above on page 11, Applicant has falsely argued that the Court has held that the answer is negative, but cites *Rafaelli*, which does not apply to illegal aliens nor mention the statutory duty in Bus. & Prof. Code § 6068(a) to "support the laws of the United States."

Nobody should be allowed to take the oath nor practice law while unlawfully present and subject to deportation. The term "unlawfully present attorney" should remain an oxymoron, rather than become a census statistic.

B. Can Applicant Evade the Federal Restrictions on Employment by Calling Himself an Independent Contractor Attorney?

This topic is thoroughly briefed in the initial brief of this amicus, at pages 25-29, which is not repeated here. The USDOJ concurs with amicus in its brief, at pages 14-15, stating on page 14, "The United States ... in particular disagrees with the assertion [of the Committee] that Mr. Garcia can work legally as an independent contractor or solo practitioner without federal work authorization." The USDOJ further warned that clients who knowingly hire an independent contractor who lacks work authorization are subject to penalties.

The California Attorney General concurs with amicus in its brief, at page 2, stating "federal law does not currently permit an employer to hire Garcia."

Title 8 U.S.C. § 1324a(a)(4) states that the use of a contract to knowingly obtain the labor of an unauthorized alien is a violation of the statute. The implementing regulation, 8 C.F.R. § 274a.1(j), states "The use of labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and §274a.5 of this part."

Section § 1324a(a)(2) requires a person who hires an unauthorized alien to terminate the employment upon learning of the alien's unauthorized work status. The implementing regulation, 8 C.F.R. § 274a.3, repeats this warning.

The Committee argues the legality of independent contractor status in its opening brief at pages 27-28, but makes no mention of the above statutes and rules and their black letter prohibition of such contracts.

Applicant's Opening Brief does not mention the federal statutory employment restrictions at all. However, at pages 22-25, he recognizes case law prohibiting his being an employee, and argues that he could circumvent employee status by forming a law corporation which would pay him dividends rather than a salary. He is apparently unaware of tax laws and corporate formalities. Even Applicant's Reply Brief fails to address the federal restrictions against his being paid by clients.

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C. Does the Issuance of a License to Practice Law Explicitly Represent that the Licensee May be Legally Employed as an Attorney?

This topic is thoroughly briefed in the initial brief of this amicus, at pages 21-23, which is not repeated here. Amicus appears to stand alone on this issue. The license informs all viewers that this Court has licensed the member as an "attorney and counselor to practice in all Courts of the State." It is hard to imagine how even the most sophisticated of clients can read the license and not believe that the licensee can be hired as an attorney. This is a trap which the Court should not allow.

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III. CONCLUSION

The conclusions of this amicus are set forth in his initial brief, at pages 32-34, and are not repeated here. Briefly, those of major importance are:

1. Mr. Garcia cannot take the oath of attorney because he does not support federal immigration laws.

2. He cannot accept pay for legal services because such pay is proscribed by 8 U.S.C. § 1324a.

3. Granting a law license to Mr. Garcia will mislead prospective clients to erroneously believe that he is legally present in the United States and can be paid for legal services.

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4. The best way to protect the public from committing the federal crime of hiring Mr. Garcia before he becomes a legal resident is to deny his admission to practice until such time as he becomes legal, can take the oath of office truthfully, and can be hired for pay.

For the foregoing reasons, including those briefed earlier, the Court should deny the motion for admission of Sergio C. Garcia to the State Bar of California.

Dated: November 14, 2013 Respectfully submitted,

Larry DeSha

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this SUPPLEMENTAL AMICUS CURIAE BRIEF IN OPPOSITION TO ADMISSION contains 2,800 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: November 14, 2013

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No Further Entries