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2001 Survey of Rhode Island Law: Cases: Regulation of the Legal Profession

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Regulation of the Legal Profession. *In re Ferrey*, 774 A.2d 62 (R.I. 2001). The Rhode Island Supreme Court possesses ultimate and exclusive authority to determine who may or may not be permitted to practice law in Rhode Island and nonresident attorneys must file pro hac vice motions with the court prior to practicing in Rhode Island.

FACTS AND TRAVEL

Steven E. Ferrey (Ferrey) was a member in good standing of the Massachusetts bar.[1] He sought permission to continue providing legal services for his client in front of the Energy Facility Siting Board, a state administrative agency.[2] He filed a pro hac vice motion in the Rhode Island Supreme Court.[3] His motion was filed in the alternative; he requested permission to practice in front of the board beginning from the time of the filing of the motion "and/or" that the admission be made nunc pro tunc, as he had already been practicing law in front of the agency board.[4] The agency gave Ferrey the specific permission to practice in front of it.[5]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court granted that part of the motion seeking prospective permission to practice, but would not retroactively grant the motion to the time when it should have been filed, before Ferrey's first appearance in front of the agency.[6] The court said that it had "never before, in any published opinion or order, granted a pro hac vice request nunc pro tunc when to do so 'would be tantamount to affixing an ex post facto imprimatur of approval on what might under some circumstances be construed as the unauthorized practice of law.'"[7] Rhode Island General Laws section 11-27-5 prohibits the practice of law by non-members of the

1. *In re* Ferrey, 774 A.2d 62, 63 (R.I. 2001); *see also* Peter S. Margulies, *Protecting the Public without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 Roger Williams U. L. Rev. 285 (2002).
2. *Id.*
3. *Id.*
4. *Id.* at 65.
5. *Id.*
6. *Id.* at 63.
7. *Id.* (quoting *In re* Church, 303 A.2d 758, 759 (R.I. 1973)).

Rhode Island bar.[8] Rhode Island General Laws section 11-27-2 defines the practice of law as "the doing of any act for another person usually done by attorneys at law in the course of their profession . . . includ[ing]: . . . acting as the attorney . . . before any court, *referee, master, auditor, division, department, commission, board, judicial person, or body* authorized . . . to exercise any judicial power . . . ."[9]

Thus, Article II, Rule 9, of the Rhode Island Supreme Court Rules was promulgated to address the admission of out-of-state attorneys desiring to practice law in Rhode Island.[10] However, nothing in the rule mentions granting pro hac vice permission to represent clients in any place other than a court, including in front of boards and agencies.[11] The omission of such language did not deprive the court "of [their] unquestioned inherent right" to permit such practice.[12] Modern conditions are such that a great deal of the practice of law is performed "'outside of any court and having no immediate relation to proceedings in court.'"[13] Therefore, because the exclusive and ultimate authority to determine who may practice law in Rhode Island is vested with the Rhode Island Supreme Court, the court may allow the practice of law before any agency, board or commission.[14]

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8. *Id.* Section 11-27-5 reads: "No person, except a member of the bar of this state, whose authority as a member to practice law is in full force and effect, shall practice law in this state." R.I. Gen. Laws § 11-27-5 (2000).

9. *Id.* (quoting R.I. Gen. Laws § 11-27-2 (2000) (emphasis added by court)).

10. *Id.* at 64. Article II, Rule 9 states, in pertinent part:

> Any attorney who is a member in good standing of the bar of any other state, not residing in this state, may, upon special and infrequent occasion and for good cause shown upon written motion presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such an extent as the court may prescribe in the presentation of a cause or appeal in any court of this state . . . .

R.I. S. Ct. Art. II, R. 9. The rule continues and lists the prerequisites for showing good cause, such as: specialization in a complex field of law; a longstanding attorney-client relationship; a lack of local counsel with adequate expertise in the area of law; a question of law of a foreign jurisdiction; a need for extensive discovery in a foreign jurisdiction. *Id.*

11. *See Ferrey*, 774 A.2d at 64.

12. *Id.*

13. *Id.* (quoting R.I. Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 144 (R.I. 1935)).

14. *Id.* (citing Unauthorized Practice of Law Comm. v. State, 543 A.2d 662, 664 (R.I. 1988)).

Absent prior permission, an out-of state lawyer who is practicing in Rhode Island is committing a criminal offense.[15] Further, it is illegal to receive any form of remuneration for the practice of law without prior permission from the Rhode Island Supreme Court.[16] State law provides for penalties and the duty is on the Attorney General to enforce the law.[17] Whether Ferrey had been engaged in the unauthorized practice of law by appearing in front of the state agency was an issue not before the court.[18]

In its strongest tone, the court noted:

> This Supreme Court alone possesses sole authority to determine who may, and who may not, engage in the practice of law in this state. No municipal or state board, agency or commission shares in that authority, and none has ever been delegated by this Court to any municipal or state board, agency or commission.[19]

Thus, the law was clear that it is unlawful to practice law anywhere in Rhode Island without pro hac vice permission.[20] Ferrey was a nonresident who had been given permission by the agency to practice, although the agency had no authority to do so.[21] The court noted that he, like everyone else in the state, is presumed to know what the law is, but that his ignorance was "somewhat understandable."[22] Therefore, because of the ignorance and the mistakenly given permission, Ferrey's request for continued representation was granted.[23] However, though Ferrey may not have known the law, the court was not willing to assist in what section 11-27-5 prohibits by granting the motion nunc pro tunc because they "are duty bound to follow that law and not blindly ignore or condone past transgressions thereof."[24]

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15. *Id.* at 63, 64 (citing R.I. Gen. Laws § 11-27-5 (2000)).

16. *Id.* at 64 (citing R.I. Gen. Laws § 11-27-6 (2000)).

17. *Id.* (citing R.I. Gen. Laws §§ 11-27-14, 11-27-19 (2000)).

18. *Id.*

19. *Id.* at 65.

20. *Id.* at 64.

21. *Id.* at 65.

22. *Id.* However, the court cited Massachusetts case law, the state where Ferrey was authorized to practice, for very similar reasoning regarding judicial authority and statutory penalties in this context. *Id.* at 65 n.2 (citing Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 30 (Mass. 1943)).

23. *Id.* at 65.

24. *Id.*

Concurrence and Dissent

Justice Flanders agreed with the majority that the motion should be granted, however, he disagreed with the majority because the motion was not granted nunc pro tunc.[25] Article II, Rule 9, is limited and there are no other explicit rules regarding pro hac vice motions for the issue at bar.[26] Additionally, granting the motion nunc pro tunc would also prevent the "inevitable tactical attempts—apparently already begun" that would undo what Ferrey had already done in the administrative proceedings, particularly since there was no apparent bad faith or wilful misconduct.[27]

Justice Flanders also addressed the pro hac vice process. Admission for nonresident lawyers should be governed through a rulemaking procedure, rather than the current practice of filing miscellaneous petitions to the Rhode Island Supreme Court.[28] In that way, a procedure for nonresident lawyers who want to provide transactional legal services in Rhode Island could be established after providing notice, hearings and a public comment period.[29] When the court selectively grants or denies the a pro hac vice request they "are roiling the waters of the bar unnecessarily, only to reap a tidal wave of confusion and fear in response."[30] There are no rules, no standards and no clear tests. This could potentially create problems for attorneys who act in good faith and could create unnecessary collateral litigation regarding the validity of work performed by a nonresident attorney in Rhode Island.[31] It would be more appropriate for the court, the bar and other interested parties to come together and promulgate a rule addressing multijrisdictional practice and the myriad of other situations that would require pro hac vice approval.[32]

Justice Flanders also opined that the statutory provisions at issue do not address visiting attorneys, licensed in another state and in Rhode Island on temporary business.[33] "[E]ven though the regular, continuous, or permanent practice of law in this state by

25. *Id.* at 65-66 (Flanders, J., concurring in part and dissenting in part).
26. *Id.* at 66.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 66-67.
33. *Id.* at 67.

nonresident attorneys would be unlawful without obtaining admission to the Rhode Island bar, legal business that is performed 'while temporarily in this state' by nonresident attorneys is arguably permissible."[34] Because there was no evidence in the record to suggest that Ferrey regularly practiced law in Rhode Island, granting the motion nunc pro tunc would not, despite the majority's assertions, be sanctioning illegal activity.[35]

Section 11-27-3, concerning receipt of fees, was inapplicable to Ferrey, as well.[36] That is because the statute is not triggered until a third party assignee of a fee owed to an attorney receives part of that attorney's fee.[37] That situation was not present in the case at bar and, thus, the statute was inapplicable.[38]

CONCLUSION

In *In re Ferrey*, the Rhode Island Supreme Court reaffirmed that they alone possess the authority to allow or disallow the practice of law in Rhode Island. The power extends to all practice, including appearing in front of boards, agencies and commission. Granting a pro hac vice request nunc pro tunc could be considered as authorizing an illegal activity. The pro hac vice power remains exclusively within the power of the Rhode Island Supreme Court and it has never been delegated.

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34. *Id.* (quoting R.I. Gen. Laws § 11-27-13 (2000)).
35. *Id.*
36. *Id.*
37. *Id.* (citing Pearlman v. Rowell, 401 A.2d 19, 20 (R.I. 1979)).
38. *Id.*