

STATE OF MAINE
SUPREME JUDICIAL COURT



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**Judicial Branch testimony against LD 530,
An Act Regarding Occupational Licensing Reform**

Senator Tipping, Representative Roeder, members of the Joint Standing Committee on Labor, I am Chief Justice Valerie Stanfill of the Maine Supreme Judicial Court, and I represent the Judicial Branch. I would like to provide the following testimony against LD 530, An Act Regarding Occupational Licensing Reform.

This bill is an attempt to regulate the procedure for admitting attorneys to practice law in Maine. An analysis of the issue of regulation of attorneys "must begin with recognition that at the foundation of our form of government there are three co-equal branches; and that our form of government, at the state as well as the federal level, embraces the doctrine of the separation of powers." *Board of Overseers of the Bar v. Lee*, 422 A.2d 998 (Me. 1980). Article III of the Maine Constitution states:

Section 1. The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial.

Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

The three "departments" are independent and co-equal, and they are "severally supreme within their legitimate and appropriate sphere of action." *Ex parte Davis*, 41 Me. 38, 53 (1856).

In the area of the admission of attorneys to the practice of law, “the judicial branch of the government, acting through the courts, has exclusive jurisdiction and the legislative branch, acting through the Legislature, can in no way limit this inherent power and authority of the court.” *In re Feingold*, 296 A.2d 492, 496 (Me. 1972). *See also Board of Overseers of the Bar v. Lee*, 422 A.2d 998, 1002 (Me. 1980) (“The power to define and regulate the practice of law naturally and logically belongs to the judicial department.”); *In re Husson Univ. Sch. of L.*, 2010 ME 16, ¶ 11, 989 A.2d 754, 756 (“[A]mong the three branches of government, it is the Judicial Branch, specifically this Court, that has the inherent authority and exclusive jurisdiction over the admission of attorneys to the practice of law in this state.”)

The Legislature has enacted statutes which regulate attorneys; 4 M.R.S. § 805-A is such a statute. But,

[W]e have enforced statutes designed to regulate the licensure of attorneys—a subject squarely within the realm of judicial interest and authority—“as a matter of comity, but not in surrender of [the judiciary’s] inherent power.” [*Bd. Of Overseers of the Bar v. Lee*, 422 A.2d 998] at 1003 (*citing In re Feingold*, 296 A.2d 492, 496 (Me.1972) (“Courts ... may and frequently do honor implementing legislation, but clearly are not bound to do so.”)).

In re Dunleavy, 2003 ME 124, ¶¶ 36-37, 838 A.2d 338, 352–53 (J. Levy, concurring.) *See also Application of Hughes*, 594 A.2d 1098, 1100 (Me. 1991) (The Court “has inherent authority to admit attorneys to the bar that cannot be limited by legislation.”)

Thus, statutes purporting to regulate the admission of attorneys to the practice of law in Maine

are not exclusive. Such provisions are in aid of the authority and power inherent in the court. . . . But, in this area, the judicial branch of the government, acting through the courts, has exclusive jurisdiction and the legislative branch, acting through the Legislature, can in no way limit this inherent power and authority of the court. Courts, however, may and frequently do honor implementing legislation, but clearly are not bound to do so.

In re Feingold, 296 A.2d at 496.

In short, procedure for attorney licensure falls within the exclusive authority of the Judicial Branch. That said, principals of comity support, within the Court's discretion, upholding statutes on attorney licensure "unless an enactment substantially interferes with the administration of justice or constitutes an unreasonable burden on judicial authority." *Dunleavy*, 2003 ME 14 ¶ 37, citing *Lee*, 422 A.2d at 1003.

Bar Admission Rule 2 provides that the bar admission rules "are intended to provide fair and efficient procedures and standards for determining the qualifications to practice law of applicants for admission to the bar." The admission requirements included in the rules provide for the need to show good moral character. Maine Bar Admission Rule 9 (see attached).

This bill appears to remove the presumption raised by a felony conviction that the applicant is not of good moral character and removes the standards for the determination of that issue by the Board of Bar Examiners. The procedure outlined in Rule 9 already provides for a hearing when the character of an applicant is in doubt and provides far more detail for the hearing procedure than is contained in this bill. Given the provisions in Rule 9, it is difficult to see why the Supreme Judicial Court should honor the procedure outlined in this bill as a matter of comity.

~~(3) A. attains a passing grade on the bar examination as provided in Rule 10;~~

~~B. completes the requirements for admission by motion as provided in Rule 11A; or~~

~~C. qualifies for admission by transferred Uniform Bar Examination score as provided in Rule 11B.~~

~~(b) An applicant who has been disbarred or is currently under suspension from the practice of law in any jurisdiction shall not be eligible to receive a certificate of qualification, provided, however, that an administrative suspension from the practice of law in a jurisdiction other than the State of Maine, for failure to comply with that jurisdiction's registration, dues, or continuing legal education requirements, shall not preclude the issuance of a certificate of qualification if the Board determines that the applicant has demonstrated that requiring the applicant to return to good standing in, or resign from, the jurisdiction that imposed the administrative suspension would impose an undue hardship on the applicant and the applicant is in good standing in at least one other state.~~

RULE 9. GOOD CHARACTER AND FITNESS TO PRACTICE LAW

(a) General Requirement. Each applicant shall produce to the Board satisfactory evidence of good character and fitness to practice law. This burden is initially met by establishing in the completed application and additional materials required by Rule 5 the absence of any information adverse to the applicant's character and fitness to practice law. If any such adverse information is provided in the application and additional materials, or otherwise received by the Board, the applicant has the burden of producing further evidence to explain or rebut such information sufficiently to satisfy the Board that the applicant is of good character and is fit to practice law. The attributes of character and fitness to practice law that are relevant to this determination are those pertinent to the trust placed in lawyers by the public and clients as well as to the requirement that lawyers in this state comply with the Maine Bar Rules and the Maine Rules of Professional Conduct.

(b) Board Review of Character and Fitness. The Board may verify all information that it receives by any appropriate means, including the use of a

three-member review panel designated by the Chair pursuant to Rule 4(b). The Board shall publish the list of applicants as soon as possible after May 20 and December 20 of each year with a request that anyone having adverse information bearing on the character and fitness to practice law of any applicant communicate it to the Board.

(c) Review and Additional Investigation.

(1) *Determination of Need for Three-Member Panel.* Notwithstanding the provisions of (2) herein, if the Chair, based upon the application, certificates, references, unsolicited communications, or other information received, determines that a hearing pursuant to Rule 9(d)(5) is necessary to resolve doubt regarding the applicant's good character and fitness to practice law, then the Chair may forego the designation of a three-member review panel, and direct the matter be set for hearing.

(2) *Additional Investigation and Recommendations.* If the application, certificates, references, unsolicited communications, or other information received by the Board cause the Board to doubt the good character and fitness to practice law of an applicant, the Chair, if it has not already done so, shall designate a three-member review panel pursuant to Rule 4(b) to conduct an investigation on behalf of the Board. An applicant who is requested upon reasonable notice to appear before the review panel to answer questions may be represented by counsel. Interviews by the review panel shall be recorded by the Board. Any other recording of the interview is prohibited. The review panel may request that Counsel for the Board assist in conducting the investigation. The review panel or, at its request, Counsel for the Board shall notify the applicant of the nature of the investigation and that the investigation is going forward and shall request that the applicant furnish explanations and further information concerning the matter or matters in question. For each investigation, a separate investigative file shall be maintained and shall be available to the review panel and Counsel for the Board. The investigative file shall contain all records and other information pertinent to the investigation, including all information received by the review panel or Counsel for the Board. If the investigation has been conducted by Counsel for the Board, at the conclusion of the investigation Counsel for the Board shall make a recommendation to the review panel, either that the Board find the applicant to be a person of good character and is fit to practice law, or that the Board conduct a hearing to resolve any doubt that remains concerning the applicant's good

character and fitness to practice law. Counsel for the Board shall summarize with the recommendation the evidence upon which it is based.

(d) Hearing on Applicant's Character and Fitness.

(1) *Determination of Need.* If the review panel, on the basis of all material produced by the applicant or otherwise acquired by the review panel or Counsel for the Board pursuant to subdivisions (a), (b), and (c) of this rule and in light of any recommendation of Counsel for the Board, determines that doubt remains concerning the applicant's good character and fitness to practice law, the Board shall conduct a hearing to determine whether the applicant is a person of good character and is fit to practice law.

(2) *Hearing Panel.* The matter shall be heard by a panel consisting of all members of the Board except the members of the review panel. The hearing panel shall exercise all powers of the full Board in the conduct of the hearing, and the determination of the panel after hearing shall be the determination of the full Board. Four members of the hearing panel, including one public member, shall constitute a quorum for all actions and decisions.

(3) *Representation by Counsel for the Board.* Counsel for the Board shall prepare and present the case against the applicant at the hearing under paragraph (5) of this subdivision and shall represent the Board before a single justice of the Supreme Judicial Court or the Law Court on petition under paragraph (6) of this subdivision.

(4) *Time of Notification and Hearing.* The Board shall notify the applicant and Counsel for the Board of the time, place, and purpose of the hearing immediately after the review panel has decided that a hearing is required. Unless that decision is made after the bar examination, such notification shall be given to the applicant prior to the bar examination. The applicant shall be permitted to sit for the examination if the hearing cannot be held before that time or if the Board has not reached its decision.

(5) *Conduct of Hearing.*

A. At least 15 days before the time set for hearing, Counsel for the Board shall mail to the applicant and file with the Board a written statement summarizing the evidence that reflects adversely on the applicant's character

and fitness to practice law, and stating that all material in the investigative file, other than Counsel for the Board's work product, will be available to the applicant at Counsel for the Board's office during usual office hours for inspection and copying at the applicant's expense. At least 15 days before the time set for the hearing, Counsel for the Board and the applicant or Counsel for the applicant, as the case may be, shall exchange witness and exhibit lists, and each shall provide the Board seven (7) copies of each exhibit intended to be introduced at the hearing by such party.

B. The hearing shall be open to the public, except that to protect the interests of an applicant, witness, or third party, the Board may, upon application and for good cause shown or on its own motion, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement that order. The deliberations of the Board following any hearing under this subdivision shall not be open to the public. The decision of the Board following any hearing under this subdivision shall be made available to the public.

C. Evidence shall be admitted at the hearing if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Board may exclude irrelevant or unduly repetitious evidence and shall observe the rules of privilege recognized by law.

D. The applicant may be represented by counsel and may present evidence. The applicant and Counsel for the Board may call, examine, and cross-examine witnesses.

E. The Chair of the Board, or the member of the Board presiding at the hearing in the absence of the Chair, shall have the power to administer oaths.

F. The Board shall cause all hearings to be stenographically or electronically recorded in a form that will readily permit transcription.

G. Subpoena. A witness or the applicant may be summoned by subpoena to give evidence or appear before the Board at the hearing. Any member of the Board, a notary public, or any clerk of the Superior or District Court may issue such subpoenas as well as subpoenas duces tecum to compel the production of books, papers, and photographs or other documents or tangible things at or before the hearing. At or before the time specified in the subpoena for

compliance therewith, the Board may quash or modify any subpoena issued under this rule if it is determined that the subpoena is unreasonable or oppressive. Witness fees in all proceedings before the Board shall be the same as for witnesses in a civil action in the Superior Court. When a witness who has been subpoenaed fails to appear without reasonable excuse, the Supreme Judicial Court or any justice thereof, or the Superior Court or any justice thereof, or the District Court or any judge thereof, may, on application of the Board, invoke the provisions of Rule 45(f) of the Maine Rules of Civil Procedure for such failure.

H. The Board shall render a written decision within 30 days after the conclusion of the hearing, determining either that the applicant is a person of good character and is fit to practice law or that the applicant has not satisfied the Board that the applicant is a person of good character and is fit to practice law. At the applicant's request, or in the discretion of the Board, a decision adverse to the applicant shall include specific findings sufficient to support the Board's determination. A copy of the Board's written decision and findings, if any, shall be promptly mailed to the applicant or the applicant's counsel and to Counsel for the Board.

(6) Proceedings Following Board Determination.

A. Within 30 days after receipt of the Board's written adverse decision, an applicant may file with the Executive Clerk of the Supreme Judicial Court a petition for admission to the bar seeking a determination that the applicant is a person of good character and is fit to practice law. At the time of filing, the applicant shall serve a copy of the petition upon Counsel for the Board and the Board by ordinary mail.

B. Within 15 days after receipt by the Board of the petition, Counsel for the Board shall file a response on behalf of the Board.

C. Proceedings upon the petition shall be a hearing de novo before a single justice of the Supreme Judicial Court assigned by the Chief Justice to hear the matter. In this paragraph (6), the word "court" shall mean the single justice of the Supreme Judicial Court assigned to hear the proceeding. The following procedures shall apply:

(i) The applicant shall be treated as plaintiff and the Board as defendant, and the proceeding shall be captioned “[name of applicant] v. Board of Bar Examiners.”

(ii) Counsel for the Board shall furnish to the applicant, within a reasonable time after the filing of the Board’s response, at the applicant’s expense, copies of all information in the applicant’s Board file and Counsel for the Board’s investigative file not previously disclosed, other than Counsel for the Board’s work product, and copies of any exhibits presented at the Board’s hearing not previously furnished. The stenographic or electronic record of the hearing made in accordance with Rule 9(d)(5)F and any other matter within the possession or control of Counsel for the Board or the Board that is discoverable under Rule 26 of the Maine Rules of Civil Procedure shall be made available to the applicant at Counsel for the Board’s office during usual office hours for inspection and copying at the applicant’s expense.

(iii) The court may order further production of documents, or may limit production, on motion and a showing of good cause.

(iv) The court may in its discretion hold a prehearing conference with Counsel for the Board and the applicant, or the applicant’s attorney, to consider such matters as may aid in the disposition of the proceeding. The court may by written order limit the issues to be heard.

(v) At the hearing, evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The court may exclude irrelevant or unduly repetitious evidence and shall observe the rules of privilege recognized by law.

D. At all times, the applicant retains the burden of producing to the court satisfactory evidence of good character and fitness to practice law and of persuading the court that the applicant is a person of good character and is fit to practice law.

E. If the court is not satisfied that the applicant is a person of good character, or if the court is not satisfied that the applicant is fit to practice law, the court shall enter judgment accordingly. If the court finds that the applicant is a person of good character and is fit to practice law, it shall enter judgment accordingly and shall remand the proceeding to the Board with instructions to

issue a certificate of qualification to the applicant, provided that the requirements of Rule 8(2) and Rule 8(3) are met.

F. The applicant or the Board may appeal to the Law Court as in a civil action within 10 days from the entry of the judgment of the single justice.

G. When the court enters a judgment against the applicant, if it determines that the grounds of the petition were frivolous, it may require the applicant to pay the reasonable expenses incurred by the Board and Counsel for the Board in the investigation of the matter or in the conduct of hearings before the Board or before the single justice or the Law Court. The court may make such orders as are just concerning the payment of such expenses.

RULE 9A. CONDITIONAL ADMISSION

~~(a) **Conditional Admission.** Following a determination that an applicant has not produced satisfactory evidence of good character and fitness to practice law pursuant to Rule 9 and upon findings that:~~

~~(1) the conditions that led to the determination that the applicant has not produced satisfactory evidence of good character and fitness to practice law are in the past and are not likely to recur;~~

~~(2) the applicant has made and is making a good faith effort to cure or avoid the conditions that led to the determination; and~~

~~(3) the applicant has in place a support system, including an identified responsible individual, to monitor and assist the applicant in maintaining good and ethical conduct and to regularly report on the applicant's progress and any problems to the Board of Overseers of the Bar;~~

~~the Board, with the written consent of the applicant, may recommend to the Court that the applicant be admitted on a conditional basis. Provided, however, that a lawyer who has been disbarred or suspended from the practice of law or has resigned from the practice of law in another jurisdiction, and has not been reinstated to the practice of law in that other jurisdiction shall be ineligible for conditional admission pursuant to these Rules.~~