NO. 12-0208

In the Supreme Court of Texas
Austin, Texas

IN RE: REBECCA RAMIREZ PALOMO

Original Proceeding for Writ of Mandamus

RELATOR'S REPLY TO REAL PARTY IN INTEREST'S RESPONSE

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[1] As party officials with responsibilities under the Texas Election Code are treated as public officers, TEX. ELEC. CODE § 161.009, Sylvia Palumbo, who is now the Webb County Democratic Party Chair, has been automatically substituted for Sergio Mora under appellate rule 7.2. TEX. R. APP. P. 7.2(a) ("When a public officer is a party in an official capacity to an . . . original proceeding, and if that person ceases to hold office before the . . . original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate.").

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STATEMENT OF JURISDICTION

Real Party in Interest, Fernando Sanchez, contends that this case has become moot, because it is too late to place Relator, Rebecca Ramirez Palomo, on the Democratic primary ballot for the office of judge of the 341st Judicial District. Sanchez contends that because the statutory deadlines as set by the District Court for the Western District of Texas for providing the list of candidates and drawing names for the ballot have passed, *see* TEX. ELEC. CODE §§ 172.029(c), .082(c), this Court now has no authority to order Ramirez' name to be placed on the primary ballot. However, this Court has decided "a long line of cases in which [it has] given precedence to ballot access over rigid adherence to statutory deadlines when a candidate is deprived of a place on the ballot through no fault of the candidate's." *Bird v. Rothstein*, 930 S.W.2d 586, 588 (Tex. 1996).

In one case, this Court ordered a candidate's name to be placed on the primary ballot "even though a large number of ballots in that statewide race had already been printed." *Id.* (citing *LaRouche v. Hannah,* 822 S.W.2d 632, 634 (Tex.1992). Indeed, this Court will exercise its authority to ensure that eligible candidates have access to the ballot up and until "[a]bsentee balloting by personal appearance." *Id*. Accordingly, during the 2008 general election this Court ordered a county party chairman to place a candidate's name on the primary ballot even though the deadlines for submitting the list of candidates and the drawing for ballot placement had both passed. *See In re Torry*, 244 S.W.3d 849 (Tex. 2008).[2] Because voting by personal appearance does not commence until May 14,

[2] In *Torry*, ":January 2, 2008, [was] the deadline for applying for a place on the ballot, *Torry*, 244 S.W.3d at 851, which made the deadline to provide the list of candidates January 12, 2008. *See* TEX. ELEC. CODE § 172.029(c).

2012, *see* TEX. ELEC. CODE § 85.001(a), (c), this Court has jurisdiction to order that Ramirez' name be placed on the Democratic general primary ballot.[3]

Additionally, the primary was on March 4, 2008, *Torry*, 244 S.W.3d at 851, which made the deadline for drawing for ballot placement January 11, 2012. *See* Acts 2011, 82nd Leg., ch. 1318, § 37 (amending § 172.082(c) of the Election Code to change the deadline for the drawing from the 53rd day before the primary date to the third Tuesday in December). The order in *Torry* was no issued until January 25, 2008.

[3] If this Court were to accept Sanchez' argument, then he is not eligible to be on the ballot, because the Democratic County Chair did not supply the certified list of candidates until March 16, 2012, *see* Reply App. tab 9, which was after the statutory deadline of March 12, 2012. If the list of candidates has already been filed late once, there is certainly nothing preventing the list from being corrected to include all eligible candidates again.

ARGUMENT

I. There Is No Legal Basis For Holding That Attorneys Are Ineligible To Practice Law Until They Remove Their MCLE Non-Practicing Exemption

One of the central issues in this proceeding is whether or not an attorney that changes her MCLE status to non-practicing is thereby rendered legally ineligible to engage in the practice of law until that status is removed. The court of appeals failed to address this issue and Sanchez offers this Court no statute or rule that so provides. Rather, Sanchez contends that if the Supreme Court Clerk or the State Bar say it, there are no higher authorities that can dispute them. However, this Court has the authority to review the State Bar's MCLE rules to determine if they actually regulate the practice of law or whether the Clerk and the Bar have given the MCLE rules a legal effect beyond their scope and meaning.

First, to the extent that the State Bar sought to regulate the practice of law in their MCLE Rules, this went beyond the Bar's authority. The State Bar was given authority to adopt "regulations . . . pertaining to [MCLE Committee's] function" of "administer[ing] the program of minimum continuing legal education established by this" Court. TEX. STATE BAR R. art. XII, § 3(C). The rule-making authority provided by this Court is thus limited to the administration of the MCLE requirements and not to the regulation of an attorney's right to practice law. This Court has repeatedly held that "agencies may not 'on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as expedient for

administrative purposes.'" *Texas Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95, 106 (Tex. 2010). Thus, even if the MCLE regulations contained any hint in the MCLE rules that claiming an MCLE non-practicing exemption made one ineligible to practice law, such a regulation would be beyond the scope of the rule-making authority and therefore invalid. *See, e.g.*, *Pub. Util. Com'n of Texas v. GTE-Sw., Inc.*, 901 S.W.2d 401, 408 (Tex. 1995) (holding invalid rule that exceeded agencies regulatory authority).

However, the Bar did not exceed its authority in adopting MCLE Regulation 5.3, because it makes no attempt to regulate anyone's eligibility to practice law. Sanchez, however, maintains that because the Clerk and the State Bar have implemented the rule as if it does, then their view of the law is conclusive. That contention runs directly counter to this Court's admonition that deference to an "agency's interpretation, however, is not conclusive or unlimited." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). Rather, courts "defer only to the extent that the agency's interpretation is reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations." *Id*.

The clear, unambiguous language of MCLE Regulation 5.3 is that it only regulates an attorney's eligibility to claim the non-practicing exemption. Neither the court of appeals nor Sanchez has pointed to any language in the regulation that says one word, either directly or by implication, that claiming the non-practicing exemption affects one's legal authority to practice law. Moreover, treating a claim for an MCLE non-practicing exemption as the equivalent of placing oneself on inactive status simply makes no sense.

For example, if an active member whose birth month is November had not practiced law from November 1, 2007 to October 31, 2008, he would be entitled to claim the MCLE non-practicing exemption for that 2008 MCLE compliance year, even though he started practicing law again on November 1, 2008. *See* MCLE Reg. 5.3.1. Moreover, under this Court's rules, he could claim his exemption without penalty until the end of his birth month, or November 31, 2008. TEX. STATE BAR R. art. XII, § 8(B). If on November 21, 2008, the attorney claimed his non-practicing exemption for the 2008 MCLE compliance year by submitting the online exemption form, according to the Clerk and State Bar he would then make himself ineligible to practice law until he updated his status. This would be true even if he was then currently practicing law. Moreover, even if he submitted an online form to remove the non-practicing exemption the following day, he would have been ineligible to practice law until the new form was submitted. According to the Clerk and the State Bar, this would make the attorney ineligible to run for a judgeship within the next four years, because he would have been ineligible to practice law until he had lifted the exemption.

On the other hand, if this lawyer had submitted a written MCLE non-practicing exemption form on November 21, 2008, he would have certified that he had not practiced law from November 1, 2007 to October 31, 2008. (App. tab 8). If the Clerk and the State Bar treated the lawyer's situation the same way as if he had submitted an online form, then he would be ineligible to practice law until he submitted a second written form stating that he wished to lift the exemption effective November 1, 2008, the date he started practicing law again. On the other hand, the Clerk and the State Bar could simply

treat the written form as making the attorney only ineligible for the period stated in the exemption form, a useless exercise since the attorney had already certified that he did not practice law during that time period any way.

Not only is there no possible reading of MCLE Regulation 5.3 that produces any of these results, they are all absurd. Because this Court "interpret[s] statutes to avoid an absurd result," *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011), it may not interpret MCLE Regulation 5.3 as legally prohibiting active members of the bar from engaging in the practice of law. Rather, the regulation's plain wording must be enforced, which language does nothing more than regulate who is eligible to claim the non-practicing exemption. Because Ramirez' submitting the online form to update her status to non-practicing on November 21, 2008 did not alter her eligibility to practice law, the Clerk's and State Bar's records to the contrary are not conclusive and the Webb County Democratic Party Chair had no authority to declare her ineligible for the office of district judge.[4]

II. Even If Attorneys are Ineligible to Practice Law for the Period They Claim the MCLE Non-Practicing Exemption, There is a Factual Dispute Over What Period Ramirez Claimed the Exemption

Even if MCLE Regulation 5.3 rendered attorneys ineligible to practice law while claiming the non-practicing exemption, there is a factual dispute on the time period that Ramirez actually claimed the exemption. While the Clerk's records state that Ramirez

[4] Sanchez also makes the argument that because the Clerk and State Bar deemed Ramirez ineligible that she is prohibited from changing these records after the end of her MCLE compliance year, relying on TEX. STATE BAR R. art. XII, § 8(A). However, this rule applies only to supplying information related to an attorney's "CLE credit hours, corrections and additions to the MCLE record." *Id*. Neither the Clerk's nor the State Bar's records relating to Ramirez' eligibility are part of her MCLE records and therefore this rule is inapplicable.

claimed the exemption from November 21, 2008 to November 5, 2009, the MCLE's records show that Ramirez claimed the exemption from November 1, 2007 to October 31, 2008. Sanchez argues that the MCLE's documents are not public records and even if they are, there is no material dispute. However, neither of these assertions is correct.

First, Sanchez argues that because MCLE records may "not be disclosed except upon consent of the member affected or as directed in the course of judicial proceeding by a court of competent jurisdiction," that these records cannot be "public records." TEX. STATE BAR R. art. XII, § 12. However, documents can be public records even if they are subject to a claim of privilege. *See In re Tollison*, 92 S.W.3d 632, 634 (Tex. App.—El Paso 2002, orig. proceeding) (holding that medical peer review records that had been filed in another suit were "undisputedly part of the public record," although they were still subject to privilege and could not be introduced in later litigation without consent). Moreover, once Ramirez agreed to the release of these records they became public records of the State Bar, indistinguishable from the records relied upon by Sanchez. Accordingly, the party chair and this Court are entitled to consider these documents in determining if a factual dispute exists.

While there is no material dispute regarding when Ramirez submitted her online exemption form and when she submitted the online form to lift the exemption, the records are in direct conflict about the time period she claimed the exemption. The time periods in the Clerk's records do not even overlap with the time period stated in the MCLE Department's records. There is simply no way to reconcile the fact that while the Clerk's records show that Ramirez claimed the non-practicing exemption until November

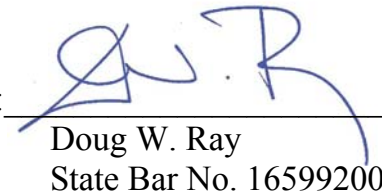
5, 2009, the MCLE Department's records show that Ramirez only claimed the exemption through October 31, 2008. Accordingly, as there is no way to determine when Ramirez actually claimed the non-practicing exemption based upon the records available, it could only be determined after a factual investigation. Because the party chair could only declare Ramirez ineligible only if the facts showing such were conclusively established by public records, TEX. ELEC. CODE § 145.003(f), he had no authority to declare Ramirez ineligible under these records.

PRAYER

Based upon the foregoing, Rebecca Ramirez Palomo, Relator, respectfully requests this Court to order the Fourth Court of Appeals to vacate its order in cause number 04-12-00085-CV and to order Sylvia Palumbo to place Relator's name on the Democratic primary ballot for the office of judge of the 341st Judicial District.

Respectfully submitted,

RAY & WOOD

By: 

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CERTIFICATE OF SERVICE

By affixing my signature below, I, Doug W. Ray, hereby certify that a true and correct copy of the above Relator's Reply to Real Party in Interest's Response has been delivered to the parties below on the 22nd day of March, 2012.

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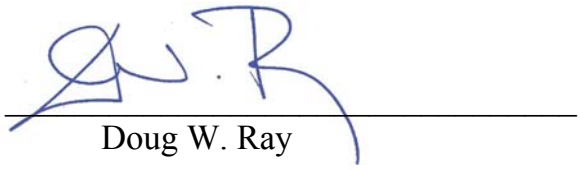

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