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A Tale of Two Licenses

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"NO PERSON SHALL BE ELIGIBLE to be a Judge or Associate Judge unless he is a United States citizen, a licensed attorney-at-law of [Illinois], and a resident of the unit which selects him." Ill. Const. 1970, art. VI, § 11. But what about attorneys who place their law license on "inactive" status? They certainly are a "licensed attorney-at-law," but are they eligible for appointment or election as a Judge?

Illinois Supreme Court Rule 756 governs attorneys on inactive status, and the rule states that "upon such registration [as an inactive status attorney], the attorney shall be placed upon inactive status and shall no longer be eligible to practice law or hold himself or herself out as being authorized to practice law in this state, except as is provided in paragraph (k) of this rule." IL Sup. Ct. R 756(a)(5). Further, paragraph (b) of Rule 756 states that "[a]n attorney listed on the master roll as on inactive or retirement status shall not be entitled to practice law or to hold himself or herself out as authorized to practice law in Illinois, except as is provided in paragraph (k) of this rule." Paragraph (k) only authorizes inactive status attorneys to practice law on a *pro bono* basis, under the auspices of a sponsoring entity, and only after the inactive attorney and the sponsoring entity have submitted a statement to the Administrator indicating that the inactive attorney will be participating in a *pro bono* program. Once the inactive attorney and the sponsoring entity submit the required statements and verifications to the Administrator, then the Administrator shall reflect on the master roll that the inactive attorney is authorized to provide *pro bono* legal services.

The Illinois Constitution does not require a candidate to possess an "active" license but must merely be a "licensed attorney." However, all law licenses are not the same. An instructive case is *People v. Munson*, 319 Ill. 596 (1925).

In *Munson*, a criminal defendant moved to quash his indictment for certain offenses for various reasons. One of the reasons given by the defendant was that the elected State's Attorney for Moultrie County was not licensed to practice law, and therefore, the State's Attorney's participation in the grand jury process by conducting the examination of witnesses, aiding in the drawing of indictments, etc. vitiated the indictment. The People objected to the motion by contending that the "Constitution, which creates the office of state's attorney, and the statute providing for the election of that officer, do not require that the incumbent shall be licensed to practice law in this state, therefore want of license to practice law is not a bar to eligibility to that office, and that since he may act as state's attorney he may attend a grand jury, subpoena witnesses and examine them, and draw and sign indictments." *Munson*, at 598. The Illinois Supreme Court held that the indictment should have been quashed even though the Constitution did not require that the elected State's Attorney be licensed to practice law because the ability to practice law was "inherent in the duties of the office itself." *Id.* at 600 *citing People v. Hubbard*, 313 Ill. 346 (1924).

The *Munson* court also cites to *Baxter v. City of Venice*, 271 Ill. 233 (1916). In *Baxter*, the elected city attorney sued the city to recover his salary for a period of six months. He was not licensed to practice law, so the city defended the suit on that basis. *Munson* states "it was there held that while the statute provides no qualifications or duties for city attorney except that he shall be a qualified elector of the city and shall have resided there at least a year before his election, the qualification that he be an attorney at law arose by implication."

In *Munson*, the requirement of the ability to practice law was "inherent in the duties of the office itself." *Munson*, at 600. This was true despite the fact the Illinois Constitution at the time only stated that "Section 22 of article 6 of our Constitution provides as follows:

'At the election for members of the General Assembly in the year of our Lord 1872, and every four years thereafter, there shall be elected a state's attorney in and for each county in lieu of the state's attorneys now provided by law, whose term of office shall be four years.'" *Munson*, at 597. There was no express constitutional requirement that the State's Attorney be licensed or be able to practice law in order to do the job at the time, but the Illinois Supreme Court held that being able to practice law was inherent, or implicit, in the duties of the

office itself. *Id.* at 600.

Similarly, there is no express requirement in the Constitution that a judge be "actively licensed" but only be "licensed." However, having the ability to practice law is an inherent requirement to being a judge, just as being a licensed attorney that was able to practice law was inherent to execute the duties of State's Attorney in *Munson*.

Other states that have confronted the question of whether an attorney needed to be able to practice law in order to be a judge are helpful. "It is the 'common sense understanding' that where Bar membership is an eligibility requirement for judicial office, one may not be a judge in a court in which one's own practice as a lawyer would be disallowed." *In re Advisory Opinion to Governor re Com'n of Elected Judge*, 17 So.3d 265, 266 (Fl. 2009); *citing to State ex rel. Willis v. Monfort*, 159 P. 889, 891 (Wash. 1916)("No person is eligible to the office of judge of the superior court unless … he is, at the time he becomes a candidate or is required to qualify as such judge, entitled to practice in the courts of this state"); *Johnson v. State Bar of Cal.*, 73 P.2d 1191, 1193 (Cal. 1937)("Certainly an attorney who has been suspended from the practice of law during this period cannot successfully claim to be eligible"); *Hanson v. Cornell*, 12 P.2d 802, 804 (Kan. 1932)("Obviously the Legislature intended that for one to be qualified to hold the office of judge … his admission to practice law created a status which continued and under which he was engaged in the active and continuous practice of law …"); *Cornett v. Judicial Ret. & Removal Comm'n*, 625 S.W.2d 564 (Ky. 1981)(stating that a person under temporary suspension from the practice of law cannot serve as a judge).

The 2009 Florida Supreme Court case is particularly helpful in this analysis because the attorney at issue in that case was suspended from the practice of law, but the Florida Constitution only requires a judge to be a member of the bar, and even suspended attorneys are still members of the bar. The Florida Supreme Court interpreted the phrase in the Florida Constitution that says in order to be a judge, a lawyer must be a "member of the bar of Florida" to mean "member with the privilege to practice law." Therefore, the court held that a lawyer who is suspended from the practice of law fails to satisfy the constitutional eligibility requirements for judgeship because they lack the ability to practice law regardless of meeting the other requirements.

While these out-of-state cases all deal with suspended attorneys, not inactive attorneys, that is a distinction without a difference. The reason that the distinction is irrelevant is because none of the attorneys in the cases above possessed the right to practice law. It is the inability to practice law that matters, not the reason for the inability. Just as a suspended attorney, a disbarred attorney, and a non-attorney are all unable to practice law, the same holds true for an inactive attorney. None of them meet the basic criteria needed to don a robe and preside over a court of law.

Further, the fact that an attorney who voluntarily inactivated their license to practice law means one thing—that attorney could neither practice law nor hold themselves out as having the ability to practice law. Illinois Supreme Court Rule 756 is very clear on this point.

It is inherent in the office of judge that a candidate be entitled to practice law. Any argument to the contrary defies logic. To argue that a judge does not need to be able to practice law to be a judge, but an attorney representing a party before the court does need to be able to practice law, would be absurd. It simply cannot be said that one must have the ability to practice law in order to represent a defendant who received a traffic ticket, but one need not have the ability to practice law in order to preside over the trial of the defendant with the ticket, decide if the charge was proven beyond a reasonable doubt, and, if guilty, impose a sentence based upon the proper legal authority.

In addition to the Supreme Court Rules, there are statutory issues to consider as well. The Illinois Attorney Act, states "No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney, nor may an unlicensed person advertise or hold himself or herself out to provide legal services." 705 ILCS 205/1 (West 2008).

Inactive attorneys would not be able to receive any compensation as a judge because they are not "regularly licensed" attorneys as required by the Attorney Act. They are not allowed to, directly or indirectly, receive compensation as an attorney because they are not allowed to practice law. Under the Attorney Act, the practice of law without being regularly licensed constitutes the unauthorized practice of law. When judges are on the bench, they are paid to practice law.

Judicial duties and responsibilities are awesome and should be neither sought nor obtained by those who do not meet the basic criteria for such an honorable office. Being qualified to be a judge means being able to practice law. The distinction between "active" and "inactive" lawyers was not known when the drafters of the 1970 Illinois Constitution completed their work. In 1970, either you were licensed and able to practice law or you were not. There was no reason to distinguish between "active" and "inactive" lawyers because the distinction—a function of the Supreme Court Rules—did not exist. The ability to practice law is an inherent requirement to being a jurist. Because of this, it does not appear possible for an inactively licensed attorney to hold the office of Judge in Illinois. ■