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Supreme Court Examines Right to Counsel Involving Criminal Defense Lawyer Not Licensed in Washington

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The Sixth Amendment guarantees “the assistance of counsel” to criminal defendants. Most post-conviction relief cases addressing this issue focus on whether counsel was “ineffective.” On unusual facts, the Washington Supreme Court recently examined the question of whether a lawyer not licensed in Washington but actively licensed in Idaho met the Sixth Amendment’s right to counsel. In a 5-4 decision, the Supreme Court found that the constitutional requirement was satisfied.

Matter of Lewis, __ Wn.2d __, 2023 WL 1457586 (Feb. 2, 2023), involved companion petitions for post-conviction relief from cases in Asotin County, which borders Idaho in southeast Washington. Both petitioners were represented by the same contract public defender. Their lawyer was an active member of the Idaho State Bar and had practiced criminal defense there for over 30 years. The lawyer, however, was not licensed in Washington. When applying for public defense work in Asotin County, the lawyer told the county that he was “in the process” of applying for Washington admission—but had not actually done so yet. (*Id.* at *15). The lawyer was awarded the contract and represented over 100 indigent clients in Washington. Although he eventually applied for admission in Washington, he never completed the requirements and never received a

Washington license. When his lack of a Washington license finally surfaced, he was disciplined in Washington and enjoined from reapplying here for a substantial period.

Following their convictions being affirmed on appeal, the petitioners sought post-conviction relief based primarily on the lawyer's lack of a Washington license (or other authorized admission). At the Supreme Court, the majority (while stressing they in no way condoned the lawyer's conduct) concluded that the constitutional guarantee was, essentially, for a lawyer rather than a lawyer licensed in Washington. The dissenters took the opposite position—arguing that the lack of a license was not merely a “technical” violation.

For lawyers handling criminal proceedings, *Lewis* merits careful review as the majority and dissenting opinions collectively survey a basic constitutional right—albeit under unusual circumstances. For other lawyers, *Lewis* underscores that even though the admission rules now make cross-border practice much easier, there are potentially significant consequences to a lawyer—and the lawyer's clients—who does not follow those rules.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.