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Invalidation of Residency Requirements for Admission to the Bar: Opportunities for General Reform

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NOTES

INVALIDATION OF RESIDENCY REQUIREMENTS FOR ADMISSION TO THE BAR: OPPORTUNITIES FOR GENERAL REFORM

I. INTRODUCTION

Individuals must jump several major hurdles to earn the right to practice law. One hurdle state bars have traditionally imposed is the requirement that applicants demonstrate their residency in that state. This must be done either upon application,[1] prior to admission, or upon admission.[2] A residency requirement has been imposed on both applicants applying for admission by examination,[3] and attorney applicants admitted on motion without exam.[4]

Residency requirements have been common and long-standing,[5] and have prompted challenges on constitutional[6] and pragmatic[7] grounds for

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1. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 16-16-2 (1987). The residency requirement component was declared unconstitutional in Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982) (mem.).

2. *See, e.g.*, WYO. SUP. CT. R. 5(c).

3. *See, e.g.*, 40 IOWA CODE ANN. § 602 app. A, Rule 105.

4. *See, e.g.*, ILL. SUP. CT. R. 705. *See generally infra* appendix and accompanying notes (survey of residency and other requirements in 50 states and Washington, D.C.). Because residency requirements prove most restrictive for attorney applicants with established practices elsewhere, this Note will concentrate on their plight.

5. *Cf.* Farley, *Admission of Attorneys from Other Jurisdictions*, in SURVEY OF THE LEGAL PROFESSION: REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 152, 168 n.3 (R. Smith ed. 1952) (survey indicating only 10 states did not require residency of attorney applicants).

6. In 1798, Andrew Jackson and others petitioned against a Tennessee state law requiring one-year residency within the state prior to bar admission, asserting that it was "inconsistent with the spirit of the federal constitution which declares that citizens of the United States shall be entitled to all the privileges and immunities of citizenship in the several states." Pratt, Book Review, 41 VAND. L. REV. 667, 671 (1988) (quoting J. ELY & T. BROWN, LEGAL PAPERS OF ANDREW JACKSON 102 (1987)). *See generally* Annotation, *Validity and Construction of Statutes or Rules Conditioning Right to Practice Law Upon Residence of [sic] Citizenship*, 53 A.L.R.3D 1163 (1973).

7. *See, e.g.*, Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 272, 397 N.E.2d 1309, 1312-13, 422 N.Y.S.2d 641, 645 (1979); Smith, *Time for a National Practice of*

many years. Despite a flurry of academic[8] and judicial[9] assaults on residency requirements in the 1970s, in that decade only four courts ruled residency requirements unconstitutional.[10] The Supreme Court of the United States summarily affirmed[11] or denied certiori[12] in several cases upholding residency barriers, supporting an inference that the Court would not help eliminate the residency hurdle.[13]

However, in deciding *Gordon v. Committee on Character & Fitness* in 1979,[14] the New York Court of Appeals opened the door for successful challenges[15] based on the privileges and immunities clauses of the Constitution.[16] The Supreme Court has since settled the residency issue, declaring that the Constitution will not tolerate residency requirements, either

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Law Act, 64 A.B.A. J. 557, 558 (1978); Comment, *The Future of State Bar Residence Requirements Under the Privileges and Immunities Clause*, 26 S.D.L. REV. 79, 87 (1981).

8. *See, e.g.*, Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979) [hereinafter Note, *A Constitutional Analysis of State Bar Residency Requirements*]; Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838 (1973); Note, *Durational Residence Requirements from* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622 (1975).

9. *E.g.*, Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978); Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); *Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641.

10. Potts v. Honorable Justices of the Supreme Court of Haw., 332 F. Supp. 1392 (D. Haw. 1971); *Lipman*, 329 F. Supp. 391 (invalidating one-year durational residency requirement, upholding 90-day requirement, against equal protection clause challenge); *Keenan*, 317 F. Supp. 1350; *Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641.

11. *Wilson*, 416 F. Supp. 984, *aff'd mem.*, 430 U.S. 925 (1977); Brown v. Supreme Court of Va., 359 F. Supp. 549 (E.D. Va.) (per curiam), *aff'd mem.*, 414 U.S. 1034 (1973); Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M.), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972).

12. Aronson v. Ambrose, 479 F.2d 75 (3d Cir.), *cert. denied*, 414 U.S. 854 (1973); Tang. v. Appellate Div., 373 F. Supp. 800 (S.D.N.Y. 1972), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

13. *See* Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286, 1289-91 (W.D. Wis. 1980) (upholding privileges and immunities claim against residency requirement, citing summary affirmance of *Wilson*, 416 F. Supp. 984). *But see* Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring) ("[T]he Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.").

14. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (rule making bar admission contingent on actual residency for six months preceding application held to violate privileges and immunities clause).

15. *See, e.g.*, Helminski v. Supreme Court of Colo., 603 F. Supp. 401 (D. Colo. 1985); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982) (mem.); Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D. Ala. 1981) (mem.); Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440 (W. Va. 1982).

16. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

for those taking the bar exam,[17] or for those seeking admission to a state's bar without exam on the basis of admission elsewhere.[18]

Invalidation of residency requirements pleases many practitioners in today's environment of interstate practice,[19] but arguably threatens the independence and integrity of state bar associations.[20] This Note examines the development and purposes of residency requirements, and the effects of such barriers on lawyers and clients. It also reviews the two Supreme Court decisions that declared residency barriers unconstitutional.[21] Further, this Note evaluates the efficacy of actual and potential state responses to the abolition of residency requirements. An Appendix lists pertinent court rules and statutes governing bar admission in the fifty states and the District of Columbia, as published in the most recent statutory and rules compilations available. The Appendix also summarizes in chart form the laws regarding residency and other selected requirements for bar admission.[22]

II. THE REQUIREMENT OF RESIDENCY

A. *General Background and History*

All states[23] use three major types of requirements to ensure lawyer competence: educational mandates, bar examinations, and moral character standards.[24] Most states require graduation from a law school ap-

17. Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985).

18. Supreme Court of Va. v. Friedman, 108 S. Ct. 2260 (1988).

19. A former American Bar Association president proposed a decade ago, that "[i]t is in the national interest and the interest of nationwide consumers of legal services that restrictive practices and state barriers be eliminated and interstate reciprocity [bar admission without exam for licensed attorneys practicing elsewhere] be broadened." Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557, 559 (1978); *see* P. ROSS, THE CONSTITUTIONALITY OF STATE BAR RESIDENCY REQUIREMENTS 2, 18 (1982); Bernstein, *A Modest Proposal*, 55 B. EXAMINER 10-11 (Aug. 1986); Salibra, *Uniform Admissions: The Time Has Come*, 54 B. EXAMINER 13-14 (Nov. 1985).

20. *See* Young, *A National Bar? No!*, 54 FLA. B.J. 109, 111-12 (1980) (national admission standard would be insufficient to test local law and procedure knowledge, and would excessively promote domination of practice by large and multistate firms); *cf.* Farley, *supra* note 5, at 167 (recommending residence not be required for longer than three months prior to filing application or six months prior to admission date).

21. Many sources review constitutional jurisprudence as it applies to bar admissions. *See, e.g.*, P. ROSS, *supra* note 19; Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 8; Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 731-79 (1981); Annotation, *Validity and Construction of Statutes or Rules Conditioning Right to Practice Law Upon Residence of [sic] Citizenship*, 53 A.L.R.3D 1163 (1973). Such detailed historical overview and analysis is beyond the scope of this Note.

22. *See infra* appendix and accompanying notes.

23. "States," as used in this Note, includes the District of Columbia, but not the territories of the United States.

24. *See* A.B.A. Section of Legal Education and Admission to the Bar and the National

proved by the American Bar Association,[25] and several impose undergraduate education standards.[26] Nearly all state bars test applicants with comprehensive exams on fundamental topics of interstate and local law.[27] Some states allow admission by motion, without the standard exam, for certain experienced practicing attorneys, judges or professors licensed elsewhere.[28] All states have long imposed moral character prerequisites, albeit with shortcomings.[29]

States clearly have the duty and constitutional power to impose such demands on persons seeking to practice law within their boundaries.[30] The rationale for requiring residency, either prior to or concurrent with admission,[31] is less clear.[32] Nonetheless, residency requirements became common.[33]

Conference of Bar Examiners, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1986) [hereinafter 1986 A.B.A. GUIDE].

25. *E.g.*, KY. SUP. CT. R. 2.070; N.M. SUP. CT. R. 15-103(B); *see* Kirkwood, *Requirements for Admission to Practice Law*, in SURVEY OF THE LEGAL PROFESSION: REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 101 (R. Smith ed. 1952).

26. *E.g.*, DEL. SUP. CT. R. 52 (a)(4); UTAH CODE ANN. § 78-51-10 (Repl. Vol. 1987).

27. *E.g.*, DEL. SUP. CT. R. 52(a)(4); FLA. BAR EXAM R. art. 1, § 1; *see* A.B.A. Section of Legal Education and Admission to the Bar and the National Conference of Bar Examiners, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 14-21 (1988) [hereinafter 1988 A.B.A. GUIDE].

28. *E.g.*, MASS. SUP. JUD. CT. R. 3:01, § 6.1 (limited written exam in practice and procedure required); N.C. R. GOVERNING ADMISSION TO PRACTICE OF L. § .0502; *see* 1988 A.B.A. GUIDE, *supra* note 27, at 28-30; *infra* appendix and accompanying notes.

29. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 497 & n.20 (1985).

30. *See, e.g.*, Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 159 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

31. *Compare* 40 IOWA CODE ANN. § 602 app. A, Rule 105 (West 1988) (residency or bona fide intention to become resident upon admission required of all applicants) *and* VA. SUP. CT. R. 1A:1(c) (state high court must find applicant has become a permanent resident for admission on motion) *with* WYO. SUP. CT. R. 5(c) (six-month residency prior to application required). Rules like those of Iowa and Virginia call for "simple" residency which is merely residency at the time of application or admission. Rules like Wyoming's demand "durational" residency which is continued residency in the state for some period prior to application or admission. *See* P. ROSS, *supra* note 19, at 1; Comment, *supra* note 7, at 79-80.

32. *Compare, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 285-87 (1985) (dismissing alleged purposes of residency requirements) *and* Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 8, at 1489 (also dismissing alleged purposes of residency requirements) *with* Sestric v. Clark, 765 F.2d 655, 661 (7th Cir. 1985) (residency facilitates knowledge of state's law and practice), *cert. denied*, 474 U.S. 1086 (1986) *and* Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M.) (six-month durational prior residency requirement held a reasonable period for morals investigation), *aff'd mem. sub. nom.* Rose v. Bondurant, 409 U.S. 1020 (1972) *and* Young, *supra* note 20, at 110 (implying practice restrictions serve legitimate goal of controlling local economic conditions).

33. *See* 1986 A.B.A. GUIDE, *supra* note 24, at 28-30 (30 states retained residency requirements for attorney applicants in 1986); Farley, *supra* note 5.

B. *Effects of Residency Requirements*

Whatever the asserted goals and benefits of residency requirements, their most noticeable effects are economic.[34] There are at least three principal groups of lawyers aggrieved by residence requirements: those admitted to practice in one state who desire to practice elsewhere; lawyers planning to specialize and engage in multistate practice elsewhere; and corporate lawyers subject to frequent relocation.[35] At least one student commentator would add another group, new graduates hoping to practice in a state other than the one they resided in during law school.[36]

Durational residence requirements pose formidable barriers for attorneys licensed elsewhere. Under the New York rule voided in *Gordon v. Committee on Character & Fitness*,[37] for example, an attorney had to give up his or her residence and occupation for at least six months.[38] A rule which forces veteran attorneys to relinquish practice[39] inflates legal service costs and does a disservice to consumers.[40] In-house corporate counselors may be in the worst position because they must often move as their employers dictate.[41]

Lawyers have an important role in daily commerce[42] and practice limitations such as residency requirements frustrate expansion of the interstate practice of law.[43] The New Jersey Supreme Court foreshadowed the demand for freer multistate practice rules over twenty years ago, in *Ap-*

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34. Supreme Court of N.H. v. Piper, 470 U.S. 279, 285 n.18 (1985) ("Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." (quoting Smith, *supra* note 19, at 557)); *see also* Sestric v. Clark, 765 F.2d 655, 663 (7th Cir. 1985).

35. Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 272, 397 N.E.2d 1309, 1312-13, 422 N.Y.S.2d 641, 645 (1979).

36. Comment, *supra* note 7, at 87.

37. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

38. *Id.* at 272, 397 N.E.2d at 1312, 422 N.Y.S.2d at 645.

39. In limited situations, lawyers could move to the jurisdiction where the durational mandate exists, and continue to practice in the state where they are licensed, because state bars have virtually never imposed continuing residency requirements. *See* Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 MISS. L.J. 1, 33 n.17 (1983).

40. A peculiar alliance formed between consumer activist Ralph Nader's Public Citizen Litigation Group and lawyers arguing for rules facilitating interstate practice, "because ironically, in this instance the corporations were consumers." Salibra, *supra* note 19, at 14.

41. *Id.* at 13. In arguing for a substantially nationalized admission standard, Salibra complains that dealing with differences in substantive law among the states is less onerous for attorney and client than the administrative morass of gaining access to state courts. *Id.*

42. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975).

43. *See* Leis v. Flynt, 439 U.S. 438, 449 n.8 (1979) (per curiam) (Stevens, J., dissenting) (quoting Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 699-700 (1975)); P. Ross, *supra* note 19, at 2.

pell v. Reiner.[44] The court in *Appell* reversed and remanded a lower court decision that a mortgage note was invalid because it was negotiated by a New York attorney who was not a member of the New Jersey bar. Although acknowledging the "general controlling principle" that transactions made for New Jersey residents under New Jersey law must be furnished by New Jersey counselors, the court noted:

> We nevertheless recognize that there are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multistate transactions arising in modern times. This is particularly true . . . in the midst of the financial and manufacturing center of the nation . . . . An inflexible observance of the general controlling doctrine may well occasion a result detrimental to the public interest, and it follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines.[45]

Demographics indicate that residency requirements ignore economic realities. As of 1980, there were forty-one standard metropolitan statistical areas ("SMSAs"), as defined by the Census Bureau, covering contiguous geographic areas in two or more states.[46] Besides representing a large share of the nation's general population and commercial centers, the SMSAs were home to an estimated 138,087 lawyers.[47] This represents twenty-five percent of the estimated 542,205 lawyers nationwide.[48]

III. Current State of the Law

A. Piper *and* Friedman: *The One-Two Combination*

If *Gordon v. Committee on Character & Fitness*[49] opened the door to the constitutional rejection of residency requirements,[50] the Supreme Court gave New York's high court the key with *Hicklin v. Orbeck*,[51] a privileges and immunities clause[52] case. The privileges and immunities clause aims to place "the citizens of each State upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those States is concerned."[53] The privileges and immunities

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44. 43 N.J. 313, 204 A.2d 146 (1964).
45. *Id.* at ___, 204 A.2d at 148.
46. American Bar Foundation, The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s 547 (B. Curran ed. 1985) [hereinafter Lawyer Statistical Report].
47. *See id.* at 547-68.
48. *Id.* at 565.
49. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).
50. *See supra* notes 14-16 and accompanying text.
51. 437 U.S. 518 (1978).
52. U.S. Const. art. IV, § 2, cl. 1.
53. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).

clause is implicated whenever states, without substantial justification,[54] discriminate against nonresidents in the exercise of certain important individual rights.[55]

In *Hicklin*, the Court clarified that a state must pass two tests to justify discriminatory treatment under the privilege and immunities clause.[56] States must show that nonresidents contribute substantially to the problem the discriminatory state action attempts to alleviate, and show that the action bears a close relationship to a substantial state interest.[57] The *Hicklin* opinion implied that the availability of less restrictive alternatives to protect the state's interest is probative and harms the state's case.[58] This revitalized privileges and immunities clause doctrine set the stage for the two cases in which the Court squarely addressed bar admission requirements.

The facts involved in *Supreme Court of New Hampshire v. Piper*[59] were simple. Piper, who lived 400 yards from the New Hampshire border, in Vermont, applied to take the New Hampshire bar exam.[60] She stated in her application her intent to become a New Hampshire resident, and passed the bar's character scrutiny and examination.[61] The New Hampshire Board of Bar Examiners, citing New Hampshire Supreme Court Rule 42, notified her that she had to establish a home address in that state before admission would be granted.[62] She informed the board she had decided to stay in Vermont for personal and financial reasons and sought an exception to the rule.[63] The exception was denied, and Piper filed suit in federal court, challenging the rule on constitutional grounds.[64]

The district court held that the practice of law was a fundamental right protected by the privileges and immunities clause. It found that Rule 42 denied Piper this right without substantial reason, and that the rule was not closely tailored to its intended goals. The district court thus con-

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54. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 396 (1948).

55. These include professional pursuits important to the national economy, including the practice of law. *E.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 280-81 (1985); Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 272, 397 N.E.2d 1309, 1312, 422 N.Y.S.2d 641, 644-45 (1979).

56. *Hicklin*, 437 U.S. at 525-26. The Supreme Court had previously articulated the tests, but it was not clear that each test represented a separate hurdle. *See Toomer*, 334 U.S. at 396.

57. *Hicklin*, 437 U.S. at 525-26. Economic protectionism, a state's desire to insulate resident businesses from nonresident business competitors, does not represent a "substantial" state interest justifying discriminatory treatment. *See Piper*, 470 U.S. at 285 n.18.

58. *Hicklin*, 437 U.S. at 528.

59. 470 U.S. 274 (1985).

60. *Id.* at 275-76.

61. *Id.* at 276.

62. *Id.* at 276-77.

63. *Id.*

64. *Id.*

cluded that Rule 42 violated the privileges and immunities clause.[65]

The Supreme Court began its review with a brief history of the privileges and immunities clause and explained that the practice of law falls within the ambit of the clause. The Court found it significant that lawyers play important roles in national commerce and as champions of unpopular causes and federal rights.[66]

The Court rejected the appellant's assertion that lawyers are so important to state judicial authority that their regulation falls within the "political rights" exception to the privileges and immunities clause.[67] Relying principally on *In re Griffiths*,[68] the Court concluded that the political rights exception was unwarranted, and the practice of law was thus a right protected by the privileges and immunities clause.[69]

The Court next considered New Hampshire's justifications for refusing to admit nonresidents into the bar. The state asserted that nonresidents would be less likely than residents to: gain and maintain familiarity with local rules and procedures, behave ethically, be available for unexpected court proceedings, or do *pro bono* and similar public service work in the state.[70] The Court proclaimed these assertions insufficient to establish a substantial reason for excluding nonresidents and further stated that exclusion of residents did not bear a substantial relationship to such goals.[71] In addition, the Court commented that Rule 42 was "markedly overinclusive," and suggested mandatory attendance at state practice seminars as a less restrictive alternative for maintaining attorney competency.[72] Because New Hampshire permitted established bar members to move out of state without losing their membership, Rule 42 was also underinclusive.[73]

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65. *Id.* at 277; *see* Piper v. Supreme Court of N.H., 539 F. Supp. 1064 (D.N.H. 1982).

66. *Piper*, 470 U.S. at 281 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975), and Leis v. Flynt, 439 U.S. 438, 450 (1979) (Stevens, J., dissenting)).

67. *Id.* at 283. The Court has long recognized states' independence in controlling activities directly related to their sovereignty as separate political bodies. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (upholding 30-day residency requirement, but not one-year, for right to vote in state election); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.) (seven-year residency requirement upheld for candidates for governor), *aff'd mem.*, 414 U.S. 802 (1973).

68. 413 U.S. 717 (1973) (rejecting the same political rights argument made in *Piper*, and holding that exclusions of aliens from a state's bar violates the equal protection clause of the fourteenth amendment).

69. *Piper*, 470 U.S. at 283.

70. *Id.* at 285.

71. *Id.*

72. *Id.* at 285 n.19. At least 30 states have some continuing legal education requirement for active bar members. *See* VA. SUP. CT. R. Pt. 6, § IV, para. 17; 1988 A.B.A. GUIDE, *supra* note 27, at 40-41.

73. *Piper*, 470 U.S. at 285 n.19. Other courts have criticized this seeming inconsistency. *See, e.g.*, Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 160 (D.S.D. 1982) (mem.).

The Court found no evidence or logic to support New Hampshire's claim that nonresidents would be unfamiliar with local procedure or behave unethically.[74] Addressing the latter matter, the Court observed that states may and do discipline nonresident lawyers for unethical conduct.[75]

The Court found more merit to the argument that nonresidents are more likely than residents to be unavailable for court proceedings, but found the concern insubstantial.[76] Proper scheduling and the use of conference telephone calls for minor judicial proceedings reduce the risk of unavailability.[77] Lawyers who were willing to take the New Hampshire bar exam and pay annual bar dues would be expected to live close to the state anyway, the Court surmised.[78] Further, trial courts could control the problem by imposing rules or discretionary orders requiring that lawyers residing far from court must retain local counsel, available for unscheduled meetings and hearings.[79]

The New Hampshire Supreme Court's final argument, that nonresidents would not be inclined to do *pro bono* work, conflicted with the Court's "reasonable" belief that "most lawyers who become members of a state bar will endeavor to perform their share of these services."[80] The Court mentioned the alternative of requiring all bar members to do *pro bono* service.[81] The Court thus held that the New Hampshire residency requirement violated the privileges and immunities clause.[82]

Justice Rehnquist based his dissent principally on two factors: a more traditional view of lawyers as officers of the state,[83] and disdain for the Court's emphasis on means analysis and the availability of less restrictive alternatives.[84] His reasonable views on legal traditions and judicial review failed to mask a distasteful implication that insular economic protectionism for lawyers is justified.[85]

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74. *Piper*, 470 U.S. at 285-86.

75. *Id.* at 286 & n.20. Several states have disciplinary rules asserting jurisdiction over nonresidents, or ensuring jurisdiction, by requiring nonresidents to designate an in-state agent for service of process. *See, e.g.*, 40 IOWA CODE ANN. § 602 app. A, Rule 105 (West 1988); N.J. CT. R. 1:21-1; WASH. R.L.D. 1.2; *infra* appendix and accompanying notes.

76. *Piper*, 470 U.S. at 286.

77. *See id.* at 286 & n.21.

78. *Id.* at 286-87.

79. *Id.* at 287.

80. *Id.*

81. *Id.* at 287 & n.22. The Court did not address the potential constitutional challenges to such schemes. *See* Cunningham v. Superior Court of Ventura County, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (1986).

82. *Piper*, 470 U.S. at 288.

83. *Id.* at 289-93 (Rehnquist, J., dissenting).

84. *Id.* at 294-95.

85. "Since at any given time within a State there is only enough legal work to support a certain number of lawyers, each out-of-state lawyer who is allowed to practice necessarily takes legal work that could support an in-state lawyer . . . ." *Id.* at 292-93. This state goal

The Court's decision in *Piper* took the "residents only" sign off the door to bar admissions, but it took a challenge to a Virginia rule to take the door off its hinges. The Court in *Piper* affirmed the unconstitutionality of residency requirements for taking a bar exam. *Supreme Court of Virginia v. Friedman*[86] extended that holding to compulsory residency for attorney applicants admitted by motion, without examination.[87]

Under Supreme Court of Virginia Rule 1A:1, certain attorneys admitted to practice before the highest court in other American jurisdictions may apply to join the Virginia bar if the place where they are currently licensed allows admission on motion.[88] Applicants must file an official application with the Supreme Court of Virginia and submit a certificate signed by the presiding judge of the high court where they are entitled to practice stating that the license has been in effect for at least five years.[89] They must also furnish a National Conference of Bar Examiners report[90] concerning their past practice and record.[91] Upon paying a fifty dollar filing fee, the attorney applicant may gain admission by motion of an existing Virginia bar member, provided the Supreme Court of Virginia finds the applicant: is "a proper person to practice law," has made such progress in legal practice as to make an exam requirement unreasonable, has "become a permanent resident of the Commonwealth," and intends to practice full-time as a Virginia bar member.[92] The court may revoke a license granted under this rule if it finds the licensee no longer satisfies the residency or full-time practice requirements.[93]

A veteran attorney, who joined the Illinois bar by examination in 1977 and the District of Columbia bar by reciprocity in 1980 challenged the residency clause Supreme Court of Virginia Rule 1A:1. She worked as an attorney for the United States Navy from 1977 to 1981, and entered private practice in Washington, D.C., in 1982. In January of 1986, she became associate general counsel for a corporation based in Vienna, Virginia.[94] One month later, she married and moved to her husband's home

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does not represent a substantial state interest, for purposes of privileges and immunities clause analysis. *See supra* note 57.

86. 108 S. Ct. 2260 (1988).

87. *Id.* at 2267.

88. VA. SUP. CT. R. 1A:1. Such practice is commonly called "admission by reciprocity," or "admission by comity." *See* Hafter, *supra* note 39, at 4.

89. VA. SUP. CT. R. 1A:1(1), (2).

90. The report employs the nationwide investigative powers of the national conference, and is required of attorney applicants by many states. *See* Merritt, *The National Conference of Bar Examiners*, in SURVEY OF THE LEGAL PROFESSION: REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 462, 477-86 (R. Smith ed. 1952).

91. VA. SUP. CT. R. 1A:1(3).

92. *Id.* R. 1A:1(4)(a)-(c).

93. *Id.* R. 1A:3.

94. *Friedman*, 108 S. Ct. at 2262.

in Maryland. In June of 1986, she applied for admission by motion to the Virginia Bar.[95]

Friedman acknowledged in her complaint that she did not live in Virginia. She assured the Clerk of the Supreme Court of Virginia that she met all other requirements of Rule 1A:1. Friedman asserted there was "no reason to discriminate against [her] . . . petition as a nonresident," citing *Supreme Court of New Hampshire v. Piper* as controlling.[96] The clerk denied Friedman's request. He explained that the Supreme Court of Virginia believed *Piper* did not apply to the "discretionary requirement in Rule 1A:1 of residence as a condition of admission by reciprocity."[97]

Friedman challenged the residency requirement in the United States District Court for the Eastern District of Virginia. She obtained summary judgment on the grounds that the requirement violated the privileges and immunities clause.[98] The Court of Appeals for the Fourth Circuit unanimously affirmed.[99]

The Supreme Court of Virginia claimed that the discretionary admission provided for by Rule 1A:1 was not a protected right under the privileges and immunities clause. It argued that the bar examination serves as an adequate alternative route to bar admission.[100] The Supreme Court of Virginia also noted that it could permissibly require all bar applicants to pass an examination.[101] The Supreme Court of the United States found neither argument persuasive.[102]

The Court read *Supreme Court of New Hampshire v. Piper* to implicate the privileges and immunities clause whenever "a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents."[103] The availability of admis-

95. *Id.* at 2262-63.

96. *Id.* at 2263.

97. *Id.* The clerk's response represents either a syntax error or a misguided Supreme Court of Virginia judgment, because Virginia's reciprocity rule requires that residency and other standards be "determined favorably for the applicant" before admission by motion is allowed. VA. SUP. CT. R. 1A:1.

98. *Friedman*, 108 S. Ct. at 2263. The district court did not address allegations that residency requirements violate the commerce clause or equal protection clause of the fourteenth amendment, and neither the court of appeals nor the Supreme Court considered such questions. *Id.*

99. *Id.*; *see* Friedman v. Supreme Court of Va., 822 F.2d 423 (4th Cir. 1987).

100. *Friedman*, 108 S. Ct. at 2264.

101. *Id.* at 2264-65. A similar argument, that admission by motion for residents represents permissible favor for certain new residents, rather than impermissible penalties against nonresidents, persuaded the Seventh Circuit Court of Appeals to uphold an Illinois bar rule like Virginia's Rule 1A:1. Sestric v. Clark, 765 F.2d 655, 660-61 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986). The Seventh Circuit also rejected commerce clause and equal protection challenges to the Illinois scheme. *Id.* at 661-63.

102. *Friedman*, 108 S. Ct. at 2265.

103. *Id.* at 2265.

sion by examination was unimportant because, even where such discrimination does not totally exclude nonresidents from the state, the privileges and immunities clause may reach discrimination against them.[104] Even the residency rule struck down in *Piper*, the Court noted, did not totally exclude nonresidents from practicing law in the state.[105]

The Court viewed the Supreme Court of Virginia's second argument as irrelevant. "A State's abstract authority to require from resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the discriminatory distinction from the reach of the Privileges and Immunities Clause."[106] Concluding that Rule 1A:1 burdens a protected privileges and immunities clause right solely on the basis of residency,[107] the Court next considered Virginia's justifications for the rule.

The Supreme Court of Virginia claimed that residency, in tandem with the full-time practice requirement,[108] assured that attorneys admitted on motion would be as committed to service and knowledge of Virginia law as those admitted by examination.[109] The Supreme Court of the United States acknowledged that the solemnity and difficulty of examination helps assure knowledge and commitment, but remained unconvinced that nonresident attorney applicants on motion would be less committed than residents applying the same way. "[I]t does not follow that when the State waives the examination it may make a distinction between residents and nonresidents," the Court opined.[110]

Virginia requires that all attorneys admitted on motion show an intent to maintain an office and regular practice in the state.[111] This alone effectively ensures that attorneys admitted on motion, residents or not, will have a substantial stake in the practice of law in Virginia and a concomitant devotion to integrity, service and knowledge.[112] As it did in *Piper*, the Court suggested that mandatory continuing legal education[113] and

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104. *Id.*

105. *Id.* New Hampshire allows *pro hac vice* appearances in its courts, by persons not members of its bar, at the trial court's discretion, if the moving attorney affiliates with a member of the New Hampshire Bar. *See Piper*, 470 U.S. at 277 n.2; *accord*, LA. REV. STAT. ANN. § 37:214 (West 1988); N.J. CT. R. 1:21-1; VA. SUP. CT. R. 1A:4. The right to appear *pro hac vice* under most systems is not a cognizable property interest within the terms of the fourteenth amendment due process clause. *See* Leis v. Flynt, 439 U.S. 438, 443-44 (1979) (per curiam).

106. *Friedman*, 108 S. Ct. at 2265.

107. *Id.*

108. VA. SUP. CT. R. 1A:1(d).

109. *Friedman*, 108 S. Ct. at 2266.

110. *Id.*

111. *Id.* (citing Application of Brown, 213 Va. 282, 286 n.3, 191 S.E.2d 812, 815 n.3 (1972)).

112. *See id.*

113. The Court apparently was not aware of Virginia's existing continuing education pro-

mandatory indigent service plans were constitutional alternatives to residency.[114]

Similar analysis supported the Court's rejection of Virginia's argument that residency facilitates enforcement of the full-time practice requirement of Rule 1A:1. "The office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but also is fully adequate to protect whatever interest the State might have in the full-time practice restriction."[115]

Chief Justice Rehnquist, in an opinion joined by Justice Scalia, dissented.[116] Chief Justice Rehnquist repeated the grounds for the objection he raised in *Supreme Court of New Hampshire v. Piper*.[117] He also showed sympathy for Virginia's assertion[118] that admission by motion should not fall under the rights protected by the privileges and immunities clause.[119]

Chief Justice Rehnquist characterized admission on motion as "an ameliorative provision, recognizing the fact that previous practice in another State may qualify a new resident of Virginia to practice there without the necessity of taking another bar examination."[120] He noted that twenty-eight states presently do not allow reciprocal admission on motion,[121] and expressed concern that Virginia might join the trend[122] toward requiring examination of all applicants.[123]

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gram. *See* VA. SUP. CT. R. pt. 6, § IV, para. 17.

114. *Friedman*, 108 S. Ct. at 2267.

115. *Id.*

116. *Id.* at 2267-68 (Rehnquist, C.J., dissenting).

117. 470 U.S. 275, 289-97 (1985) (Rehnquist, J., dissenting).

118. *See Friedman*, 108 S. Ct. at 2264-65; *supra* note 101.

119. *Id.* at 2267 (Rehnquist, C.J., dissenting).

120. *Id.* Note that this still begs the question. It assumes new residents are more qualified than nonresidents to practice in Virginia without an exam.

121. *Id.* at 2268, n.***. Even acknowledging that Chief Justice Rehnquist may have access to amendments of state court rules unavailable to this author, his note deserves clarification. First, five of the states he lists, California, Maryland, Massachusetts, Mississippi and North Dakota, generally require qualified attorney applicants to take only limited "attorney's exams" in court procedures. Another state he lists, North Carolina, requires only a recent passing score on the MPRE. Montana and Rhode Island, also listed, both allowed admission by reciprocity, according to latest rules published in code compilations; because each also maintained a residency requirement for admission by motion, they may have joined Chief Justice Rehnquist's list since then. *See infra* appendix and accompanying notes; *see also* 1988 A.B.A. GUIDE, *supra* note 27, at 29.

122. *Cf.* Farley, *supra* note 5, at 157 (11 of 48 states required exams of attorney applicants in 1952).

123. *See Friedman*, 108 S. Ct. at 2268 (Rehnquist, C.J., dissenting). This fear reflects Chief Justice Rehnquist's assertion, implied in his *Piper* dissent, that state bars deliberately seek to insulate their established resident memberships from the threat of outside competition. *See supra* note 85 and accompanying text. As the Chief Justice's *Friedman* dissent points out, the unconstitutional Virginia rule is more accommodating to certain attorney

B. *Residency and Other Requirements After the Knockout*

The rapid and recent assault on residency requirements brought rapid change to states' bar admission rules. A 1952 survey found residency required of attorney applicants in all but ten jurisdictions: Washington, D.C., Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Montana and Ohio.[124] Eleven states required examination of attorney applicants.[125] By 1984, residency restrictions confronted attorney applicants in twenty-three of the thirty-one states (including the District of Columbia) that allowed admission on motion.[126] A total of twenty-eight states required residency for admission by exam.[127] By 1986, the decision in *Supreme Court of New Hampshire v. Piper* reduced the number of states retaining residency requirements for admission by exam to six.[128] Thirty states allowed admission by motion.[129]

The most recent statutory and rule compilations regarding bar requirements indicate that twenty-nine states now allow admission on motion.[130] Nine of these states effectively imposed residency requirements on such admissions.[131] Nonresident bar applicants in eleven states must now maintain an in-state office, or designate an in-state agent for purposes of

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applicants than the constitutional alternative requiring exams of all applicants. *See Friedman*, 108 S. Ct. at 2267-68. He fails, however, to address the critical issue under the privileges and immunities clause: whether attorney applicants who do not intend to reside in the Commonwealth are a peculiar source of some state problem, such that they should be required to take a full bar exam, while residents who have practiced elsewhere receive an exam waiver.

As this Note argues, states need not react as defensively as Chief Justice Rehnquist fears they will, particularly if a healthy bar and well-served legal clients are the states' goals. Legislators and bar leaders should also consider that what is good for some resident attorneys is not necessarily good for the state's overall economy. For example, a Texas corporation could be deterred from moving its corporate headquarters to Virginia if it knows it must obtain new counsel for its complicated interstate legal work, and is satisfied with its current provider. *Cf.* Salibra, *supra* note 19, at 13-14 (effective corporate representation is severely impeded by state practice restrictions); Farley, *supra* note 5, at 151 ("[R]equirements which serve only to protect local lawyers from competition . . . can not be justified. They constitute barriers which should be abolished for the good of the profession.").

124. Farley, *supra* note 5, at 152, 168 n.3.

125. *Id.* at 157.

126. *See* Ashman, *New Hampshire's Not So Simple Residence Requirements: The* Piper *Opinions*, 53 B. EXAMINER 24-26 (survey and commentary by executive director of the National Conference of Bar Examiners, pending Supreme Court appeal of *Piper*).

127. *Id.*

128. *See* 1986 A.B.A. GUIDE, *supra* note 24, at 2-4. The *Piper* decision of course invalidated such rules.

129. *Id.* at 28-30.

130. *See supra* note 121; *infra* appendix and accompanying notes.

131. *See infra* appendix and accompanying notes. Again, these rules are void under the decision in Supreme Court of Va. v. Friedman, 108 S. Ct. 2260 (1988).

service of process, or both.[132]

IV. After *Piper* and *Friedman*: Evaluating Alternatives to Residency

Courts and commentators have offered many alternatives to residency requirements[133] to uphold the integrity of state bars without impeding access to the courts by nonresident attorneys.[134] This section will evaluate the viability of such options, in light of administrative constraints and the growing demand for multistate and interstate legal services. Opportunities for reform in Virginia will receive special attention.

A. *The Blanket Exam Requirement*

Virginia may choose to repeal admission on motion altogether, forcing all attorney applicants to take the bar examination, and thus fulfill Chief Justice Rehnquist's prophecy.[135] Several factors argue against such a move.

First, examination is somewhat redundant because Virginia, like virtually all other states, makes the Multistate Bar Examination of the National Conference of Bar Examiners a major component of its exam process.[136] Full examination also would deter an older lawyer more than a younger one. Younger attorneys, who have done less to prove their competency, would perform better on examinations simply because the broad-based concepts tested are fresher in their minds.[137] In this way, examination may hinder the availability of skilled and competent lawyers for Virginia clients, which is the result residency requirements were alleged to promote.

The inherent implication of reciprocal motion systems is that exper-

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132. *See infra* appendix and accompanying notes.

133. *E.g.*, Supreme Court of Va. v. Friedman, 108 S. Ct. 2260, 2266-67 (1988); Supreme Court of N.H. v. Piper, 470 U.S. 274, 285-87 (1985); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 160 (D.S.D. 1982) (mem.); Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 8, at 1488-89.

134. The proposals considered here could generally apply to residents and nonresidents, as well as attorney applicants and applicants for admission by examination.

135. Supreme Court of Va. v. Friedman, 108 S. Ct. 2260, 2268 (1988) (Rehnquist, C.J., dissenting).

136. *See* 1988 A.B.A. Guide, *supra* note 27, at 14-17, 21. The only states which do not administer the Multistate Bar Examination are Indiana, Iowa, Louisiana, and Washington. *Id.*

137. *See* Smith, *supra* note 19, at 558; *cf.* Brenner, *Consultant's Report*, in Survey of the Legal Profession: Reports of Consultant and the Advisory and Editorial Committee on Bar Examinations and Requirements for Admission to the Bar, 145 (R. Smith ed. 1952) (chart indicating passing percentages for first time examination takers declines with age).

ienced attorneys in good standing elsewhere have demonstrated the general legal competency which testing measures in new law school graduates and inexperienced attorney applicants.[138] The traditional justification for examining attorney applicants is that each state has unique laws.[139] Virginia, however, has adopted nationally known uniform laws covering more than fifty topics.[140] These include commercial law,[141] disposition of principal and income from estates,[142] and transfer of assets to minors.[143] Virginia could effectively test knowledge of its unique laws and court procedures by using limited "attorney's exams," used in at least five other states.[144]

Finally, Virginia and other states with unconstitutional residency requirements for reciprocal motion should consider the legal challenges to a decision eliminating reciprocity. Repeal motivated by economic protection of the local bar may be actionable under federal antitrust laws.[145]

B. *Modifying Reciprocity to Meet Valid Concerns*

The invalidation of the residency requirement for attorneys admitted on motion is unlikely to prompt a sudden flood of nonresident attorney applicants.[146] Over eighty percent of the nation's lawyers work in solo

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138. *See* Hafter, *supra* note 39, at 42.

139. *See* Farley, *supra* note 5, at 167; *cf.* Hafter, *supra* note 39, at 9 (exam requirement retains viability in Louisiana, where domestic law stems from the Napoleonic Code).

140. *See* 14 VA. CODE ANN. at 908-10 (Repl. Vol. 1988) (index of uniform law topics).

141. VA. CODE ANN. §§ 8.1-101 to 8.11-108 (1965 & Cum. Supp. 1988).

142. *Id.* §§ 55-253 to -268 (Repl. Vol. 1986).

143. *Id.* §§ 31-37 to -59 (Cum. Supp. 1988).

144. *See supra* note 121; *infra* appendix and accompanying notes. The Commonwealth may be peculiarly justified in examining all attorney applicants for knowledge of state court rules and procedure. For example, Virginia has not followed the state court trend of basing its evidence and civil procedure rules on federal rules.

Another alternative to requiring full examination of all attorney applicants is to adopt a special, limited-practice licensing scheme. Under this approach, attorneys with good standing elsewhere may handle specific matters for one or more clients, whether or not the matter involves court appearances. Morris, *State Borders: Unnecessary Barriers to Effective Law Practice*, 53 A.B.A. J. 530, 531 (1967). Such a system may resemble an expanded *pro hac vice* procedure, limiting practice to attorney applicants associated with local counsel. *See id.* It could also expand upon the limited bar memberships conditioned on type of client or practice. *See, e.g.*, KY. SUP. CT. R. 2.111 (limited practice certificate for lawyers employed full-time by firms doing business in Kentucky); VA. SUP. CT. R. 1A:2 (certain foreign patent and trademark attorneys admitted to practice in those specific areas, without examination or residency requirements).

145. Hafter, *supra* note 39, at 38 n.130.

146. A reciprocity advocate acknowledges that admission statistics in the District of Columbia, once the sole American jurisdiction with reciprocity and no residency strings, suggests otherwise. Hafter, *supra* note 39, at 37-38. The district is an anomaly, however. Among its more than 25,000 resident attorneys, for example, over 57% work for the federal or city government, or for corporations or associations with important lobby interests in the nation's capital. LAWYER STATISTICAL REPORT, *supra* note 46, at 92-93. Many of Washington's

practice or in firms with fewer than ten attorneys,[147] and only two percent of all firms have offices in more than two communities.[148] It remains uneconomical for most lawyers to pay annual bar dues in a distant state where they do not maintain a regular practice. Virginia's in-state office and full-time practice requirements add to the practical barriers for out-of-state attorneys.[149]

However, some increase in the number of attorney applicants is likely. One or more of the following Virginia bar reforms should ensure attorney competency and availability for court proceedings.

1. More Effective and Extensive Character Investigation

Existing Virginia rules require attorney applicants to submit a National Conference of Bar Examiners report on past practice.[150] This is an effective use of Virginia bar resources, and offers an adequate review of an attorney applicant's fitness and moral character.[151] Those not seeking Virginia bar admission on motion should also be subject to more extensive background and character investigations[152] if the Virginia General Assembly and Supreme Court of Virginia continue to believe moral character checks can weed out bad attorneys.

2. Expanded Continuing Legal Education Requirements

Continuing legal education ("CLE") requirements force all attorneys to

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nearly 10,000 resident private practitioners, as well as nonresidents who practice there, also are presumably attracted by federal government interests and administrative law.

147. LAWYER STATISTICAL REPORT, *supra* note 46, at 66.

148. *Id.* at 53. It is also worth noting that 14.8% of lawyers living in Virginia are admitted to practice in other jurisdictions, but not Virginia. *Id.* at 206. This far exceeds the 6.5% national average for this phenomenon. *Id.* at 65.

149. In a case involving solely the Supreme Court of the United States' supervisory authority over federal district court rulemaking, the Supreme Court called residency and in-district office requirements "unnecessary and irrational." Frazier v. Heebe, 107 S. Ct. 2607, 2613 (1987). Dicta in *Supreme Court of Va. v. Friedman* suggests that the Court would not be so harsh toward state bars requiring in-state offices. *See* 108 S. Ct. 2260, 2267 (1988). Full-time practice requirements may be more open to challenge. *See id.* (office requirement is "fully adequate to protect *whatever interest the State might have* in full-time practice restriction") (emphasis added); *see also* Helminski v. Supreme Court of Colo., 603 F. Supp. 401, 407 (D. Colo. 1985) (local office requirement preferred alternative to residency).

150. VA. SUP. CT. R. 1A:1(3).

151. *See, e.g.*, Strauss v. Alabama State Bar, 520 F. Supp. 173, 178 & n.6 (N.D. Ala. 1981) (mem.); Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1360 (E.D.N.C. 1970); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 445 (W. Va. 1982).

152. The current process for investigating background and moral character of exam applicants is cursory. The process should be intensified if moral character standards are to have any true meaning and effect. *See* Comment, *The Investigation of Good Moral Character for Admission to the Virginia Bar—Time for a Change*, 19 U. RICH. L. REV. 601, 610-12, 617 (1985).

keep up to date on state law and courtroom procedures.[153] Virginia requires CLE[154] and could afford to increase the post-licensing education burden.

The Commonwealth imposes the lightest CLE burden of any state with CLE mandates.[155] Virginia's requirements are also not as specific as those in other states. South Carolina, for example, requires eleven "trial experiences" before an attorney may appear in court alone.[156] For non-lawyer applicants, Virginia could also join the minority of states requiring skills training courses during law school.[157]

3. Disciplinary Procedures and Jurisdiction

Post-admission sanctions may prove better deterrents to improper legal practice than pre-admission investigations and testing.[158] Concerns that nonresident attorneys would not comply with bar disciplinary proceedings are unwarranted.[159]

An office requirement alone ensures that Virginia bar inquiries and courts have jurisdiction over nonresident attorneys. Yet even this requirement has its limitations. First, as previously noted, such a requirement is itself open to constitutional attack, if it forces nonresident attorneys to do what residents need not do.[160] Second, to the extent the Virginia bar

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153. *E.g.*, Supreme Court of Va. v. Friedman, 108 S. Ct. 2260, 2266-67 (1988); Helminski v. Supreme Court of Colo., 603 F. Supp. 401, 407 (D. Colo. 1985).

154. VA. SUP. CT. R., pt. 6, § IV, para. 17.

155. Virginia requires eight hours per year of CLE, compared to an average of 13.5 and a high of 20. *See* 1988 A.B.A. GUIDE, *supra* note 27, at 40-41.

156. S.C. R. FOR EXAMINATION & ADMISSION OF PERSONS TO PRACTICE L. 5B.

157. As of 1988, ten states had such requirements. *See* 1988 A.B.A. GUIDE, *supra* note 27, at 10-11.

158. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 167 (1971); Rhode, *supra* note 29, at 590 ("[R]esources now consumed in predicting professional misconduct would be better expended in detecting, deterring and redressing it.").

159. Supreme Court of N.H. v. Piper, 470 U.S. 274, 286 & n.20 (1985).

160. *See supra* note 149; *cf.* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona agricultural regulation requiring grower to build packing facilities in state, rather than use nearby California plant, held to violate commerce clause of the Constitution).

The principal argument against the constitutionality of office or full-time practice requirements is that less restrictive alternatives exist. If the asserted purpose of such requirements is to ensure adequate legal skill, then continuing legal education or an initial attorney's exam in court rules and procedure, for example, are proper substitutes. *See supra* note 144. If the asserted purpose is to ensure availability for court appearances and disciplinary procedures, affiliation with local counsel and designation of the Virginia Supreme Court clerk as agent for service of process are sound options. *See infra* notes 161-66 and accompanying text.

The less restrictive means analysis is not dispositive, however, and continuing practice or office requirements would likely survive judicial scrutiny. *See* Note, *A Constitutional Analysis of State Bar Residency Requirements*, *supra* note 8, at 1489; *see also* Aronson v. Ambrose, 479 F.2d 75 (3d Cir.) (Virgin Islands rule conditioning bar admission on intent to

wants to discourage outside competition, an office requirement may be the wrong thing to do. An out-of-state competitor with an office across the street is logically a more dangerous foe than one without local presence. Further, an office requirement may prove redundant. As the Supreme Court noted, a lawyer who is willing to pay initial application fees and annual dues, and comply with continuing legal education and other regular requirements, is naturally likely to maintain an active practice in the state, and an office in or near the state.[161] Even if that requirement were waived, most lawyers practicing in Virginia would be subject to the general "long-arm" jurisdiction of the Virginia courts.[162]

Other states also require nonresident attorneys to designate the clerk of the high court, or some resident attorney, as an agent for service of process.[163] This type of jurisdictional tactic is not foreign to Virginia law. A similar service requirement is already made of attorneys admitted *pro hac vice* into Virginia courts.[164] Virginia also designates a state official as the service agent for nonresident motor vehicle operators.[165]

Finally, according to the Court's proposal in *Piper*, state courts could, by rule or discretion, require lawyers residing far from court to retain a local attorney, who would attend unscheduled meetings and hearings which the distant lawyer could not.[166]

V. CONCLUSION

The elimination of residency requirements challenges the ability of state bars to regulate the conduct of their members. The challenge may be met, however, in ways which foster healthy competition among all lawyers, without regard to state boundaries. In Virginia, this kind of competition should be welcomed, not discouraged.[167]

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continue to reside in and practice in territory upheld against equal protection clause challenge), *cert. denied*, 414 U.S. 854 (1973). As a practical matter, federal courts may be more reluctant in the post-*Friedman* era to eliminate more defendable efforts by state bars to operate independently.

161. *See* Supreme Court of N.H. v. Piper, 470 U.S. 274, 285 (1985).

162. VA. CODE ANN. § 8.01-328.1 (Cum. Supp. 1988).

163. *E.g.*, U.S. DIST. CT. R. 701. The comment to the rule calls this provision "[t]he most significant change" to court rules, and states it was added "to eliminate service problems as part of an overall effort to simplify the Court's disciplinary procedures." *Id.* at comment.

164. VA. SUP. CT. R. 1A:4.

165. VA. CODE ANN. § 8.01-308 (Repl. Vol. 1984).

166. Supreme Court of N.H. v. Piper, 470 U.S. 274, 287 (1985). However, because the critical factor would be distance from the courthouse, not whether the counselor resides in the state, such a system could create a peculiar situation; imagine thousands of D.C. and Maryland attorneys practicing uninhibited in Alexandria courts, while Richmond attorneys are forced to retain local association with their northern Virginia colleagues.

167. Although the national population of lawyers grows steadily, the 735:1 persons-per-lawyer ratio in Virginia lags far behind the 418:1 national average. *See* LAWYER STATISTICAL REPORT, *supra* note 46, at 65, 207.

The Commonwealth presently uses several of the methods prescribed by courts and commentators for ensuring the competency of nonresident lawyers. Specifically, it requires: CLE; a National Conference of Bar Examiners report on past conduct and practice; and a Virginia law office and full-time practice. Virginia should follow the example of other states by increasing its annual education requirements for attorneys, and tailoring such requirements according to the perceived shortcomings of most bar members. Expanded CLE demands should be accompanied by more vigorous application of post-admission sanctions against incompetent lawyers; the strictest bar entry requirements mean little if existing members may forever retain their status, despite ineffective or unethical practice.

If these steps are taken, Virginia's in-state office and full-time practice requirements should be reconsidered. Although such demands are probably constitutional, they offer nominal benefits to the legitimate interests of the Virginia bar. These same benefits would be fully realized by amending CLE standards, requiring a comprehensive examination of Virginia rules and procedure, or appointing a state agent to receive service of process for nonresident attorneys. The needs of Virginia citizens and lawyers are best met not by eliminating admission on motion, but by modifying and supplementing existing restrictions.

Paul G. Gill

APPENDIX*

*The chart below summarizes data from the most recent statutory and rules compilations available to the author. The information charted relates to the existence of residency requirements for exam takers and attorney applicants applying on motion, where applicable. The applicability of reciprocity provisions, limiting admission on motion to attorneys from states which grant the same privilege, is also noted. The last column indicates whether the jurisdiction requires nonresidents to designate an in-state agent for service of process or maintain an office within the state. The accompanying footnotes, numbered consecutively as 1A, 2A, etc., explain the subtleties of each state's admission requirements found in the rules and statutes.

State	Residency for Exam (Yes or No)	Motion Available (Yes or No)	Reciprocity (Yes or No)	Residency for Motion (Yes or No)	Svc./Office (Specify)
Ala.	No	No	N/A	N/A	No
Alaska[1A]	No	Yes	Yes	N/A	No
Ariz.	No	No	N/A	N/A	No
Ark.[2A]	No	No	N/A	N/A	No
Cal.[3A]	No	Yes	No	No	No
Colo.[4A]	No	Yes	No	No	No
Conn.[5A]	No	Yes	No	No	No

1A. Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982) (overruled former Bar Rule 5(1)(a) requirement of simple residency at time of admission); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980) (removed 30-day durational residency requirement of former Bar Rule 2(1)(e)).

2A. The former rule allowing reciprocal admission on motion, Ark. R. Governing Admission to the Bar XI, was eliminated by order of the Arkansas Supreme Court of July 1, 1985. *See* Publisher's Notes, ARK. R. GOVERNING ADMISSION TO THE BAR XI.

3A. Attorney applicants licensed and "actively, substantially and lawfully engaged in the practice of law" in an American jurisdiction for four of six years preceding examination may join the California bar by taking a limited attorneys' examination. *See* CAL. R. REGULATING ADMISSION TO PRACTICE L. II, IV § 41(2)(a), XII.

4A. *Compare* COLO. R. CIV. P. 201.3(1) (exam waived for attorney applicants with active practice in five of past seven years, or scaled score of 152 or better on Multistate Bar Examination within last two years, provided moral fitness and educational requirements are met) *with* COLO. R. CIV. P. 202, 7A COLO. REV. STAT. (1973) (repealed Nov. 10, 1982) (imposing measure-for-measure reciprocity requirements).

5A. The state allows admission by motion for attorney applicant with five years good standing in another jurisdiction, good moral character, and passing score on the Multistate Professional Responsibility Examination (MPRE), who "intends . . . to devote the major portion of his or her working time to the practice of law in Connecticut." CONN. SUPER. #CT. R. 21. A former statutory provision mandating residency was repealed in 1963. *See* CONN. GEN. STAT. ANN. § 51-82 (West 1985).

State	Residency for Exam (Yes or No)	Motion Available (Yes or No)	Reciprocity (Yes or No)	Residency for Motion (Yes or No)	Svc./Office (Specify)
Del.[6A]	No	No	N/A	N/A	No
D.C.[7A]	No	Yes	No	No	Svc.
Fla.	No	No	N/A	N/A	No
Ga.	No	No	N/A	N/A	No
Haw.[8A]	No	No	N/A	N/A	No
Idaho[9A]	No	No	N/A	N/A	No
Ill.[10A]	No	Yes	Yes	Yes	No
Ind.[11A]	No	Yes	No	Yes	Both
Iowa[12A]	Yes	No	N/A	N/A	Svc.
Kan.[13A]	Yes	Yes	No	Yes	No

6A. Former Del. Sup. Ct. R. 53 allowing admission on motion was repealed effective Feb. 21, 1984. *See* DEL. CODE ANN. (Rules Repl. Vol. 1987).

7A. D.C. CT. APP. R. 46(c) (allows admission by motion provided applicant pays for a National Conference of Bar Examiners (NCBE) investigation, proves good moral character, has five years good standing elsewhere, a law degree and a proper multistate bar exam score). All attorneys admitted to the U.S. District Court must also designate the clerk of court as agent for service of process. U.S. DIST. CT. R. 701.

8A. *See* Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Haw. 1971) (invalidating on equal protection grounds the requirement of six months physical residency in state sometime after age 15).

9A. IDAHO CODE § 3-101 (Cum. Supp. 1988) was amended in 1985 to remove Idaho's former requirements of United States citizenship and state residency.

10A. Attorney applicant seeking admission on motion must meet higher of qualifications for Illinois or those seeking admission without exam in states where applicant is licensed, and all such jurisdictions must offer reciprocal admission on motion. ILL. SUP. CT. R. 705(b). They must also demonstrate actual residency. *Id.* R. 705(d).

11A. Exam applicants must certify they will actively engage in Indiana law practice within two years of admission. IND. A.D. R. 13. Nonresidents must additionally either: maintain an in-state office; affiliate with Indiana bar members with Indiana offices; or be employed full-time by established state businesses or government organizations. *Id.* Rule 6 further requires attorney applicants seeking exam waiver to show bona-fide Indiana residency, active practice in at least five of the last seven years, and persuade the admissions board that their admission is "in the public interest." *Id.* R. 6.

12A. All applicants must be state inhabitants, state a bona fide intention to become Iowa residents upon admission, or demonstrate bona fide intention to practice law in Iowa. Those relying only on an intention to practice law must also designate the clerk of the supreme court as agent for service of process. Rule 40 IOWA CODE ANN. § 602 app. A, Rule 105 (West 1988).

13A. Exam waived for attorney applicants seeking a "temporary permit," but only upon a showing that applicant "is or will become a bona fide resident." KAN. SUP. CT. R. 706(a)(4). Applicants by examination must show residency. *Id.* R. 702. *Contra* 1986 A.B.A. GUIDE, *supra* note 24, at 2-3.

State	Residency for Exam (Yes or No)	Motion Available (Yes or No)	Reciprocity (Yes or No)	Residency for Motion (Yes or No)	Svc./Office (Specify)
Ky.[14A]	No	Yes	Yes	No	No
La.	No	No	N/A	N/A	No
Me.	No	No	N/A	N/A	No
Md.[15A]	No	Yes	No	No	No
Mass.[16A]	No	Yes	No	No	No
Mich.[17A]	No	Yes	Yes	No	No
Minn.[18A]	No	Yes	No	No	Either
Miss.[19A]	No	Yes	Yes	Yes	No
Mo.[20A]	No	Yes	Yes	No	Office
Mont.[21A]	Yes	Yes	No	Yes	No
Neb.	No	No	N/A	N/A	No
Nev.	No	No	N/A	N/A	No
N.H.	No	No	N/A	N/A	No

14A. Kentucky allows admission on motion if applicant demonstrates an intent to practice, and proves that jurisdictions where he or she is licensed have comparable admission and comity requirements. KY. SUP. CT. R. 2.110. Nonresident lawyers may also apply for a limited practice certificate if they are employed full time by firms doing business in Kentucky. *Id.* R. 2.111.

15A. Attorneys with five years active practice out of the last seven, as lawyer, law professor or judge, may join the bar upon passing an "out-of-state attorney exam." MD. R. GOVERNING ADMISSION TO BAR 14 (a)(i).

16A. Attorney applicants must pass the MPRE and "a limited written examination in Massachusetts practice and procedure." MASS. SUP. JUD. CT. R. 3:01, § 6.1.6. The same standards apply to attorneys licensed in foreign countries, with the addition of a "principal residence" in Massachusetts requirement. *Id.* § 6.2.1.

17A. Attorney applicants are admitted on motion contingent on Michigan residency, unless the jurisdiction they are applying from does not require residency. MICH. R. FOR BD. L. EXAMINERS 5(a)(4).

18A. Minnesota requires all bar applicants meet one of the following requirements: residency; office in state; or designation of appellate court clerk as agent for service of process for all purposes. MINN. R. FOR ADMISSION TO BAR II(B). Attorney applicants must meet general requirements, have practiced actively in five of the prior seven years, and never failed the Minnesota bar examination. *Id.* R. VIII(D).

19A. Reciprocal admission by motion is available for certain attorney applicants, conditioned on residency and a certified intention to establish a permanent law office in Mississippi within 30 days of admission, plus the satisfactory completion of an "attorney's examination." R. GOVERNING ADMISSION TO MISS. STATE BAR VI, § 1.

20A. Admission on motion requires applicant to maintain or be employed in a full-time law office in Missouri. MO. SUP. CT. R. 8.10(e).

21A. Statutory provisions support the listings in this chart. *See* MONT. CODE ANN. §§ 1-1-402, 37-61-202, -208 (1987). The American Bar Association suggests otherwise. *See* A.B.A. GUIDE, *supra* note 24, at 2 (no residence requirement for admission by exam).

State	Residency for Exam (Yes or No)	Motion Available (Yes or No)	Reciprocity (Yes or No)	Residency for Motion (Yes or No)	Svc./Office (Specify)
N.J.[22A]	No	No	N/A	N/A	Both
N.M.[23A]	Yes	No	N/A	N/A	No
N.Y.[24A]	No	Yes	Yes	No	Svc.
N.C.[25A]	No	Yes	Yes	No	No
N.D.[26A]	No	Yes	No	No	Svc.
Ohio	No	Yes	No	Yes	No
Okla.[27A]	No	Yes	Yes	No	No
Or.[28A]	No	No	N/A	N/A	Svc.
Pa.[29A]	No	Yes	Yes	No	No
R.I.[30A]	No	Yes	No	Yes	No
S.C.	No	No	N/A	N/A	No

22A. All active bar members must maintain an office in state. Nonresident members designate the supreme court clerk as agent for service of process for all activities, including disciplinary actions. N.J. Ct. R. 1:21-1(a).

23A. State effectively requires residency for out-of-state applicants who are not attorneys. *See* N.M. Sup. Ct. R. 15-103(B) (nonresident exam applicants must show active practice for at least four of six years preceding application).

24A. All attorney applicants designate the clerk of the appellate division as agent for service of process. N.Y. Ct. R. § 520.11.

25A. MPRE only exam requirement for motion, provided jurisdiction where applicant licensed provides similar privilege. N.C.R. Governing Admission to Practice of L. § .0502.

26A. All bar applicants must designate supreme court clerk as agent for service of process. N.D. Cent. Code § 27-11-01, Rule 1(A)(3) (Cum. Supp. 1987). Exam waived for applicants with five years bar status elsewhere, active practice four of last five years; Board of Examiners may require attorney's exam, if unsatisfied about attorney applicant's competency. *Id.* Rule 4(D).

27A. Admission by motion contingent on reciprocity, and applicant paying for NCBE investigative report. Okla. Stat. Ann. tit. 5, app. 5, R. 2 § 3, § 5 (West Cum. Supp. 1989). If reciprocal state's admission standards are "more stringent and exacting" than Oklahoma's, and the fees it requires are higher, such standards and fees apply to the applicant. *Id.* § 5. Certain temporary law practice permits and corporate counsel activities of those not in the Oklahoma bar are permitted. *Id.* §§ 6, 7.

28A. Nonresidents must designate a "resident active member of the Oregon State Bar" as in-state agent for service of process. Or. R. Regulating Admission to Practice L. 1.10(2). All applicants must pass state bar exam. *Id.* R. 2.25.

29A. Reciprocity must be by specific agreement with other states. Pa. Bar Admission R. 204.

30A. Qualified attorney applicants may get a one year temporary permit without examination; they may apply within 30-60 days of the permit's expiration for permanent bar standing, which shall be granted if the bar finds the applicant "since the issuance of the temporary license, has resided in this state and made the practice of law in this state his principal occupation and intends to continue to so reside and practice and that all other qualifications remain satisfactory." R.I. Sup. Ct. R. 34(d). Two-year temporary permits are allowed for legal aid practitioners. *Id.* R. 34(e). Rule 42-1 asserts court jurisdiction in disciplinary matters over all specially- and fully-admitted practitioners. *Id.* R. 42-1.

State	Residency for Exam (Yes or No)	Motion Available (Yes or No)	Reciprocity (Yes or No)	Residency for Motion (Yes or No)	Svc./Office (Specify)
S.D.[31A]	No	No	N/A	N/A	Either
Tenn.[32A]	No	Yes	No	No	No
Tex.[33A]	No	Yes	No	No	No
Utah	No	No	N/A	N/A	No
Vt.[34A]	No	Yes	No	No	No
Va.[35A]	No	Yes	Yes	Yes	Office
Wash.[36A]	No	No	N/A	N/A	Svc.
W.Va.	No	Yes	Yes	No	No
Wis.	No	Yes	No	No	No
Wyo.[37A]	Yes	Yes	No	Yes	No

31A. Code requires residency, or office in state, or designation of supreme court clerk as agent for service of process. S.D. CODIFIED LAWS ANN. § 16-16-2 (1987). The residency requirement has been unenforced since 1982. *See* Stalland v. South Dakota Bd. of Bar Examiners, 530 F.Supp. 155 (D.S.D. 1982) (mem.).

32A. Attorney applicants must have passed admission requirements similar to the general Tennessee standards, in the state where they are licensed. TENN. SUP. CT. R. 7 § 5.02.

33A. Attorney applicants from jurisdictions whose admission standards are not equivalent to or do not exceed those of Texas may be required to take the examination. TEX. GOV'T CODE ANN. § 82.036(b) (Vernon 1988).

34A. Attorney applicants are admitted on motion if they practiced five of the last 10 years; requirement drops to three years if any jurisdiction where applicant is licensed requires fewer than five years experience for admission by motion applicants. R. OF ADMISSION TO BAR OF VT. SUP. CT. § 7(a). Attorney applicants must study three months in a Vermont law office, under the supervision of a Vermont bar member who has had at least three years experience. *Id.* § 7(d).

35A. The permanent residency requirement of VA. SUP. CT. R. 1A:1, for reciprocal admission on motion, was voided in Supreme Court of Virginia v. Friedman, 108 S. Ct. 2260, 2267 (1988). The Supreme Court of Virginia has not yet revised the rule, which also requires the attorney applicant to furnish a NCBE investigative report, practice law full time in Virginia and maintain an office in the state. *See* Elkins, *U.S. Supreme Court Voids Virginia's Residency Rule*, 3 VA. LAW. WEEKLY 1 (June 27, 1988).

36A. Nonresident bar members designate an in-state agent for service of process. WASH. A.P.R. 5(e).

37A. Every applicant, by motion or exam, must establish residency for six months prior to admission. WYO. SUP. CT. R. 5(c).