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Regulating the Multistate Practice of Law

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REGULATING THE MULTISTATE PRACTICE OF LAW

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> The licensing and admission power over lawyers vested in each of the fifty state jurisdictions, ninety-three federal districts and eleven circuits, has led to a hodgepodge of standards for admission, and regulations that are desperately in need of careful re-examination.
>
> —Chief Justice Warren Burger[1]

I. INTRODUCTION

Multistate or interstate practice by attorneys in this country is an expanding phenomenon. While no published quantitative data specifically support that assertion, a variety of established or verifiable facts exist that make the inference virtually indisputable. First is the increased mobility of our society generally[2] and with it, no doubt, the increased mobility of lawyers and their clients—*i.e.*, the mobility of legal problem-solvers, problem-bringers and hence the legal problems themselves. Second, an outgrowth of the first set of facts is the increasing degree of uniformity of our laws, to a point where we are now commonly confronted with model codes, uniform state acts, federal practice rules (often copied by states) and similar substantive and procedural developments. Third, partly a response to the first two sets of facts and partly a reflection of the growing general complexity of our society, is the gradual change in the character of law practice from a generalist skill to an increasingly specialized one; hence the emergence of lawyers regarded and operating as corporate law specialists, general or specific federal law specialists, civil rights specialists and others specially

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1. *Quoted in* Wilkey, *Proposal for a "United States Bar,"* 58 A.B.A.J. 355, 356 (1972).

2. *See* U.S. BUREAU OF THE CENSUS, MOBILITY OF POPULATION OF THE UNITED STATES MARCH 1969–MARCH 1970 (1971).

equipped to cope with problems that transcend jurisdictional boundaries and the legal competence of local generalists.

The first-mentioned fact—the increased mobility of lawyers—suggests a concomitant increase in interstate practice of law, assuming no absolute restrictions on such practice. The other facts—the mobility of clients, the multistate character of legal problems and the increase in uniformity and specialization—suggest a need for, and explain why lawyers might want to engage in, interstate practice.

Resistance to the phenomenon of increased interstate practice of law is prevalent today. A network of legal rules and regulations is aimed at restricting the practice of out-of-state ("foreign") lawyers. The purpose of this article is to examine critically some of these restrictions and their underlying rationales.[3] The "right" or "privilege" —some limitations turn on this distinction[4]—to practice law out-of-state is regulated by various restrictions tantamount to a general prohibition with the limited exceptions of admission *pro hac vice* (for one occasion) and admission on motion (or by comity) as a foreign at-

3. Some earlier examinations of multistate practice regulations include Note, *Certification of Out-of-State Attorneys before the Federal District Courts: A Plea for National Standards,* 36 GEO. WASH. L. REV. 204 (1967); Note, *Attorneys: Interstate and Federal Practice,* 80 HARV. L. REV. 1711 (1967); Note, *Restrictions on Admission to the Bar: A Byproduct of Federalism,* 98 U. PA. L. REV. 710 (1950); Comment, *Admission to the Pennsylvania Bar: The Need for Sweeping Change,* 118 U. PA. L. REV. 945 (1970) Comment, *Interstate and International Practice of Law,* 31 S. CAL. L. REV. 416 (1958); Note, *Unauthorized Practice Statutes and Rights of Out-of-State Attorneys,* 40 S. CAL. L. REV. 569 (1967); Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right,* 67 COLUM. L. REV. 731 (1967); Horack, *"Trade Barriers" to Bar Admissions,* 28 J. AM. JUD. SOC'Y 102 (1944); Nahstoll, *Freedom to Practice Law in Another State,* 55 A.B.A.J. 57 (1969); Joost, *Consolidation of Law Offices,* 53 A.B.A.J. 429 (1967); Dalton & Williamson, *State Barriers Against Migrant Lawyers,* 25 U.M.K.C.L. REV. 144 (1957); C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

4. *See* Comment, *"Yankee Go Home"—Civil Rights Volunteer Attorneys and the Unauthorized Practice of Law,* 53 CORNELL L. REV. 117, 122 (1967), *citing* MISS. CODE ANN. § 8666 (1956) which provided in part: "It is hereby declared to be the public policy of the State of Mississippi that the practice of law before any court or administrative agency is a matter of privilege and not a matter of right."

Conclusionary distinctions of this type have been challenged in a variety of contexts. One can no longer treat welfare recipients arbitrarily on grounds that the benefits are charity. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969). In that sense, the landmark article by Reich, *The New Property,* 73 YALE L.J. 733 (1964), arguing that the poor are entitled to welfare benefits as a matter of (property) "right," is, in its emphasis on the right-privilege dichotomy, perhaps conceptually a step backwards despite the laudatory commitment to better social practices it expresses. Another institutional area where similar developments have occurred is at the borderline of criminal justice: One can no longer deny juveniles or mentally ill persons procedural due process by respectively labeling the proceedings juvenile (*see In re* Gault, 387 U.S. 1 (1967)) or civil (*see* Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966)), rather than adult-criminal. *See also* note 86 *infra.*

torney.[5] All activity beyond the exceptions is, or at least risks being, prohibited.[6] Criteria considered in allowing exceptions include reciprocity, type of practice and length of practice in a foreign state; residence in the admitting state; association with local counsel; and home state examination on competence and ethics. Permitted legal activity may include litigation in state and federal courts, administrative agency practice and office practice. Regulations take the form of statutes, bar association rules, case law and court rules.

The restrictive out-of-state practice rules require re-evaluation at these diverse levels. It is also necessary to examine the reasons underlying the rules since the latter are far from self-explanatory in conception and operation. The two principal rationales are protection of the public and economic protection of the local bar. Supportive of both is the basic political fact of federalism, under which states are the entities designated to regulate certain affairs and concerns of their residents.

Protection of the public from incompetence or unethical conduct on the part of foreign attorneys is a purpose legitimate enough on its face; however, problems arise concerning the degree to which specific rules relate to the general purpose, the dubious nature of assumptions or predictions about interstate law practice, formulation of rules which tend to be too broad or too vague, and the desirability of their application to specific situations or circumstances. At times it also appears that the first rationale is used to justify restrictive practice

5. A typical restriction, WIS. STAT. ANN. ch. 256, app. [ST. BAR R. 2(4)] (Supp. 1974), provides:

> No individual other than an enrolled active member of the State Bar shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law. A judge in this state may allow a nonresident counsel to appear in his court and participate in a particular action or proceeding in association with an active member of the State Bar of Wisconsin who appears and participates in such action or proceeding. Permission to such nonresident lawyer can be withdrawn by the judge granting it if such a lawyer by his conduct manifests incomtency to represent a client in a Wisconsin court or his unwillingness to abide by the Code of Professional Responsibility and the Rules of Decorum of the court.

6. What is included in the term "practice of law" depends very much on the context in which the term is defined. Only a few states have statutes defining practice of law generally. The statutes of some states enumerate certain activities as practice of law, but the status of activities excluded from enumeration is unclear. Provisions in other states appear quite circular, referring to practice of law as that in which lawyers are authorized to engage. Moreover, what is practice of law for *foreign* attorneys is distinct from the foregoing and even more elusive, depending on factors such as the frequency and formality of the activity and of the procedures by which authorization is sought. *See* Part IV *infra*.

rules which are actually motivated by the second rationale. Furthermore, the legitimacy of that second rationale is questionable: Economic protectionism is arguably prima facie unconstitutional or illegal, and rules designed to achieve that objective have been held unconstitutional under some circumstances.[7]

This article will present some conclusions on theoretical grounds about the existing rules and the public protection rationale. There will be some discussion about the application of these rules to various multistate practice situations. Finally, the article will suggest directions for future empirical research in this area.

II. ADMISSION OF FOREIGN ATTORNEYS *PRO HAC VICE*

All but a few states have statutory provisions extending to foreign attorneys the right or privilege to practice for one specific occasion. Apparently *pro hac vice* admission in the few states without relevant statutes occurs customarily and informally on specific court or local bar rule authority.[8] Admission *pro hac vice* is evidently a routine matter in all states:[9] the foreign applicant is simply introduced to the

7. *E.g.*, Darby v. State Board of Bar Admissions, 185 So. 2d 684 (Miss. 1966); People v. Black, 156 Misc. 516, 282 N.Y.S. 197, 200 (1935). *But see* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), in which the court appears to admit, at least tacitly, the validity of economic protectionism. The court, in disposing of the state's claim that certain restrictions on admission *pro hac vice* were reasonable and necessary, explicitly conceded that the "State has basically three interests that need to be given consideration." The court identified the second of these as "the financial or economic interests of the members of the Mississippi bar." *Id.* at 246.

Economic favoritism of local residents (or economically motivated discrimination against nonresidents and aliens) has typically been judicially invalidated in contexts other than law practice. *See, e.g.*, Truax v. Raich, 239 U.S. 33 (1915) (percentage limitation on employers' hiring of aliens); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (prohibition on issuance of commercial fishing licenses to aliens). *See also* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

8. *E.g.*, in Alabama and Ohio there is no formal state-wide authority for admission *pro hac vice*, but such admission occurs de facto by way of local custom or rule. *See* A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE 9, 22 (Research Contributions of the American Bar Foundation, No. 5, 1968); VI MARTINDALE-HUBBELL LAW DIRECTORY 7, 1831 (1975). The situation in Connecticut is more obscure. *See* Taft v. Amsel, 23 Conn. Supp. 225, 180 A.2d 756 (1962).

9. *See* Farley, *Admission of Attorneys from Other Jurisdictions*, 19 BAR EXAM. 227 (1950), *reprinted in* SURVEY OF THE LEGAL PROFESSION, DIV. IV, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 151 (1952). Notable exceptions have occured; *e.g.*, the United States District Court for the Southern District of Mississippi attempted to exclude out-of-state civil rights attorneys by restricting admissions *pro hac vice* to one appearance within any 12-month period. *See* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).

judge of the appropriate court by a local attorney, in person or by letter. The statutes on the subjects are typically permissive rather than mandatory, and the judge has considerable discretion even in states where the statutory standards are comparatively explicit.

The *pro hac vice* statutes can be distinguished from one another on the basis of several requirements or conditions which must exist before admission can be granted.[10] The statute of any one jurisdiction may include one or several of these conditions simultaneously, and it appears that the courts interpreting the statutes sometimes call for additional requirements not expressly contained in the statutes.[11] Permission granted by the judge of the court in question appears to be sufficient in slightly fewer than half the jurisdictions.[12] However, five more states admit on judge's permission if the home state of the applicant reciprocates.[13] Statutes in nearly half the states permit admission *pro hac vice* only on the condition that the foreign attorney associate with local counsel;[14] three additional states require such local association only if the same is required by the home state of the applicant.[15] Finally, a few jurisdictions further require that the local associated counsel cosign all papers incident to the action.[16]

10. *See* KATZ, *supra* note 8; Farley, *supra* note 9.

11. KATZ, *supra* note 8, at 8. The author warns that this statutory compilation can be misleading if relied upon without thorough research of the decisional law in each state. *Id.* at 1 n.1.

12. *E.g.*, ARK. STAT. ANN. § 25–108 (1947); *Ex parte* McCue, 211 Cal. 57, 293 P. 47 (1930); COLO. REV. STAT. ANN. § 12–1–18 (1963); DEL. SUP. CT. R. 31(4); ILL. ANN. STAT. ch. 110A, § 707 (Smith-Hurd Supp. 1974); KY. REV. STAT. ANN. § 30.090 (1974); MD. ANN. CODE art. 10, § 7 (1957); MICH. STAT. ANN. § 27A.916 (1962); MISS. CODE ANN. § 73–3–39 (1972); MONT. REV. CODES ANN. § 93–2005 (1947); N.Y. CT. APP. R. 520.8(d); N.D. CENT. CODE § 27–11–27 (1974); P.R. LAWS ANN. tit. 4, § 723 (1965); R.I. GEN. LAWS ANN. § 11–27–13 (1970); S.C.R. FOR ADMISSION TO PRACTICE LAW 11; TENN. CODE ANN. § 29–105 (1955); V.I. CODE ANN. tit. 5, app. V, rule 51 (1966).

13. FLA. APP. R. 2.3(b); MASS. ANN. LAWS ch. 221, § 46A (1974); MINN. STAT. ANN. § 481.02(6) (1971); N.C. GEN. STAT. § 84–4.1 (Supp. 1974); VA. CODE ANN. § 54–42. (1974).

14. *E.g.*, ALAS. R. CIV. P. 81(a)(2); ARIZ. SUP. CT. R. 28(c); GA. CODE ANN. § 24–3602 (1965); IND. R. ADMISSION & DISCIPLINE 3; IOWA CODE ANN. § 610.13 (1950); KAN. STAT. ANN. § 7–104, –122 (1964); ME. REV. STAT. ANN. tit. 4, § 802 (1964) and ME. R. CIV. P. 89(b); MO. ANN. STAT. § 484.100 (Vernon 1952) and MO. SUP. CT. R. 9.01; NEV. SUP. CT. R. 42; N.H. SUPER. CT. (CIV.) R. 13; N.M. STAT. ANN. § 18–1–26 (1970); N.C. GEN. STAT. § 84–4.1 (Supp. 1974); ORE. REV. STAT. § 9.240 (1974); PA. STAT. ANN. tit. 17, § 1602 (1962); VA. SUP. CT. R. 1.6; WASH. REV. CODE § 2.48.170 (1974) and WASH. ADMISSION TO PRACTICE R. 7; WYO. SUP. CT. R. FOR BAR ASS'N 19.

15. LA. REV. STAT. §§ 37:214, 215 (1974); NEB. REV. STAT. § 7–103 (1970); OKLA. STAT. ANN. tit. 5, §§ 17.1, 17.2 (1966) & tit. 5, ch. 1, app. 1 [OKLA. BAR ASS'N R. art. II, § 5] (Supp. 1974).

16. ALAS. R. CIV. P. 81(a)(2); IND. R. ADMISSION & DISCIPLINE 3; R.I. GEN. LAWS ANN. § 11–27–13 (1969).

Thus, it should be apparent that the conceptual simplicity of admission *pro hac vice* is obscured by the considerable interstate diversity in rules and, presumably, rationales. Aside from this cloud of diversity, there is a more fundamental difficulty with the concept of admission *pro hac vice*.

Admission *pro hac vice* in one sense clashes with a principal rationale behind restriction on foreign practice. Admission limited to one occasion, and granted only because so limited, clearly has little to do with protecting the public from an incompetent or unethical foreign lawyer. It could be argued that the real consideration behind admission *pro hac vice* must rather relate to economic protectionism: "We will allow you to take money out of the hands of the local bar this once, but not regularly."

It can also be argued with considerable plausibility, however, that the *pro hac vice* statutes intend temporarily to subordinate concern over foreign attorney competence and ethics to the client's convenience or other interests. One can postulate a variety of circumstances under which a client would have a compelling need or desire to retain a foreign attorney and under which abdication of local control would not seem anomalous in relation to the objective of protecting the public.[17] In addition, admission *pro hac vice* typically applies to the trial of a case, where direct judicial supervision is at least theoretically possible. If the statutes as written and as applied focused on the presence or absence of public protection and judicial supervision, admission *pro hac vice* would not be difficult to justify. The operation and requirements of the statutes, however, often seem to belie any such focus.

Reciprocity requirements, for example, imply a disregard of legitimate concerns and instead are explicable solely in terms of economic protectionism. Clearly, requirements based on the fact that the foreign attorney's home state also permits simple permission or also mandates association with local counsel have nothing to do with safeguarding competence, ethics or even client convenience. Instead, they appear to stand only for the questionable proposition that a foreign attorney may take some business from the local bar so long as it has the same privilege in the foreign lawyer's state.

The requirement that the foreign attorney associate with local

17. Consider, for example, the situation of a local party engaging counsel admitted to practice in a foreign jurisdiction whose law will be controlling in the local action.

counsel is, on its face, a rational precondition. The most compelling reason for the requirement is the assumption that local counsel will assure or enhance competence in representation—competence in dealing with local laws and procedures and perhaps in handling local conditions, personalities, customs and prejudices. The ability to deal with local procedure might include such activities as watching the court docket or serving papers related to the case on parties concerned. The ability to deal with local conditions, personalities and the like is a more elusive asset, but no less important. Legal competence is a broad and many-faceted quality, and requirements of local association should therefore not be attacked on narrow grounds or without full analysis. Nonetheless, the statutory scheme could be improved by focusing on the type of case for which local association should be required and on the lawyer selection process; not just any local lawyer should be deemed an acceptable associate for any foreign applicant on any case.[18]

The power to enforce standards of competence or ethics rather than just the effort to achieve minimally adequate and ethical representation is an important facet of the local association requirement. This is especially true where the concern is ethics. It is doubtful that association with local counsel improves the ethics of the foreign lawyer, but it does enhance the chances of remedial enforcement for the state or the client. To a lesser extent, the argument also applies to the concern over competence. In some jurisdictions, the local associated counsel is made an agent for service of papers in case of foreign attorney misconduct,[19] and in other states the associate may actually be answerable for misrepresentation.[20] These requirements give the associated lawyer a real interest in the actions of the foreign lawyer and hence increase the likelihood that the local counsel will indeed exert control over the foreign attorney to insure the competent and ethical conduct of the latter.

Of course there are more direct ways than local association rules for states to enforce ethical and competency standards with respect to foreign attorneys. Extension of service of process can be accomplished

18. For example, a local lawyer specializing in municipal bonds would not be appropriately associated with a foreign lawyer representing a criminal defendant.

19. *See, e.g.*, IOWA CODE ANN. § 610.13 (1950); KAN. STAT. ANN. § 7–104 (1963); VA. SUP. CT. R. 1:6.

20. *See, e.g.*, IOWA CODE ANN. § 610.13 (1950); *In re* Greenberg, 15 N.J. 132, 104 A.2d 46 (1954).

via long-arm statutes.[21] In addition, sanctions against the foreign attorney may be enforced through criminal action or through the contempt power of the court before which he or she practiced. A final sanction can be the loss of fees.[22] However, dependence on court or aggrieved client initiative may reduce the practical effectiveness of these alternatives. Action would probably be taken only in extreme cases. Nonetheless, the local association requirement appears advantageous because it combines the feature of actual aid in the matter of competence with the greater possibility of enforcement in case of misconduct.

The permissive, as opposed to mandatory, character of the *pro hac vice* statutes,[23] however, has little to commend it. Whether lawyer competence or ethics, client interest, or even the suspect economic protectionism is at stake, there is no justification for treating like situations differently. Such disparate treatment may in fact violate the concept of equal protection under the law. If the permissive or discretionary wording of the statutes is intended simply to give the decisionmaker power to weigh subtle factual differences that would be difficult to deal with by statutory provision, there is no objection. If the statutes permit arbitrary exercise of discretion, however, they should be amended. Labeling the interstate practice of law a privilege rather than a right only begs the question; it hardly constitutes a justification for arbitrariness.[24]

III. PERMANENT ADMISSION

A foreign attorney may obtain more general or permanent admission under circumstances and by procedures that are similar or identical to those applicable to local citizens seeking bar admission. Specifically, a foreign attorney may take the local bar examination, establish

21. Long-arm or implied consent statutes, originally providing for jurisdiction over nonresident motorists, *e.g.*, WIS. STAT. ANN. § 345.09 (1971), now extend such jurisdiction in a broad range of contexts. *See, e.g.*, CONN. GEN. STAT. ANN. § 33–411 (1958) (corporate liability); ILL. ANN. STAT. ch. 110, §§ 16, 17 (Smith-Hurd Supp. 1974) (civil liability generally); NEV. REV. STAT. § 14.080 (1973) (products liability).

22. *See* Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501 (1962).

23. *See, e.g.*, DEL. CH. CT. R. 170(b) (1971): "Attorneys may be admitted *pro hac vice* in the discretion of the court and such admission will be at the pleasure of the court."

24. *See* note 4 *supra*.

residence, satisfy the ethical requirements and be admitted as a local attorney. However, a foreign attorney may sometimes gain permanent admission on motion under the principle of comity without taking the local bar examination.[25] Conceptually, the individual is then admitted as a foreign attorney, though the vast majority of jurisdictions blur the conceptual point by adding residence requirements indicating that the applicant is at least expected to *become* a local attorney. In some states, permanent admission of foreign attorneys is accomplished through a special attorneys' examination, a process distinguishable both from local admission through a complete examination and from admission on motion without examination.[26] Again, however, requirements regarding residence, years of prior practice and moral character may be a part of the process.[27]

As with the *pro hac vice* rules, the scope and rationale of the requirements covering permanent admission of foreign attorneys are unclear. Some rules and reasons are legitimate in theory; some are perverted in application; others have little justification either in theory or as applied.

A. Residence[28]

In the majority of jurisdictions, residence requirements are part of—indeed, appear to be the conceptual and practical essence of—the

25. *See, e.g.,* D.C. CT. R. 46(I)(c)(3), (4); ILL. ANN. STAT. ch. 110A, § 705 (Smith-Hurd 1968 & Supp. 1974); MICH. STAT. ANN. § 27A.946 (1962).

26. *See, e.g.,* OKLA. STAT. ANN. tit. 5, ch. 1, app. 5 [OKLA. ADMISSION TO PRACTICE R. 4] (Supp. 1974); WASH. ADMISSION TO PRACTICE R. 3(B)(10), 4(B).

27. There are some interesting sidelights to the general admission-of-foreign-attorneys subject worth noting. For example, some American Indian tribes are now establishing admission requirements, including bar examination on the tribal codes and constitutions, for practice in the tribal courts. Interview with Judge John Sharp, Judge Howard Doore and Court Assistant Sandy Watts, Blackfoot Tribal Court, Blackfoot Reservation, Browning, Montana, Oct. 11-12, 1974. In a totally different setting, consider the recently adopted New York rules under which lawyers who are not U.S. citizens may be licensed as "legal consultants." 22 N.Y. CODES, RULES & REGULATIONS pt. 521 (1974), *authorized in* N.Y. JUDICIARY LAW § 53.6 (McKinney Supp. 1974). Although they greatly restrict the types of activities in which such "consultants" may engage, the New York rules have been hailed as a "significant breakthrough." *See* 60 A.B.A.J. 1080 (1974).

28. Residence is the prime issue in multistate practice today. Virtually all the unauthorized practice literature of the past several years deals with this issue. *See, e.g.,* Note, *New Mexico's Bar Residency as an Unconstitutional Penalty on Applicant's Right to Travel,* 2 N.M.L. REV. 252 (1972); Note, *Residency Requirement as a Prerequisite to Take the State Bar Examination,* 1 TEXAS SO. L. REV. 231 (1971); Note, *Residency Requirements—Equal Protection for Nonresident Bar Applicants,* 48 N.D.L.

full admission schemes.[29] Only a small number of states have no residence requirements.[30] In short, the entire admission process seems tailored to the lawyer who intends to settle and set up practice in a new state. The process fails to account for lawyers who have some part-time business in several states.

Requiring an individual to reside in a particular state for a specified period of time as a precondition to eligibility for certain rights, privileges or benefits seems unrealistic, even archaic. Recognizing the greater mobility of Americans today than in earlier times, courts have held residence requirements invalid in a variety of institutional contexts.[31] Nonetheless, residence requirements for lawyers appear to have a measure of theoretical legitimacy to the extent they help to assure legal competence in the form of the foreign lawyer's familiarity with local laws and customs and public familiarity with the applicant's intentions, reputation and skill. Thus, reasonable residence requirements for foreign attorneys are not per se irrelevant to the state's legitimate concerns.

Such requirements may include preapplication or pre-examination residence;[32] various preadmission and even postadmission requirements provide, for example, that a stated period of time must elapse before the applicant will be admitted to practice, that the candidate maintain an office for full-time practice, or that the candidate intend to or actually "reside" continuously within the state.[33]

REV. 499 (1972); Note, *The Constitutionality of State Residency Requirements for Admission to the Bar,* 71 MICH. L. REV. 838 (1973); Note, *Residence Requirements for Admission to the Bar,* 36 ALBANY L. REV. 762 (1972); Note, *Residency Requirement: Attorneys,* 6 SUFFOLK U.L. REV. 639 (1972); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change,* 56 CORNELL L. REV. 831 (1971).

29. *See, e.g.,* IOWA CODE ANN. § 610.10 (1950); MONT. REV. CODES ANN. § 93–2001 (1947); WASH. ADMISSION TO PRACTICE R. 3(B)(2).

30. *See, e.g.,* ARK. STAT. ANN. § 25–101 (1947); ILL. SUP. CT. R. 701(a); KAN. STAT. ANN. § 7–102 (1964).

31. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (public welfare); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (health services).

32. *See, e.g.,* MO. SUP. CT. R. 8.01 (3 months residence prior to application); ME. REV. STAT. ANN. tit. 4, § 804 (1964) (6 months residence prior to examination); W. VA. CODE ANN. § 30–2–1 (1966) (1 year residence prior to admission). *See generally* Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change,* 56 CORNELL L. REV. 831 (1971).

33. *See, e.g.,* ORE. REV. STAT. § 9.230 (1974); S.C.R. FOR ADMISSION TO PRACTICE LAW 4, 5. Often the residence rules are ambiguous, reflecting changes in attitude and law that leave gaps in the logic of the law. For example, Missouri's typical residence-restriction admission scheme was amended in 1972 to include the provision that "a non-resident attorney who is a member of the Missouri Bar and maintains an office in

It is difficult to judge the reasonableness of each of these residence rules[34] without considering alternative means by which a foreign attorney may gain admission suitable to his or her particular circumstances, and alternative methods for a state to check the competence and ethics of the foreign candidate. It is arguable, for example, that a state can assess the foreign applicant's professional and personal character by methods which are at least as efficacious as residence. For instance, the foreign attorney's standing in his or her home state can provide evidence more reliable than what can be learned about the candidate by community and local bar observation over the few weeks or months required by the residence rules.

Moreover, existing residence laws, even if preferable to other indicators of professional and personal character, can nevertheless be extremely burdensome in practical application. Economically, meeting the residence conditions may be prohibitive for the lawyer who wishes to relocate a practice or the lawyer who does not intend to move but only wishes to practice occasionally, on an interstate basis. For the lawyer who intends to change residence, the solution may well be some form of conditional, dual or temporary licensing which would permit the lawyer to practice during the transitional period.[35] For the lawyer who contemplates only very sporadic multistate practice, admission *pro hac vice* appears to be the appropriate solution. For the lawyer between these two extremes, the problem is more difficult to solve. Perhaps relaxing the definition of residence, *i.e.*, requiring only intent to reside or perhaps only intent to practice a significant portion

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Missouri for the practice of law may practice law and do a law business as in the case of a resident attorney." Mo. SUP. CT. R. 9.02.

34. Although there is no case law on interstate law practice to the effect that residence restrictions are per se unreasonable as there is in the welfare area, *see* note 31 *supra*, several courts have invalidated attorney residence requirements on specific grounds. *See* Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970), in which the court held North Carolina's 12-month pre-examination residence requirement unconstitutional because not rationally related to a compelling state interest. The court rather cavalierly dismissed the learning of local law, government and custom as promoting "cultural provincialism" rather than legal competence. However, it also implied that a more "reasonable" (shorter) time period to enable the examining board to conduct interviews and investigate moral character would be acceptable. Since the decision, the North Carolina Board of Law Examiners has amended its rule and now requires 2 months pre-examination residence. See sources cited in note 28 *supra* for further discussion on this issue.

35. *Cf.* ORE. REV. STAT. § 9.230 (1974). Provisions of this type represent a growing phenomenon, *see, e.g.*, KAN. STAT. ANN. § 7–124, SUP. CT. R. 212(j) (Supp. 1973). *See also* Morris, *State Borders: Unnecessary Barriers to Effective Law Practice*, 53 A.B.A.J. 530 (1967); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831 (1971).

of the time, is an answer.[36] A type of limited licensing, confined to the business that necessitates the interstate practice, is also a possibility. Alternatively, temporary association with local counsel, presently limited to admission *pro hac vice,* could be an effective and workable solution in the permanent admission context as a check on the newly or conditionally licensed lawyer.[37] These solutions do not abolish residence or thwart its aims; they merely minimize the possible hardships resulting from residence requirements.

B. Prior Practice

Requiring a certain period of prior practice in another state, in conjunction with residence or special bar examination requirements, imposes an unnecessary burden on the foreign applicant. Independent of the other requirements, however, the prior practice rule may provide evidence, though not a guarantee, of a foreign lawyer's professional and personal character. At best, however, prior practice is only an indirect indicator of facts better discovered, for example, by examination requirements. While practical experience is certainly helpful and perhaps even indispensable to good "lawyering," it is not sufficiently precise to identify those lawyers who satisfy state standards of, and state interests in, such competence. If consideration were given to the similarity between the laws, procedures and examinations of the applicant's home state and those of the "new" state, then the prior practice rules would gain credibility. However, current rules generally do not focus on the existence of such similarity.

In some jurisdictions, the prior practice rules require trial experience in particular.[38] Such a requirement is reasonable only if admission is of a specialized nature, with a separate license granted for trial practice[39]—not the situation in any state for local admission. Trial practice constitutes only a small fraction of legal work; to require

36. *See* Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953).

37. It might be equitable as well as substantively useful to apply this requirement to recently graduated, as well as to "foreign," lawyers.

38. *E.g.,* in Connecticut, trial experience is an absolute prerequisite for comity admission. *In re* Plantamura, 149 Conn. 111, 176 A.2d 61 (1961), *cert. denied,* 369 U.S. 872 (1962).

39. *See* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227 (1973).

experience in it for general admission, and then only in the case of foreign attorneys, is indefensible.

Several states not only require a number of years of prior practice, but require the practice to have been in the state of original admission.[40] This additional restriction is also of questionable validity since, as noted, under prior practice rules, states do not consider the similarity in laws and procedures between the admitting and foreign states. It is the foreign attorney's practical experience under laws, procedures and customs similar to those of the admitting state which is relevant to competence there, not whether that experience was gained in the state of original admission or elsewhere. Dubious notions about stability and mobility, and their relationship to competence and ethics apparently underlie the restriction. The burden of the restriction falls most heavily on federal poverty lawyers, military lawyers and others whose practices prevent settling in any one state for an extended period of time, much less in the state of initial admission.

C. Bar Examination

About a quarter of the states require that a foreign applicant pass a bar examination before being permanently admitted, regardless of the length of practical experience.[41] At least two of these give a special examination, distinct from the local one, to foreign lawyers, presumably as a concession to practical experience.[42] In several states, whether a foreign applicant must pass an examination is left to the discretion of the body (*e.g.*, the board of examiners, the state supreme court) considering the admission application.[43] The remaining jurisdictions do not require examination of foreign attorneys with a specified amount of experience. Requiring a foreign applicant to pass the standard local bar examination equates the process with regular local admission and is unnecessarily burdensome. Requiring no examination, on the other hand, leaves no satisfactory means by which to as-

40. *See, e.g.*, N.D. CENT. CODE § 27–11–25 (1960); S.D. COMPILED LAWS ANN. § 16–16–12 (1967).

41. *See, e.g.*, ARIZ. SUP. CT. R. 28; LA. REV. STAT. ANN. tit. 37, ch. 4, app. [ARTS. OF INCORPORATION OF THE LA. ST. BAR ASS'N art. XIV, §§ 7, 9] (1974); NEV. SUP. CT. R. 65.

42. *See* CAL. BUS. & PROF. CODE § 6062 (West Supp. 1975); WASH. REV. CODE § 2.48.060 (1974).

43. *See* COLO. R. CIV. P. 202; DEL. SUP. CT. R. 31; TEX. REV. CIV. STAT. ANN. art. 306a (1973 & Supp. 1974); UTAH CODE ANN. § 78–51–10 (1953).

sure competence. Conditioning admission on a special examination for foreign applicants is conceptually and practically the most appropriate procedure.

The examinations themselves, however, are a focal point of much controversy. Many questions have been raised regarding the content of the examinations and the correlation between the applicant's examination performance and subsequent professional competence. Some critics doubt that bar examinations in any way serve to identify competent lawyers.[44] The charge that many of the state bar examinations place too much emphasis on memorization of detailed rules and pay too little attention to legal reasoning ability is certainly valid in many cases. Existing (and proposed) examinations may also be criticized for failing to measure the applicant's ability to negotiate, speak publicly, inspire confidence as a counselor, judge people regardless of their economic or racial background, or demonstrate whatever other capabilities one might expect a lawyer to possess. Within the narrow framework of the debate (if not of our present knowledge) about local or multistate legal practice, the proposition that individual jurisdictions have an interest in testing one's knowledge of local rules and procedures is not untenable. The best means by which to test that knowledge in the case of foreign lawyer applicants, may well be through a less restrictive scheme of residence requirements in conjunction with special examinations.[45]

Discretionary examination of foreign applicants, employed in four states,[46] is desirable only if the discretion is reasonably circumscribed and focused; however this is seldom done. A better statute would provide for admission on motion without examination only if (1) the applicant had significant prior practice in a foreign state, (2) whose laws, procedures and customs appeared, after a required inquiry, to be substantially similar to those of the admitting state. An examination should be required for permanent admission in all other cases.

44. *See, e.g.,* Bell, *Do Bar Examinations Serve a Useful Purpose?* 57 A.B.A.J. 1215 (1971); Stanmeyer, *The Case for a Better Bar Examination,* 58 A.B.A.J. 489 (1972). *See also Admission to Bar by Examinations in 1971,* 41 BAR EXAM. 126 (1972), which states that the national average of applicants passing the local examinations was 72% in 1971.

45. Without doubt, distinguishing competent from incompetent applicants by means of an examination (or any other method, for that matter) is extremely difficult. Examinations that purport to make such distinctions must be subject to critical, periodic review. See *In re* Reid, 76 Nev. 76, 349 P.2d 446 (1960), for a discussion of the merits of bar examinations versus other indicators of legal competence.

46. *See* note 43 *supra.*

D. Reciprocity, Diversity and Multistate Examinations

Reciprocity alone, without consideration of the values sought to be protected by the admission rules, is unsound. Some states grant full admission on motion to foreign attorneys only if the foreign attorney's state has provisions to the same effect.[47] If the reciprocity requirements derived from an assessment about the similarity between the laws, procedures and examinations of reciprocating states, then such requirements would be supportable. There is, however, little evidence that such an assessment is undertaken. Consequently, reciprocity does nothing to strengthen the admission on motion concept which, in the absence of examination or residence requirements, is already weak because unrelated to the purpose of assuring a foreign attorney's competent and ethical conduct.

Rules excusing classes of applicants from the bar examination and much of the general sentiment against bar examinations probably stem from the belief that abstract learning of local rules and procedures is too difficult or too burdensome, and that only practical learning (experience) is productive and feasible. However, if the goal of assuring foreign attorney competence in local law and procedure is to be pursued seriously, the solution lies not in reciprocity, but in concepts and practices specifically responsive to the interests of the public and those of the bar.[48]

Proposals featuring a "national bar examination" as the exclusive test for bar admission ignore the issue of local law competence or assume that it is not legitimate. Denying its legitimacy is both unrealistic and unproductive; the conflict between local needs and interests, and

47. *See, e.g.*, GA. CODE ANN. § 9–201 (1972); MISS. CODE ANN. § 73–3–25 (1972); W. VA. CODE ANN. § 30–2–2 (1971). However, a number of jurisdictions currently admit on motion without examination irrespective of reciprocity. Letter from Edward I. Cutler, Tampa, Fla., past member of the ABA Committee on Unauthorized Practice of Law, to Samuel J. Brakel, Jan. 24, 1974.

48. Relaxed residence rules, conditional licensing, and association with local counsel during the conditional period are recommended in the text accompanying notes 35–37 *supra*. In general, flexibility in response to real problems is a desirable characteristic of admission rules and their administration, so long as the fundamental regulatory objectives are not ignored or undermined. For example, the recent development in Florida, whereby exiled or emigrant Cuban lawyers are permitted to take the Florida bar examination despite their failure to meet some of the other qualifications required of other "foreign" applicants, should be applauded. Letter from Edward I. Cutler, *supra* note 47. The exceptional treatment satisfied the serious employment problems of Cuban lawyers and the representation needs of their potential Cuban clients. Whether it is wise to formalize such exceptional treatment is a separate question, which may well be moot by the time it receives formal consideration.

the demands of an increasingly mobile, complex and specialized society, persists. Moreover, although the national examination proposals do not expressly contradict the concept of local control over practice, they do so in effect by removing from the states the basis for that control: the power to prescribe application and admission standards. By thus failing to account for local law competence and to preserve local control over practice, the national examination concept falls short of striking a balance which will ensure attorneys' responsibility and reliability, yet permit their mobility.

A more promising solution appears to be the dual examination concept: a national (or multistate) bar examination designed to test general ability, supplemented by a local examination to assure a narrower legal competence. Such a dual scheme is already operative in 39 states and the District of Columbia.[49] Much of the present debate concerning this scheme seems misdirected at questions of efficiency, *e.g.*, whether standardized national tests using multiple choice formats avoid duplicative efforts by the examiners of the various states, and whether they can be graded more easily and objectively. The scheme, however, seems advantageous. It is consistent with the concept of local control that characterizes the state admission rules, but at the same time recognizes the increasing uniformity and mobility of skills by reducing the burden on "foreign" applicants of demonstrating their competence.[50]

49. Letter from Joe E. Covington, Director of Testing, National Conference of Bar Examiners, to Samuel J. Brakel, Sept. 9, 1974.

50. For a sampling of the diverse responses to the Multistate Bar Examination, see Eckler & Covington, *The New Multistate Bar Examination*, 57 A.B.A.J. 1117 (1971); Covington, *The Multistate Bar Examination—A New Approach*, 26 ARK. L. REV. 153 (1972); Pock, *The Case Against the Objective Multistate Bar Examination*, 25 J. LEGAL ED. 66 (1973); Griswold, *In Praise of Bar Examinations*, 62 ILL. B.J. 442 (1974). Earlier literature included Thomas, *The Bar Examination: It's Function*, 32 BAR EXAM. 69 (1963); *1966–1967 Issues in Legal Education (A Survey)*, 16 CLEV.-MAR. L. REV. 1, 7–9 (1967); *Panel Discussion—A Uniform Bar Examination—National or Regional: Is It Possible or Practical?* 39 BAR EXAM. 52 (1970).

Well before the actual construction and use of the Multistate Bar Examination, some states were already moving individually in the direction of examinations viewed as national in scope. The California examination, for example, was described more than 10 years ago as a "truly national bar examination" with "very little emphasis on local law." Thurman, *The Law School Dean Looks at the Bar Examination and Bar Examiners*, 31 BAR EXAM. 102, 103 (1962). Concerning the New Jersey examination of a decade ago, it was observed that "the bulk of the questions could be used interchangeably from state to state and that the answers . . . would not vary significantly from state to state." Gibbons, *Preparation of Bar Examinations*, 33 BAR EXAM. 18, 23–24 (1964).

IV. FOREIGN PRACTICE ON INDIVIDUAL RISK: UNENFORCED OR UNENFORCEABLE "RESTRICTIONS"

A fundamental aspect of multistate practice regulation is its format as a flat prohibition against such practice with only limited exceptions—admission under certain circumstances when applicants meet defined requirements. In addition to such explicit exceptions, however, there exists a large gray area, a no-man's land of unenforced or unenforceable proscriptions on professional activity. Indeed, some of this activity is not just tacitly permitted, but has been deliberately carved out by court decisions or by the logical implications that flow from the decisions. Paradoxically, the range of unenforced proscriptions, *i.e.*, de facto permitted activity, has become defined and has grown in response to the effort to restrict foreign lawyer activity.

Needless to say, this area of nonregulation poses some difficult questions for those who hope to find logic and reason in the rules, and for lawyers who hope to find instruction as to what they may or may not do. Contradiction abounds in this no-man's land, and, not surprisingly, the legitimate concerns of assuring ethics and competence are all but lost in the chaos that has ensued.

Obscuring the boundaries of this no-man's land is the continuing uncertainty as to what activities are included in the term "practice of law."[51] Few "neutral" definitions are applicable in this context; most have been framed in response to disputes over the permissibility of foreign lawyer activity and the collectibility of resulting fees. The obvious result is that the definitions of law practice vary dramatically with variations in perspective or interest. For example, when the activity in question is performed by a foreign attorney not admitted in the state, it is in the attorney's interest to designate the activity as isolated or incidental—not truly "practice of law"—and thus not prohibited or at least not enforceably prohibited; however, the complaining party (the local bar or the aggrieved or nonpaying client) will be motivated to stretch the definition of law practice so that the activity will fall within it and thus be prohibited. By contrast, when the same type of activity is performed by a foreign attorney who has gained admission *pro hac vice*, the interest in labeling the activity as isolated or in-

51. For detailed discussion of this issue, see Part IV-D *infra*.

cidental shifts diametrically. In short, the confusing situation is that "practice of law" is a positive characterization in one instance and from one perspective, but an incriminating and undesirable label in the other. Significantly, none of these designations has much relevance to the issues of attorney competence or ethical conduct.

Ostensibly, many of the distinctions between illegitimate and legitimate foreign practice turn on whether the practice is litigation (state or federal), agency practice or office practice. While these divisions are not without their own problems and ambiguities, they do provide a focal point for the discussion and analysis of the rules and rationales. They are also useful for raising any constitutional issues that may be involved.

A. Litigation in State Courts

While seldom the major part of a lawyer's work, litigation is commonly conceived to be the essence of it. To the extent that one includes in the conception of litigation the preparation for and prevention of litigation, that view is fair enough. With this conception as background, it becomes clear that all bar admission regulations contemplate litigation as the heart of what a lawyer is admitted to do.

Permanent or general admission by definition permits the whole range of lawyer activity, whether closely, remotely or not at all related to litigation, in addition, of course, to litigation itself. Admission *pro hac vice,* on the other hand, is almost exclusively associated with litigation, and specifically litigation in state courts although case law provides implicit and occasionally explicit indications that the *pro hac vice* procedure has relevance to litigation in federal courts, practice before nonjudicial forums, and even to foreign office practice.[52] But the primary function of the process is to gain access to the state courts, and awareness of this fact affords a refined perspective of admission *pro hac vice,* its rationales and specific requirements.

For example, litigation in a state court generally involves the application of local law and procedure.[53] This in turn suggests that *pro hac vice* criteria should be especially concerned with assuring competence

52. *See In re* Estate of Waring, 47 N.J. 367, 221 A.2d 193 (1966).

53. Some state court cases, however, may turn on federal or foreign law—the reason the foreign attorney is involved in the first place. But even in such instances, acquaintance with local custom, procedures and personalities may be important and constitute justification for association with a local attorney.

in that law and procedure. Because the imposition of examination and residence requirements for admission *pro hac vice* would render that procedure so cumbersome as to be useless, the requirement of association with local counsel becomes especially compelling as the only method of attempting to assure that competence. However, another aspect of litigation is that the foreign attorney will be before, and to an extent within the control of, the state court. This might seem to satisfy the state's interest in ethics and enforcement and thus obviate *pro hac vice* local cocounsel and cosignature requirements. However, since actual court presence is likely to be only a fraction of "litigation,"[54] and since court scrutiny and control may exist more in theory than in practice even during actual presence, the local association requirement should probably be retained.

B. Litigation in Federal Courts

In the absence of a unified or uniform federal bar comparable to state bars, the federal courts play a large role in controlling the practice of law before them. As a result, each federal court has its own admission standards, unbound by state rules and limited only by federal constitutional provisions. The United States Supreme Court and the federal courts of appeals typically admit attorneys upon a showing of authorization to practice before the highest court of any state.[55] Similar deference to state admission rules is understandably a primary feature of the federal district court rules.[56] There is no federal bar examination or federal test of character; reliance is placed on state regulations. About 15 district courts offer general admission to any

54. *See* Part IV-D *infra*.

55. U.S. SUP. CT. R. 5; FED. R. APP. P. 46. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 600–04 (4th ed. 1969).

56. This has occurred although Congress has expressly delegated to these courts the power to promulgate rules regulating practice before them. *See* 28 U.S.C. §§ 1654 (1970), 2071 (Supp. III, 1973).

Even in the absence of such express delegation, a good deal of literature and some law exists to the effect that the courts have "inherent" power and responsibility to regulate the practice of law, including some rather dire assessments and predictions about the conceptual and practical consequences of the "abandonment" of this power. *See* Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MILITARY L. REV. 1 (1972); AMERICAN BAR FOUNDATION, UNAUTHORIZED PRACTICE HANDBOOK (1972) (compilation of state statutes and cases on practice of law); *In re* Branch, 70 N.J.L. 537, 57 A. 431 (1904); KAN. SUP. CT. R. 41, *cited in* Martin v. Walton, 368 U.S. 25 (1961); Cooper's Case, 22 N.Y. 67 (1860).

attorney and 45 require membership in the bar of the state where the district court sits.[57]

The district courts also grant admission *pro hac vice,* many requiring association with local counsel as well; others also have reciprocity and "neighboring state" rules.[58] Some Southern district courts, apparently desiring to control the influx of foreign civil rights lawyers, have sought to limit admission *pro hac vice* to a small number of cases per attorney per calendar year.[59]

Although they often follow state standards, the federal courts on occasion assert, or are instructed to assert, their independence in practice-of-law matters.[60] Presumably the federal courts pursue the same policies which underlie the state practice rules. Consequently, much of the commentary about forms of admission generally and about their relevance to state litigation applies to litigation in the federal courts as well. However, one peculiarity of federal laws and procedures—their relative uniformity—contrasts with the interstate situation. On the other hand, the federal courts adopt many aspects of state regulation which are formulated essentially in response to diversity.

We can assume that state ethical standards are useful for federal court purposes as well. However, state methods of assuring legal competence may not be so relevant in the federal court context. State bar examinations, to the extent that they test knowledge of local law and procedures rather than broader professional capabilities, are not an adequate index of competence in a court where federal substantive and procedural law is applied. Thus, federal admission procedures requiring only membership in a state bar, gained by way of state examination, are inadequate to assure competence in a federal court. Because state law is frequently relevant and applied in federal forums, passage of a state bar examination and state bar membership should be viewed as necessary, but not sufficient, conditions for federal court practice. Similar analysis suggests that other state admission require-

57. Note, *Constitutional Right to Engage an Out-of-State Attorney,* 19 STAN. L. REV. 856, 863 (1967).

58. *Id.*

59. *See* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), invalidating a district court rule which limited *pro hac vice* appearances to one per year: "Any rule, whatever its source, that unnecessarily restricts a litigant's choice of counsel in civil rights litigation cannot be sustained." *Id.* at 246. *See* note 111 and accompanying text *infra.*

60. For example, in Theard v. United States, 354 U.S. 278 (1957), the Court remanded a federal disbarment decision in which the district court had felt bound to accept as dispositive an earlier state disbarment. The case was explicitly confined to disbarment, but the logic is certainly applicable to admission issues as well.

ments such as association with local counsel, residence and reciprocity —if designed to strike the previously mentioned balance of interests in competence, mobility and responsibility[61]—are also relevant to qualification for federal admission, but alone should not be sufficient. To complement the state qualifications, there is a need for a mechanism, perhaps examination, to assure competence in federal laws and procedures.[62]

Many proposals have been advanced for uniform federal bar admission, including special federal certification, general admission of all attorneys regardless of residence, and development of national standards.[63] These proposals, however, ignore the state law, procedure and custom component that is relevant in federal courts. Thus, while the existing scheme is deficient because too restrictive, these proposals are unsatisfactory because too lax. Standard federal admission rules seem desirable, but only in conjunction with state requirements.

C. Federal Agency Practice

Federal agency practice is a distinct topic primarily because the United States Congress and the United States Supreme Court have treated it so. Theoretically, practice before state agencies could have been subject to separate admission procedures, but a clear development along such lines apparently has not occurred. On the other hand, federal agency practice could readily have been integrated with the rules and regulations covering federal court practice so that fed-

61. To promote such a balance, for example, most state residence rules should be relaxed as to requirements of intent and duration; state reciprocity rules should focus on actual similarity of laws and procedures between the jurisdictions in question. *See* Part III *supra*.

62. Notably, the Eastern and Western Districts of Arkansas have established their own machinery for examinations, but waive the examination for members of the Arkansas bar. The process apparently has not been used in recent years. The Southern District of Ohio requires passage of its own examination on points of federal law as well as membership in the bar of any American jurisdiction. Note, *Constitutional Right to Engage an Out-of-State Attorney*, 19 STAN. L. REV. 856, 863 n.40 (1967).

By the same token, state examinations should not neglect some coverage of federal laws and procedures, which are sometimes relevant in state litigation and office practice.

63. *See* Comment, *Certification of Out-of-State Attorneys Before the Federal District Courts: A Plea for National Standards*, 36 GEO. WASH. L. REV. 204 (1967); Crotty, *Requirements for Admission to Practice in the Federal Courts*, 19 BAR EXAM. 243, 255–62 (1950), *reprinted in* SURVEY OF THE LEGAL PROFESSION, DIV. IV, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 123, 138–47 (1952).

eral practice in general, like state practice in general, becomes the operative field. The federal practice did not, however, develop this way.

In the leading case in this area, *Sperry v. Florida*,[64] the United States Supreme Court held that a state could not deny the right of a layman, not licensed to practice law in any state, but specifically licensed to practice before the U.S. Patent Office, to perform lawyerlike services related to the preparation and prosecution of patent applications. The recognized right of the state to protect its citizens from "unauthorized" practice is pre-empted in these situations by congressional authority and administrative action implementing that authority.

Since many federal agencies conduct adversary proceedings and have authority similar to the Patent Office, the *Sperry* holding could free a rather wide range of lawyerlike activity from state control. Presumably, a layperson or "foreign" lawyer, licensed by federal agencies, could maintain offices and perform services in several different states so long as the individual's activities were confined to agency affairs. Except to the extent that such a situation might be economically harmful to a state bar, there appear to be no persuasive arguments against it. Federal agency practice—judging in part from the very fact that the agencies are empowered and do license laypersons —seems to be sufficiently "esoteric," distinctive and nonlocal to preclude the need for local bar regulation.

One reason that *Sperry* might cause concern among guardians of state and local bar interests is that the case dealt with activities *ancillary* or *incidental* to actual appearance before the Patent Office. It is the permission of such incidental activity—perhaps analogous to nonlitigation activity in the more conventional realm of legal practice—that greatly broadens the potential range of authorized "unauthorized" practice. In that context, the issue is verbalized under the rubric "office practice."

D. Office Practice

Despite their inconsistency and ambiguity on some levels, the multistate practice regulations are still comparatively clear when the activity scrutinized is court litigation. The statutes presume litigation as

64. 373 U.S. 379 (1963).

the essence of law practice and are framed with that presumption in mind. Thus, it is clear that admission *pro hac vice* permits the foreign lawyer to litigate the one problem for which admission was granted. Similarly, it is clear that a foreign lawyer who has not been admitted in a state, *pro hac vice* or otherwise, violates its regulations by litigating there nonetheless. Difficulties arise, however, when one attempts to define litigation. Without much doubt litigation includes some activity outside the courtroom in preparation for trial. It can be argued with equal cogency that it includes some activity designed to prevent a trial, *e.g.*, out-of-court settlements. However, the logical implication of stretching the definition of litigation is that *all* lawyer activity is in some sense intended to prepare for or prevent a confrontation in court.[65]

Realistically, at some point lawyer activity becomes difficult to detect or restrict. At that point, one might term the activity nonlitigation, "office practice," or even "not practice of law." The label depends largely on the context in which the question concerning the activity is raised. Also at that point, the conceptual problems for rule-makers or rule-interpreters, whose function is to impart a measure of logic and predictability to the law, are at a maximum, as are the practical problems for lawyers who must discern what foreign activity is permissible.

A review of the leading cases relating to office practice indicates the complexities involved.[66] Without being unduly critical, it appears that the most conspicuous characteristic of the cases is the courts' substitution of sophistry for reason. Because the cases also seem to turn primarily on individual fact situations, it is extremely difficult to extract any consistent or coherent principles from them. Thus, we encounter terms such as "advice and assistance,"[67] "incidental . . . consultations"[68] and "solitary incident"[69] to designate office activity by

65. The intractable detail of the line-drawing process inherent in applying conclusory labels such as "litigation" and "office practice" might productively be replaced by the more fundamental inquiry, "What activities warrant institution of enforcement procedures and why?" *See* Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276, 1306 (1967).

66. The three leading cases in the area are Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964); *In re* Estate of Waring, 47 N.J. 367, 221 A.2d 193 (1966); Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965). *See* Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967).

67. Appell v. Reiner, 43 N.J. 313, 204 A.2d 146, 148 (1964).

68. *In re* Estate of Waring, 47 N.J. 367, 221 A.2d 193, 198 (1966).

69. Spivak v. Sachs, 21 App. Div. 2d 348, 250 N.Y.S.2d 666, 668 (1964), *rev'd*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

nonadmitted foreign lawyers which the courts consider not proscribed or not proscribable. At the same time, some of these terms may denote prohibited activity for a foreign lawyer who has been admitted *pro hac vice; e.g.,* such a lawyer's activity which is merely "supervisory" or "advisory" in the case for which he or she was admitted would be suspect. Moreover, the same term can assume different meanings in the effort to reach the intuitively desired result. Thus, lawyers, admitted *pro hac vice* would prefer their activities labeled "incidental" (meaning "inseparable" rather than "isolated") and therefore within the authority conferred by the admission procedure. In some instances, obvious lawyerlike activities of nonadmitted lawyers will be designated as "not practice of law" so as to justify nonenforcement, while in others the same designation will have precisely opposite consequences for lawyers admitted *pro hac vice, i.e.,* separable or distinguishable from the limited practice of law for which admission was granted.

The difficulty facing the courts is admittedly enormous. In essence the courts are asked to make prosecutorial decisions— *i.e.,* enforcement versus nonenforcement—cloaked in judicial language. Fundamentals are often obscured by individual issues and special interests. The basic purpose of the rules is to protect the public from a lawyer's incompetent and unethical conduct. Therefore, the question must be: Does each rule serve this objective?

A jurisdictional problem has been identified by commentators who suggest that "federal rules apply only to federal court practice, leaving state rules to govern . . . all office practice."[70] This could be a spurious issue; implied is that the presence or absence of specific authority and specific rules shapes the boundaries of permitted legal activity by foreign lawyers. In reality, however, there exists no abstract law or grant of jurisdiction concerning office practice at all. Nevertheless, this void has hardly prevented courts, both state and federal, from dealing with the issue. For example, *Sperry*[71] represents the assertion of federal jurisdiction over federal agency "office practice." State courts have assumed jurisdiction on an ad hoc basis.[72]

70. Note, *The Practice of Law by Out-of-State Attorneys,* 20 VAND. L. REV. 1276, 1303 (1967).
71. 373 U.S. 379 (1963). *See* text accompanying note 64 *supra.*
72. *See, e.g.,* Spivak v. Sachs, 16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 956 (1965).

Another issue is raised by the prospect of granting admission *pro hac vice* for office practice. The arguments favoring such admissions can be framed in terms of the harshness or narrowness of multistate regulations and, from the other side, of the lack of supervision over office practice as contrasted to litigation. Present provisions for admission *pro hac vice,* however, are not necessarily limited by their terms to litigation in the narrow sense.. One might further ask whether an a priori definition of office practice for purposes of admission *pro hac vice* will be any more workable or rational than the uncertain parameters of the scope of permitted activity presently developed in the absence of formal office practice admission procedures.

Turning to more substantive issues, New Jersey presently appears to have developed the most explicit rules on multistate office practice. In *Appell v. Reiner,*[73] the New Jersey Supreme Court devised the "incidental" rule: when all but an incidental portion of office practice is within foreign state boundaries, and the local activity conducted by a foreign attorney is incidental to the basic out-of-state transaction, that incidental activity does not constitute unauthorized practice of law. The *Appell* court suggested that the activity is not unauthorized so long as: (1) the foreign attorney is licensed in at least one of the states in which the transaction occurs; (2) use of local counsel is precluded because "grossly impractical and inefficient"; (3) association with local counsel would result in fees in excess of reasonable compensation; and (4) no local court proceeding is involved.[74]

Two years after *Appell,* the same New Jersey Supreme Court arrived at a "coordinating-supervisory" standard for permitted office practice by out-of-state attorneys. In *In re Estate of Waring,*[75] a New York law firm which had long represented the decedent and her family was retained by the executors to administer her estate. Local counsel was retained for local aspects of the estate while the foreign counsel limited themselves to "general supervision" and federal taxation questions. The court granted recovery of fees to the New York firm, holding that such supervisory activity was not prohibited. The court emphasized the principle of limiting rules to "commonsensible" application.[76] Noting that a compelling interest in the foreign firm's

73. 43 N.J. 313, 204 A.2d 146 (1964).
74. 204 A.2d at 148.
75. 47 N.J. 367, 221 A.2d 193 (1966).
76. 221 A.2d at 198.

retention had been shown, the court also stressed the firm's self-regulation in properly restricting its activities by allocating local matters to New Jersey counsel.[77]

The New Jersey cases are not founded on a clear and consistent rationale, but perhaps can be explained by the commonsense, but analytically unhelpful, proposition that unnecessary hardship to clients or lawyers ought to be avoided. It is clear that there is little connection between either the "incidental" or "supervisory" rule and the fundamental rationale behind multistate practice regulation—assuring lawyer competence and integrity. The *Appell* court simply adopted a fact situation and, by labeling and underlining, transformed it into a rule; there is no principle, other than intuition or expediency, in this process. Similarly, in *Waring*, although the foreign firm's previous involvements and the fact that local counsel was retained provided sound factual justification for the result reached, the "supervisory" rule which emerged from the case is less than useful precedent.

That there is little rhyme or reason to the *Appell* and *Waring* cases is exemplified by a New York case decided chronologically between, but logically opposite, the New Jersey cases. In *Spivak v. Sachs*,[78] the New York Court of Appeals reversed lower court holdings that a foreign lawyer's service was not the practice of law because "advisory and consultive" and "a solitary incident." The reversal demonstrates the unpredictability of case law whose focus is on the incidental or nonincidental nature of the activity in controversy, a focus which may have some bearing on the issues of bar economics or client convenience, but which bears no relation to the basic rationale of assuring competence and ethics. The New York court did little to clarify the question. It held that the practice was not permitted because: (1) the client was a New York citizen rather than a citizen of the foreign attorney's state (California); (2) the advice given by the foreign attorney was directed to the client and not to the local counsel who was also on the case; and (3) the services were not limited to inspecting documents and attending conferences, but included advice that the suit be filed in a different jurisdiction and that local counsel be dismissed.[79] The court then impliedly admitted the transitory significance of those criteria by citing *Appell* approvingly and adding that in view of "the

77. *Id.* at 198–99.
78. 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).
79. *Id.* at 165–66, 167, 211 N.E.2d at 330, 331, 263 N.Y.S.2d at 954–55, 956.

numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York,"[80] even though the applicable New York statute "could . . . be stretched to outlaw customary and innocuous practices."[81] *Spivak,* then, by way of dictum, added two phrases to the store of magic terms denoting permitted activity: "customary and innocuous practice" and activity only "somehow tied" to the local forum. It is apparent that *Appell, Spivak* and *Waring* leave the area in considerable disarray.

The federal courts addressing the subject raise constitutional issues, but essentially are no more helpful because they duplicate the state courts' failure to focus on the fundamental question of why there is or should be multistate practice regulation at all, not just why a specific instance of interstate activity should or should not be permitted. In a leading federal case, *Spanos v. Skouras Theatres Corp.,*[82] a California attorney, unlicensed in New York, was retained for six years "primarily as a consultant" to the defendant's New York lawyer. The defendant was a New York corporation and the consultation was exclusively on federal antitrust matters relating to the movie industry, in which area the foreign lawyer was a well-known specialist. In an action to recover fees, the trial court designated the foreign attorney's practice a "solitary incident" involving only one client in one matter and thus not practice of law. The Court of Appeals for the Second Circuit reversed on the ground that even though the attorney's activities related to a single case, the duration of those activities dictated that they be considered practice of law. However, on reconsideration en banc, the court reversed itself on pragmatic and constitutional grounds. It noted the "increased specialization and high mobility of the bar" and held that "[u]nder the privileges and immunities clause of the Constitution, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."[83]

The final result of *Spanos* may not be offensive because there was local association and because consultation was apparently limited to

80. *Id.* at 168, 211 N.E.2d at 331, 263 N.Y.S.2d at 956.
81. *Id.*
82. 364 F.2d 161 (2d Cir.), *cert. denied,* 385 U.S. 987 (1966).
83. *Id.* at 170.

federal issues and only one client. The reasoning, as it can be traced from the lower court's holding to the ultimate decision, however, is far less commendable. If protection of the public is the rationale for regulation, then the rules should require attorneys such as Spanos to apply formally for some kind of local bar admission incident to a six-year consultation period. Labeling an activity a solitary incident and thus not practice of law, or a solitary incident and nonetheless practice of law, leads nowhere. Mention of the privileges and immunities clause focuses no closer to the issue of protecting the public from incompetent or unethical lawyer behavior.[84]

V. THE CONSTITUTIONAL FOCUS

A. Right to Practice

The practice of law is not a right expressly guaranteed by the United States Constitution, and admission to the bar of one state confers no reciprocal constitutional right to practice in another. There remain, nevertheless, constitutional limits on state authority to regulate practice. *Schware v. Board of Examiners*[85] involved the refusal of New Mexico to allow Schware to take its bar examination. The United States Supreme Court held that the Board had acted arbitrarily in deciding that Schware was deficient in moral character and that he had been deprived of due process when he was denied an opportunity to take the bar examination. The Board could require applicants to meet its standards, "but any qualification must have a rational connection with an applicant's fitness or capacity to practice law."[86]

84. A peculiar aspect of the introduction of privileges and immunities in *Spanos* is that the defendant was a corporation. In Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), and succeeding cases the Supreme Court has firmly established the principle that "[a] corporation is not a citizen within the meaning of the provision, and hence has not 'privileges and immunities' secured to 'citizens' against state legislation." Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899).

85. 353 U.S. 232 (1957). Compare Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966), *noted in* 55 CALIF. L. REV. 899 (1967), in which the court overruled the committee's decision that bar applicant Hallinan lacked the requisite good moral character to become a lawyer because he had been arrested for civil rights protests.

86. 353 U.S. at 239. A strong dictum is of interest: "A State cannot exclude a person from the practice of law . . . in any manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Id.* at 238–39. Appended to this statement was the following footnote: "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized,

B. Right to Counsel

The right to counsel, including appointed counsel for indigents in criminal cases where incarceration may occur, is an established constitutional right.[87] The right to court-appointed counsel has not been recognized in civil cases, nor for misdemeanors or petty offenses when no incarceration can be imposed, though such extension has been strongly advocated.[88] The implications of these constitutional developments for a "right" to out-of-state counsel are uncertain.

In *U.S. v. Bergamo,*[89] the Court of Appeals for the Third Circuit reversed a district court decision denying admission *pro hac vice* to a foreign attorney to represent a criminal defendant. The court concluded that the sixth amendment right to counsel as applied in federal criminal proceedings includes counsel licensed by any state. Thus, the court abandoned the admission regulation scheme in this criminal case. A plausible explanation for the result in *Bergamo* is that the place of bar membership was not really relevant because the trial was in a federal court and primarily involved federal law. However, this factor was not cited by the court. The result could also be justified if admission *pro hac vice* had been wrongly or arbitrarily denied or if local counsel had been unavailable, but the case did not turn on those issues.[90]

It would appear that *Bergamo* applies only to the federal court system and does not affect the states' power to regulate foreign practice in criminal cases. This inference finds support in a later decision in the same circuit, *Cooper v. Hutchison,*[91] in which the court ex-

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it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." *Id.* at 239 n.5.

87. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

88. *See* Justice Douglas' dissenting opinion in Hackin v. Arizona, 389 U.S. 143 (1967).

89. 154 F.2d 31 (3d Cir. 1946).

90. *Bergamo* involved a very confused fact situation which may have made articulation of clear reasons difficult. Apparently the lower court judge had been virtually "harassed" by foreign lawyers claiming to represent the defendants. He repeatedly refused to admit them for the case on grounds that there were plenty of competent local lawyers available. A final refusal to a foreign attorney was made the day before the trial date. At trial, the local attorney who was to be associated on the case refused to present the defense on the ground the unanticipated rejection of the chief (foreign) counsel had left him unprepared. In short, it was clear that the client was not adequately represented, but confusion over where the fault lay may have blurred the issues and their resolution on appeal.

91. 184 F.2d 119 (3d Cir. 1950).

pressed doubt that a defendant has a constitutional right to choose any attorney. In addition, the District Court for the Southern District of New York in *People v. Epton,*[92] ruled some 20 years after *Bergamo,* and 15 years after *Cooper,* that "counsel of his own choosing means counsel recognized by the Courts of this State." In sum, the *Bergamo* "right" to out-of-state counsel in federal criminal cases is better viewed as a matter of federal judicial policy than as a constitutional right.

The right to effective counsel, however, received constitutional endorsement on first amendment grounds in *NAACP v. Button.*[93] The United States Supreme Court held in *Button* that states cannot regulate the practice of law in such a way as to preclude certain groups from effective litigation. Recognizing civil rights litigation as "a form of political expression,"[94] the Court stated that the freedom of such expression depends on the capacity to obtain effective counsel, including out-of-state counsel when local representation is unavailable. The Court also advanced the rule that when a client's constitutional rights are involved, the burden of justifying admission restrictions shifts to the state which then must "advance any substantial regulatory interest, in the form of substantive evils flowing from the practitioner's activities, which can justify the broad prohibitions it has imposed.[95] In two subsequent cases,[96] the Court found that state restrictions failed to meet the "substantial regulatory interest" test announced in *Button,* thus impermissibly violating the clients' right of freedom of association. One of the cases, *United Mine Workers v. Illinois State Bar Association,* involved a union plan for referral and employment of attorneys to handle Federal Employer's Liability Act (FELA) claims. This case is particularly relevant to the multistate practice issue because the potential effect of the union plan would have been to channel cases to out-of-state FELA expert attorneys.

The ramifications of these three Supreme Court decisions are not entirely clear. One commentator suggests that they stand for an unqualified constitutional right to counsel of one's own choosing.[97] This

92. 248 F. Supp. 276, 277 (S.D.N.Y. 1965).
93. 371 U.S. 415 (1963).
94. *Id.* at 429.
95. *Id.* at 444.
96. Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).
97. KATZ, *supra* note 8, at 4.

interpretation would require invalidation of *any* regulation of multistate practice; a state would be required to grant "full faith and credit" to the accreditation of an attorney of any other state, a notion which no court has yet adopted. A narrower and more plausible reading of the cases is that in some very special situations, such as the civil rights context of the 1960's or the closely defined FELA scheme, the interests of the client can take precedence over the state regulatory interest to shift the burden of justifying the practice regulations to the state.

The Court of Appeals for the Fifth Circuit, in *Lefton v. City of Hattiesburg*,[98] specifically established the right to foreign counsel in a civil rights case and presented a difficult, but perhaps the most rational rule. In *Lefton*, absence of local counsel was held to limit the state's traditional discretion over admission *pro hac vice:* "[I]f no local counsel are available, a court rule requiring local counsel should be waived."[99] Although the solution is self-evident, the rule is rational and addressed to the problem. The rule is also difficult to the extent that "nonavailability" can be interpreted in a very subjective fashion and is possibly onerous for clients to establish. How many members of the local bar must have refused the case before nonavailability is established? Still, these difficulties of practical application can be overcome to make the rule work fairly for clients. Dealing with the essential and practical issue of availability of local counsel reaches the heart of the multistate regulation problems and rationales and seems far preferable to the process of trying to identify what is or is not "constitutionally protected" by the first and sixth amendments.

VI. SPECIALIST ATTORNEYS IN OUT-OF-STATE PRACTICE

The discussion thus far has pertained to attorneys generally, but a cursory focus on several types of specialist attorneys—corporation house counsel, civil rights attorneys and judge advocates—is useful to illustrate the limits of existing regulatory schemes and the difficulties in improving them.

98. 333 F.2d 280 (5th Cir. 1964).
99. *Id.* at 285.

A. Corporation House Counsel

Restrictive practice regulations are especially significant to attorneys employed by multistate business firms as house counsel.[100] In some jurisdictions, the requirements for admission on motion for foreign house counsel are more stringent than for all other attorneys on the grounds that house counsel, unlike private attorneys, do not generally practice law.[101] Corporate legal work is deemed too specialized to

100. Two surveys indicate that between 47 and 61% of all corporations employ house counsel. A 1959 study relating the presence of a legal staff to the size of a corporation revealed the following results:

Size of Company by Number of Employees	*Number of Companies Replying*	*Number of Companies Having Legal Departments*	*Percent Having Legal Departments*
Fewer than 500	40	3	8
500-999	32	3	11
1,000-4,999	99	41	41
5,000-9,999	34	22	65
10,000-49,999	52	48	92
50,000 and up	13	13	100
Size not available	16	4	25
Total	286	134	47

Mathes & Clark, *Organization for Legal Work*, 16 NATIONAL INDUSTRIAL CONFERENCE BOARD, BUSINESS RECORD 463 (1959). The 1959 survey was confirmed by a similar survey in 1967 which produced the following results:

Company Size (Number of Employees)	*Total Number of Companies*	*Have House Legal Counsel*	
		Number	*Percent*
1,000 or fewer	34	3	9
1,001-5,000	63	32	51
5,001-25,000	60	50	83
Over 25,000	34	31	91
Total	191	116	61

Forman & Brown, *Board Chairmen, Presidents, Legal Counsel: Some Aspects of Their Jobs*, 4 NATIONAL INDUSTRIAL CONFERENCE BOARD, CONFERENCE BOARD RECORD 9, 11 (1967).

101. *See* Note, *Corporate Counsel: Qualifications for Admission to the Bar on Motion Under Reciprocity Statutes*, 41 NOTRE DAME LAW. 235, 242 (1965).

The alternate position is that admission requirements for corporation house counsel should be less stringent than those for privately-employed attorneys. It can be argued that since corporate practice is a specialized activity often requiring interstate mobility, there should be special limited admission for foreign corporate practitioners. The out-of-state admission would be automatic for those house counsel duly licensed in any one state provided the practice is confined to office consultation on corporate matters only. For example, the New Jersey State Bar Association has recently granted associate membership to corporate counsel with an office in that state though not admitted there. The Supreme Court of New Jersey has not yet

be considered as "practice of law" and counted toward the designated number of years of practice required for admission on motion.[102] The Rhode Island Supreme Court attempted to deal with the problem of defining "practice of law" in *Petitions of Jackson & Shields.*[103] The Rhode Island State Board of Bar Examiners denied admission on motion to two attorneys, one a corporation attorney and member of the New York bar and the other a navy judge advocate and member of the District of Columbia bar, on the ground that they had not engaged in "active general practice." The state supreme court reversed, stating:[104]

> [T]he phrase 'general practice' does not contemplate . . . activities ranging over the entire field of legal action. Such a view would . . . exclude from its purview lawyers who [are] specializing in some particular field of legal activity. . . . [T]he phrase 'general practice' was intended to encompass all of the manifold activities of a legal nature that inhere in the consequences of those human relationships of which the law takes cognizance.
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> . . . .
>
> . . . [A] lawyer who specializes in the adjustment of conflicts and the termination of litigation generated by some particular human relationship . . . is engaged in the general practice of law . . . .

Other states have defined practice as restrictively as the Rhode Island State Bar.[105] Since in many corporate legal departments litigation

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followed this lead. Letter from Brian D. Forrow, Vice President and General Counsel, Allied Chemical Corp., to Samuel J. Brakel, June 10, 1974. The case for special treatment of corporate counsel as distinct from any other specialist attorney is of dubious validity. If corporate attorneys are entitled to such treatment, it may be argued that other types of attorneys are equally entitled.

102. There are at least three problems with this argument. First, the argument is not applied to *local* corporation house counsel who after years of exclusively corporate practice presumably would encounter no problems in setting up as private practitioners. Second, the unsatisfactory nature of the admission-on-motion scheme itself which, if unaccompanied by requirements such as residence (liberally construed) or special examination, is a poor method for assuring the competence of any lawyer, corporate or otherwise. On the other hand, if the requirements of residence and/or examination are part of the admission scheme, and if the corporation counsel meets them, then there remains no justification whatsoever for discriminatory treatment. Finally, with the increase in specialization throughout law and society, and the correlatively decreasing percentage of lawyers who "practice generally" as the admission on motion laws contemplate, it makes little sense to single out corporate specialists as the one group failing to meet this criterion for admission.

103. 95 R.I. 393, 187 A.2d 536 (1963).

104. 187 A.2d at 539–40.

105. *See* Note, *Corporate Counsel: Qualifications for Admission to the Bar on Motion Under Reciprocity Statutes,* 41 NOTRE DAME LAW. 235 (1965).

is often referred to outside specialists, this provision imposes a special hardship on corporate attorneys. The trial experience rule is a carry-over from earlier times when a solo attorney practiced all phases of law.[106]

B. Civil Rights Attorneys

The problem regarding admission of foreign civil rights attorneys can be framed in terms of "availability." Until recently (and perhaps still today), it was difficult for some minority group members in certain localities to obtain local counsel for certain causes. These localities made foreign attorney admission rules more restrictive precisely in response to the actions of foreign attorneys seeking to remedy the availability problem.

The issue presents itself in two forms: foreign attorneys unable to obtain admission *pro hac vice* because of inability to obtain local associated counsel, and foreign attorneys unable to obtain admission despite local association. Both situations illustrate how statutes designed to protect the public can become tools for depriving minority groups of legal representation. The inability aspect was manifestly present when local courts in the South during the 1960's convicted out-of-state civil rights attorneys not associated with local counsel for unauthorized practice.[107]

Sobol v. Perez[108] and *Sanders v. Russell*[109] present the other facet of the issue: denial of admission despite local association. In *Sobol,* the foreign attorney, although associated with local counsel, was charged with unauthorized practice. Sobol asked the federal district court to enjoin his prosecution on the ground that Louisiana's unauthorized practice statute violated the equal protection clause of the fourteenth amendment by depriving certain groups of needed representation. The court, while enjoining the prosecution, avoided the constitutional issue and instead based its holding on a liberal reading of a statutory exception. In doing so, the court focused squarely on the availability issue—the unavailability of civil rights lawyers because of

106. *See* Hunt, *What Constitutes Law Practice for Admission to the Bar on Motion or by Comity?* 29 BAR EXAM. 35, 38 (1960).
107. *See* Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases,* 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 65 (1968).
108. 289 F. Supp. 392 (E.D. La. 1968).
109. 401 F.2d 241 (5th Cir. 1968).

harassment by authorities—which is the proper focus in multistate practice regulation in this context.

In *Sanders,* the Fifth Circuit invalidated a Mississippi federal district court ruling that (1) limited admission *pro hac vice* to attorneys admitted elsewhere for five years or more and (2) restricted such admissions to not more than one appearance per year.[110] The circuit court held, rather narrowly, that admission of the petitioning attorneys who did not meet these standards did not conflict with any legitimate interests that may have motivated the district court to promulgate the rule.[111]

C. *Judge Advocates*

The problem for military judge advocates,[112] as for corporation house counsel, is meeting the prior practice requirements for admission. The issue is whether military legal practice, like specialized corporate practice, is within the scope of the statutory contemplation of law practice.

In *Application of Babcock,*[113] the Supreme Court of Alaska upheld a state bar decision refusing admission to a former judge advo-

110. *Id.* at 243.

111. *Id.* at 245–46. Other indications that the circuit court intended its ruling to be narrow are its avoidance of constitutional language and its provisos that the holding did *not* apply to practice in state courts, to fee-generating cases or general admission in federal courts, or to admission *pro hac vice* without association with local counsel. While avoidance of the constitutional issue was probably proper, the other limitations on the holding are troublesome.

It is difficult to find justification for restricting admission *pro hac vice* to one appearance per year no matter what the forum. *See* notes 9 & 59 *supra.* The most obvious ends served by such restriction are the illegitimate ones of obstructing civil rights litigation and economic protectionism. Perhaps the court in limiting its holding to the litigants and circumstances before it reasoned that a legitimate purpose was conceivable. For example, limiting *pro hac vice* appearances to a small defined number can be said to be aimed at the foreign applicant who abuses the *pro hac vice* procedure when, given his or her intentions and circumstances, he or she should apply for general admission.

As to the requirement of five years of practice, it is in itself not a sound requirement upon which to base admission. Yet, because the statutory schemes of many states contain similar requirements, *see* Part III-B *supra,* a broadside attack against the district court rule seemed inappropriate. The conclusion that can be drawn from the complexities raised by decisions such as *Sanders* is that rules and statutes which clearly focus on the fundamental practice regulation goals—assuring the availability of competent and ethical attorneys—would make abuses in the civil rights field more difficult.

112. See Marks, *supra* note 56, for a recent evaluation of the Defense Department's attempt to expand the military legal service program.

113. 387 P.2d 694 (Alas. 1963).

cate who had served as a military lawyer for 10 years and had participated in over 1,000 trials:[114]

> [W]e do not believe that it can be reasonably said of a lawyer in the military service, even though he be assigned to do work only of a legal nature, that he is engaged in the business or profession of practicing law. His business or profession while in the Armed Forces, as we see it, is that of being a soldier . . . .

This reasoning is not persuasive, and the Alaska Legislature has since amended and enlarged the statutory definition of practice of law to include military legal service. A few states, however, still expressly decline to consider judge advocate service as legal work, and many other jurisdictions in practice discourage admission of military applicants or have no comity arrangements.[115]

In sum, the subject of admission of specialist attorneys is fraught with issues which relate to matters of politics, economics and social preconceptions, all of which are unrelated to the rationale of protecting the public from the incompetent and unethical conduct of foreign lawyers.

VII. CONCLUSIONS AND RECOMMENDATIONS

This article has scrutinized the "hodgepodge of standards for admission"[116] as they relate to multistate practice. It has examined state restrictions on various kinds of law practice by foreign attorneys, the state interests and policies that undergird them and some of the judicial limitations on these restrictions. On the basis of this study, several specific recommendations are proposed.

The economic protection of the local bar cannot be recognized as a

114. *Id.* at 697–98.

115. *See* Howell, *Does Judge Advocate Service Qualify for Admission on Motion?* 53 A.B.A.J. 915 (1967).

The difficulty with these statutes, the Alaska Supreme Court ruling and even the Alaska legislation which eventually changed the law to include military practice within the statutory definition, lies in their focus. The issue is framed in terms of whether military practice is or should be considered "law practice"; however, the real issue is whether a JAG member can be presumed to be sufficiently competent in local law and procedures to be allowed to practice in that state. A judge advocate's practice experience is as relevant for determining the narrow issue of local law competence as the practice experience of any other foreign lawyer. In short, there is no reason to treat the military lawyer any differently than any other foreign applicant; to do so is an unjustifiable discrimination.

116. Chief Justice Warren Burger, *quoted in* Wilkey, *Proposal for a "United States Bar,"* 58 A.B.A.J. 355, 356 (1972).

valid motive for restrictions on multistate practice; all rules whose only justification is economic self-interest should be abolished. *Pro hac vice* statutes need several modifications: (1) they should inquire into the circumstances that make it necessary for the client to be represented by a foreign attorney and for the home state to abdicate its usual controls; (2) those requirements based solely upon reciprocity lack justification and should be abolished; (3) provisions requiring association with local counsel are sound only so long as they are designed to guarantee local competence in a field of law relative to the case or instance for which admission *pro hac vice* is granted; (4) the discretionary aspects of the *pro hac vice* scheme should be eliminated. Labeling the practice of law a "privilege" as opposed to a "right" provides no justification for arbitrary or discriminatory admission *pro hac vice.*

Permanent, in contrast to *pro hac vice,* admission should not be based on reciprocity or comity principles alone, nor solely on a specified requisite period of foreign practice. Such provisions fail to assure competence in local law and procedure; only among states with very similar legal systems and customs is the application of these principles appropriate. The statutes as presently constituted do not focus on that circumstance. If reciprocity arrangements in multistate regulation are to be retained, their focus should shift to the issue of similarity in laws and procedures among reciprocating states.

Residence requirements are a conceptually appropriate way of guaranteeing competence in local processes and ethical behavior. One advantage of these provisions is that they give the potential client population an opportunity to judge an attorney's qualifications. Unfortunately, as presently stated and applied, these requirements are often too burdensome and should be relaxed. Compromise provisions such as conditional licensing for a specified period appear preferable to traditional residence rules. Thought might also be given to expanding the requirement for local counsel association for a defined period to permanent admission applicants; presently the requirement is confined to *pro hac vice* applicants.

Moreover, permanent admission rules requiring trial experience are unreasonable and should be abolished, since trial practice is only a fraction of a lawyer's work and local applicants are not subjected to similar requirements. Admission rules stipulating that the requisite period of prior practice in the foreign state be in the state of original admis-

sion are without justification and appear to exhibit only a prejudice against mobility.

To the extent that admission regulations for either local or foreign applicants are intended only to ensure competence in local laws and procedures, requiring passage of a local bar examination so focused appears reasonable. Special, limited examinations for foreign lawyer applicants appear to be a logical and practical means for accomplishing the limited ends described. Discretionary examination, however, is a dubious principle. At best, it allows for relaxation of a burdensome requirement in cases where local law competence is assured by other means, *e.g.*, practice in a neighboring state with very similar legal processes or perhaps even frequent *pro hac vice* practice in the home state. The opportunity for favoritism or discrimination appears to outweigh the advantages.

Proposals for a national bar examination and admission based exclusively on such examination fail to acknowledge the state interest in promoting competence in local law, procedure and custom. While the pressures for liberalization of dated and narrow rules are real, further fact gathering and reasoned analysis are necessary to enable the striking of an appropriate balance between local needs and interests and the demands of an increasingly mobile, complex and specialized society. Multistate examination, as a supplement to, or supplemented by, local examination is a more promising solution.

It seems appropriate for federal courts in their admission procedures to consider state standards and requirements because state laws and procedures are often applicable in federal courts. In addition, federal court admission procedures would be improved by specifically testing for federal law competence. Proposals for uniform federal bar admission standards are sound so long as they retain the proviso that local requirements be met as well.

Special agency-practice licensing of foreign attorneys or even laypersons, as is done by the U.S. Patent Office, seems acceptable. There are methods, short of opposing such special licensing, to assure that the licensees do not engage in the general "practice of law," however defined.

That there will remain an area of foreign lawyer activity that is very difficult, if not impossible, to regulate should perhaps be accepted as inevitable. It may be that it is not in a state's interest to enforce, for example, prohibitions in every "isolated" instance of "office

practice" by foreign lawyers. Nonenforcement in these areas is a "prosecutorial" decision; it is inappropriate for the courts to become involved in such decisions and to fashion prosecutorial rules that have no relationship to the basic purposes underlying multistate practice regulations. Thus, courts should avoid rules turning on issues such as whether the activity is "isolated," "supervisory," "incidental," "office" or designated by any other labels that have little bearing on the goals of assuring lawyer competence and ethical behavior. Similarly, framing the multistate practice issues and decisions in federal constitutional terms is unavailing and, more often than not, only diverts attention from more precise concerns.

Specialist lawyers, whether corporation, civil rights or military, should not be subjected to more stringent rules than other attorneys when applying for foreign admission. Given the absence of valid reasons for such differential treatment, it is essentially invidious discrimination. On the other hand, further study is needed to make a persuasive case for more lenient or limited admission standards for specialist lawyers.

Finally, with respect to specialist and generalist attorneys alike, empirical research is needed on the magnitude and nature of multistate practice. A two-part study would be desirable: (1) to assess the extent of multistate practice by identifying those who have been or can be expected to be affected by the regulations;[117] and (2) to examine the impact of multistate practice rules by relating them to the actual experiences and work patterns of lawyers.[118] Only then can the

117. The study should randomly sample lawyers, who would be asked a series of short questions to determine the frequency, circumstances and reasons for which they have desired, gained or been denied the opportunity to practice law in a foreign jurisdiction. Such questions would indirectly reveal a good deal about the nature of law practice, the number and distribution of specialists and the level of specialization among "generalists." An ongoing study by Barlow F. Christensen of the American Bar Foundation entitled "The Work of Lawyers," involving intensive interviews with selected samples of attorneys of one state, touches upon some of these issues. The sample of lawyers surveyed would have to be large, but the questionnaire would be simple and could perhaps be self-administered through the mails.

118. This part of the study would be more difficult and potentially more costly. Lawyer and client mobility, the nature of clients and interstate legal problems, the availability of experts or specialists, and the "litigation" versus "office practice" distinction are among the issues which should be examined. The method of study for this part may have to be a choice among mutually exclusive alternatives. One could either select one or a few of the many specialist lawyer groups or geographically unique groups (such as lawyers practicing in bordertowns or cities) among whom the incidence and seriousness of multistate practice problems—as revealed by the first part of the study—is especially high. The procedure would be to study a sizable and representative sample of these few groups in an effort to obtain an accurate picture

propriety and enforceability of existing or proposed regulations be fully assessed.

of the problems relating to these selected groups. The alternative is to settle for a much more flexible and impressionistic study of *all* the types and groups of lawyers affected by multistate practice problems. One would forego a measure of accuracy and in-depth knowledge in favor of a broader view of the impact of the regulations.