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Executive Summary on Reciprocity

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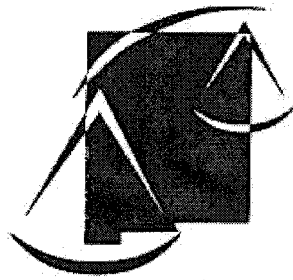
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Reciprocity

EXECUTIVE SUMMARY ON RECIPROCITY

Law students Daniel Marquez and Patrick Redmond, under the supervision of University of New Mexico Law Librarians Barbara Lah and Alexandra Siek, researched the issue of reciprocity and bar membership. This is a short summary of the memorandum discussing the findings of that research. Collectively the memos discuss the following issues raised by reciprocity: 1) the various forms of reciprocal licensing schemes; 2) the impact that reciprocal licensing has had on bar membership; 3) a comparison of reciprocal licensing to admission *pro hac vice*; 4) legal issues such as constitutional concerns raised by the adoption or rejection of reciprocity; and 5) professional issues.

Before delving into these topics and the arguments for and against reciprocity it is important to become familiar with the history of professional regulation, reciprocal licensing, and the development of restrictions on interstate practice. Until the era of the Great Depression, reciprocal licensing under admission on motion was the rule rather than the exception.¹ During the latter half of the twentieth century, however, as improved transportation and communications facilitated multijurisdictional practice, some states reacted by repealing their reciprocal admission rules.² After a 1998 case stirred the waters³, the American Bar Association created a Commission on Multijurisdictional Practice, which resulted in a model rule for admission on motion, designed to ease impediments to attorneys' national mobility.⁴ Some states followed with new rules for reciprocal licensing, admission on motion and admission without examination.⁵

Critics of multijurisdictional practice reform remain, however. Some have raised states' rights and inherent powers concerns.⁶ Others have argued that argued that "state licensing assures quality control among lawyers and protects clients from incompetent practitioners."⁷ Still others have cast multijurisdictional practice reform as part of a trend toward encroachment on the legitimate practice of law by non-lawyers. Proponents of reform have answered that state licensing and regulation would continue under the ABA proposal. Further, a larger pool of specialized practitioners would more likely enhance than detract from the quality of legal services in the state.⁸ Reform proponents have suggested that opponents' real motive for retaining barriers is economic protectionism.⁹ Even the U.S. Supreme Court has repeated the comment that many states that have "erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."¹⁰ Apart from practical and professional issues, state barriers to multijurisdictional practice would seem to be disfavored under the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges and Immunities Clause and the dormant Commerce Clause, among other provisions.

To be clear, the basic idea behind reciprocity is that the foreign attorney is granted full admission and licensure with the forum state bar association without having to take that state's bar

¹ RICHARD L. ABEL, AMERICAN LAWYERS 115-18 (1989).

² See, e.g., Michael P. Crow, *Is Reciprocity Making a Comeback?*, 73 J. KAN. B. ASS'N 4 (Oct. 2004).

³ *Birbower v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998).

⁴ *ABA Model Rule on Admission by Motion*, available at http://www.abanet.org/cpr/mip/final_mip_rpt_121702.pdf; *Id.* at 50.

⁵ See Mark Jansen, *MJP Picks Up Steam: More States are Looking at ABA Proposals to Ease Rules on Multijurisdictional Practice*, 90 A.B.A.J. 43, 45 (Jan. 2004).

⁶ See Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91, 106 (2003).

⁷ *Id.*

⁸ *Id.* at 107.

⁹ *Id.*

¹⁰ *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985) (quoting Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978)).

examination. But the requirements for such admission differ from state to state. It is helpful to identify the different licensing schemes in the following manner.

There are basically three licensing methods in use labeled "general reciprocity," "limited reciprocity," and "strict reciprocity."¹¹ "General reciprocity" is the most open and flexible form of reciprocal licensing. Normally any qualified attorney from any state is granted bar admission in a "general reciprocity" jurisdiction. Texas¹² and the District of Columbia¹³ employ "general reciprocity." "Limited reciprocity" is the intermediate form of reciprocal licensing. Under this system only attorneys from jurisdictions that would extend a reciprocal license to an attorney from the granting state may receive reciprocal admission. Colorado¹⁴ and Alaska¹⁵ are "limited reciprocity" jurisdictions. "Strict/Specific reciprocity" is the most restrictive form of reciprocal licensing. A "strict/specific jurisdiction" will only offer reciprocal licenses to attorneys from specific states. Maine¹⁶ has a "strict/specific reciprocity" agreement with New Hampshire and Vermont. Depending on the state its reciprocal licensing scheme may have been in place for decades or perhaps only a few years.

The next issue covers what effect, if any, the existence or adoption of reciprocity in a state had on bar membership and admission by examination. Extensive research in this area found no conclusive or correlative evidence that suggested the adoption of reciprocity attracts inordinate numbers of out-of-state attorneys or appreciably reduces the number of applicants sitting for examination. A blanket conclusion that the adoption of reciprocity, especially an expansive form like "general reciprocity," has no effect on bar admission numbers, even initially, may not be entirely warranted. The District of Columbia's adoption of reciprocity produced an initial decline in admissions by examination of almost 60%.¹⁷ In other uniquely attractive states or those bordering states with very large bar memberships such as California, Florida, New Jersey, Nevada, Arizona and even New Mexico, any hypothesis remains untested, since they have not yet adopted reciprocity. It does seem that once reciprocity has been in place for a number of years bar admission numbers resist fluctuation and revert back to steady and predictable figures. This has been the case in the District of Columbia, Indiana, Iowa, Massachusetts, Michigan, and Minnesota.¹⁸

In developing the classification of reciprocal licensing schemes it was important to note that admission *pro hac vice* is not the same as nor is it a form of reciprocity. The major distinction is that a reciprocal license grants the licensee full, unencumbered membership into that State bar. Admission *pro hac vice* does not grant an attorney a license to practice law in that state. Admission *pro hac vice* only permits certain court appearances, usually only applies to litigators, and usually limits the number of appearances an attorney will be granted per year. Further *pro hac vice* rules usually do not provide the same protections that most reciprocity rules do such as a minimum number-of-years practicing

¹¹ These are labels which were developed by Daniel Marquez and Patrick Redmond.

¹² RULES GOVERNING ADMISSION TO THE BAR OF TEXAS RULE XIII.

¹³ D.C. Ct. App. RULE 46(c)(3).

¹⁴ C. R. C. P. 201.3(1).

¹⁵ AK. BAR R. 2.

¹⁶ MAINE BAR ADMINISTRATION RULES 11A.

¹⁷ E-mail from Christopher C. Dix, Deputy Director Committee on Admissions for the District of Columbia Bar (March 7th, 2007, 7:04 AM MST).

¹⁸ Compare National Conference of Bar Examiners, 1989 STATISTICS 9 (1989) http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/1989stats.pdf, and National Conference of Bar Examiners, 1996 STATISTICS 23 (1996) http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/1996stats.pdf, and National Conference of Bar Examiners, 2005 STATISTICS 34 (2005) http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2005stats.pdf.

requirement or the maintenance of an in-state presence requirement. Finally, because reciprocal licensees are licensed bar members it is easier to assert disciplinary authority over them than unlicensed attorneys appearing temporarily under *pro hac vice* rules

The substantive arguments for and against reciprocity are separated into two categories—those based on legal issues and those based on professional issues. The most common professional issues discussed are economic protectionism, client autonomy, attorney competence, protection of local court systems, and attorney discipline. Although rarely admitted by the opponents of reform, many commentators, judges, and lawyers identify economic protectionism as the main reason for the rejection of reciprocity.¹⁹ In fact those states with the largest legal economies or their neighbors such as California, Florida, Nevada, Arizona, New Jersey and New Mexico have refused to adopt reciprocity.

Another argument made to advance reciprocity is that clients are better suited to choose their legal representatives and should have the freedom to do so.²⁰ This may be true for sophisticated and experienced legal consumers such as large corporations. The reverse argument is that the entire point of the licensing process is to test attorney competence, ensure client protection, and prevent professional misconduct. But no evidence or empirical data could be found to support the argument that foreign attorneys engage in professional misconduct more frequently or are less competent to practice law.²¹ Additionally, others argue that foreign attorneys have less of a stake in the community. There is less of an incentive for the foreign attorney to obtain justice, offer *pro bono* services, participate in local continuing legal education, or pursue legal actions or attempt to establish precedent which will benefit the community.²² Others have raised concerns about attorney discipline. It is not entirely clear how expansive a bar's jurisdictional authority is. Even if disciplinary jurisdiction exists the resources to discipline out-of-state attorneys may not. This concern has been expressed by both the smallest and largest legal systems in the U.S.²³ And aside from discipline, questions about the civil and criminal liability of these attorneys also remain unclear.

As for the legal issues raised by reciprocity under the Constitution's anti-protectionist provisions, a review of case law and commentary compels a curious conclusion. While courts have noted the burdens intentionally placed on out-of-state competition, for the most part these burdens do not appear to be constitutionally vulnerable. The practice of law is a constitutionally protected privilege²⁴, and a residency requirement for bar admission violates Article IV's Privileges and Immunities Clause.²⁵ The Supreme Court has suggested, however, that some narrowly-tailored "inducement of commitment"

¹⁹ See, e.g., Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-state Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 147-48; Gerald J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 265 (2002); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 n.18 (1985), quoted in Perlman at 150; Clint Bolick, *The Arizona Bar: Not Exactly a Warm Welcome*, 39 ARIZ ATT'Y 34 (Apr. 2003).

²⁰ CAL. SUPREME COURT ADVISORY TASK FORCE ON MULTIJURISDICTIONAL PRACTICE, FINAL REPORT AND RECOMMENDATIONS 21 (2002), available at <http://www.courtinfo.ca.gov/reference/documents/finalmjprept.pdf> (last visited May 8, 2007).

²¹ See, e.g., Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 5 U. ILL. L. REV. 1331 (2003); Perlman, *supra* note 19, at 171.

²² Piper, 470 U.S. at 285; See also A.B.A. Center for Professional Responsibility, *Client Representation in the 21st Century*, 2002 A.B.A. REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 12, 2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf.

²³ See, e.g., DEL. STATE BAR ASS'N. REPORT OF THE MULTIJURISDICTIONAL PRACTICE SPECIAL COMM. 19 (2001); CAL. SUPREME COURT ADVISORY TASK FORCE ON MULTIJURISDICTIONAL PRACTICE, *supra* note 20, at 19.

²⁴ Piper, 470 U.S. at 280-81.

²⁵ *Id.* at 288.

requirement may be permissible under the Clause.²⁶ A bar examination requirement serves as such an "inducement of the nonresident's commitment to the bar and to the State's legal profession."²⁷ It is questionable, however, whether the "intention to practice" requirements many states impose demonstrate a comparable "commitment" so much as they resemble invalid residency requirements in bearing only a superficial relation to it. Nor do bar examination requirements seem likely to run afoul of Fourteenth Amendment Privileges or Immunities. Despite a recent District Court declaration that "limited" reciprocity violates the "right to travel,"²⁸ the prevailing view seems to be that requiring out-of-state attorneys to pass the bar exam cannot constitute prohibited "differential treatment."²⁹ For purposes of Dormant Commerce Clause analysis, restrictions on out-of-state lawyers at least arguably affect interstate commercial activities.³⁰ However, courts are unlikely to deem a bar examination requirement as unconstitutionally burdensome or discriminatory, since most in-state attorneys have in fact fulfilled it.³¹ As some commentators might say, states can continue to pursue largely protectionist policies with apparently full constitutional sanction.

²⁶ *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988).

²⁷ *Id.*

²⁸ *Morrison v. Board of Law Examiners of North Carolina*, 360 F. Supp. 2d 751, 759 (E.D.N.C. 2005), *rev'd*, 453 F.3d 190, (4th Cir. 2006), *cert. denied* 127 S.Ct. 1124 (2007) (Note that this decision was later reversed.)

²⁹ See, e.g., *Paciulan v. George*, 229 F.3d 1226, 1229 (9th Cir. 2000).

³⁰ *Comment. Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 NW U.L. REV. 737, 740 (1978).

³¹ *Scariano v. Justices of the Supreme Court of Indiana*, 38 F.3d 920, 927 (7th Cir. 1994).