1-1-1990

Legitimizing Realities: State-Based Bar Admission, National Standards, and Multistate Practice

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Publication Information

Repository Citation
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May the commands then of a Prince be opposed? May he be resisted as often as any one shall find himself aggrieved, and but imagine he has not Right done him? This will unhinge and overturn all Polities, and instead of Government and Order leave nothing but Anarchy and Confusion.¹

I. INTRODUCTION

State by state lawyer licensing is grossly inefficient and invites protectionist abuse. It is also here to stay, and for good reason. Some of those good reasons are explored in this article. Abuses and more palpable failures of the present system are also examined.

These propositions are defended: State-based bar admission is preferable to a national system, although some existing state standards are indefensible. National standards do and should govern much state policy; and they are especially needed (and sorely lacking) in the motion admission process.

In addition, this article advances into the largely uncharted region of extra-territorial law practice. While unauthorized practice rules seem to establish impenetrable barriers at state lines, the reality of multistate practice on a single state license is commonplace. It is impossible to reconcile the law as it is written with the law as it is practiced. The law must be changed.

Admittedly, the state-based system of bar admission causes serious problems. This is an era of multistate, even multinational, law firms. Particularly legal matters are often oblivious to state boundaries, requiring lawyers to research the laws and visit the courtrooms and law offices of many states. Individual clients often require legal advice on the laws of many states and nations. The fact is that many lawyers must engage in the multistate practice of law, even though bar admission still occurs one state at a time.

It is impractical to secure bar admission in more than a handful of states; yet, during the course of a lawyer's career, a lawyer may well engage in practice in more than a dozen states. Moreover, it may be totally unpredictable which states those will be until a particular matter arises, at which point

¹ J. LOCKE, TWO TREATISES OF GOVERNMENT 419 (P. Laslett rev. 2d ed. 1970).
securing timely bar admission is impossible. In addition, the state-based system is abused through protectionist or xenophobic rules. The problems for the multistate lawyer are serious, especially considering the prohibitions in ethical rules and the criminal law against unauthorized practice. These problems have prompted discussions about a national system of bar admission, presumably in the belief that the state-based system is an anachronism whose problems are endemic and incurable.

In response to that critique, this article identifies the justifications for lawyer licensing and argues that formal bar admission should remain state-based. The state-based system, however, is a complex interplay of national standards and local (i.e., state-based) standards. Recognizing the national dimension of many state-based requirements and the realities of contemporary law practice, the article analyzes the circumstances in which bar admission in the first state should entitle the lawyer to engage in limited forms of practice in another state, without the requirement of formal bar admission in that other state.

II. JUSTIFICATIONS FOR LAWYER LICENSING

A. GENERALLY

Bar admission rules exist because law practice is a licensed occupation. The reasons for licensing lawyers should dictate and limit the requirements for securing a license to practice law. This part of the article will focus on the justifications for lawyer licensing in the belief that bar admission rules—who makes them, what they provide, and who applies them—must be assessed in light of the justifications for lawyer licensing.

Much has been written about the history of the legal profession in the United States. The classic works on the subject were written by Charles Warren and Alfred Z. Reed early in the twentieth century and by Roscoe Pound several decades later. These writers describe a profession whose power fluctuates. After being virtually outlawed in seventeenth century colonial America, lawyers had risen to positions of power and leadership by the outbreak of the Revolutionary War. Thereafter, the profession entered a period of declining prestige, generally attributed to relaxed bar admission standards during the Jacksonian era. Finally, after the Civil War, as bar associations grew in stature and power, the modern era of increasingly stringent standards for bar admission began.

3. C. WARREN, HISTORY OF THE AMERICAN BAR (1911); A. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW (1921).
5. More recent accounts of the history of the legal profession include R. STEVENS, LAW
Throughout the history of the legal profession in America, admission standards have been widely viewed as either the problem with the profession or the solution to the profession's problems. At one extreme, bar admission standards have been seen as tools for implementing racist, sexist, and socially elitist goals and for providing economic protection to lawyers already licensed. At the other extreme, bar admission standards have been seen as the only effective means by which the quality of the profession could be maintained and improved so that the profession properly discharges its public responsibilities.

The history of bar admission in America reflects sharp division over whether exacting admission standards help the public or help only the profession. This division of opinion, however, evidences remarkable agreement that admission standards substantially affect the composition of the bar and the quality of its contribution to the nation. Moreover, much of the disagreement, at least since the advent of formal legal education requirements, has been about the criteria to which the "higher" or "lower" standards are applied.

Thus, for much of our history and throughout this century, law practice has been a licensed occupation and entrance has been highly regulated. More recently, partial deregulation has occurred as the result of two different forces. The Supreme Court has deregulated the bar with respect to minimum fee schedules, advertising and solicitation of clients, and residence requirements of newly licensed lawyers. On a different front, some legal fields are no longer the exclusive province of lawyers. Non-lawyers are increasingly called upon to advise clients with respect to such legal matters as taxes, pension and profit-sharing plans, and mergers and acquisitions, thus deregulating the practice of law as to those fields.

A more frontal assault on lawyer licensing and regulation was launched by W. Clark Durant, III, chairman of the board of the Legal Services Corpora-

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6. The most significant disagreement concerns admission based upon proof of practice elsewhere (i.e., motion admission). See infra Part III(B)(5).

7. While entrance into the profession may be highly regulated, government policy has been rather laissez-faire toward lawyers who are already licensed. Expanding disciplinary agencies, more frequent and larger legal malpractice claims, strict enforcement of frivolous claims rules, and the common use of disqualification motions may signal increasing regulation of the practicing bar.


tion’s during the Reagan Administration, who called for the massive deregulation of law practice.\textsuperscript{11} Bar admission rules were a particular focus of Durant’s criticism.\textsuperscript{12} In Durant’s view, the sweeping regulation of law practice is designed more for the protection of the bar than for the benefit of the public. Thus, the justifications for licensing lawyers require discussion in order to determine whether there should be bar admission rules and, if so, what goals those rules should serve. These concerns necessarily precede a discussion of the merits of particular features of the bar admission process.

\section*{B. THE SOCIOLOGY OF OCCUPATIONAL LICENSING}

According to Emile Durkheim, two general principles organize the division of labor in society. Durkheim called these two principles "mechanical solidarity" and "organic solidarity."\textsuperscript{13} Mechanical solidarity is the most primitive organization of labor in a community.\textsuperscript{14} Ruled by tradition, mechanical solidarity is readily identified by its lack of specialization. All members of the community are engaged in the same kind of work, such as food gathering or hunting. The community functions as a single mechanism engrossed in the work of perpetuating itself.

The advent of industrialization forever altered the monocentric order of mechanical solidarity in society. In response to the diversification of function necessary in a more complex society, a division of labor developed. The pivotal characteristic of this organization of labor is specialization. The interdependence among community members, as the product of specialization, is central to Durkheim’s principle of organic solidarity.\textsuperscript{15} Durkheim compares organic solidarity to human anatomy, in that the health of the whole being is intrinsically bound up with the interdependence among the particular organs. It is organic differences that create bodily order and physical well-being. The interdependence of community members results from the various specialized tasks perceived as essential to society’s prosperity. Each occupation performs an essential task. For example, non-lawyers are compelled to rely upon the skills of lawyers for representation and advice within the complex specialized boundaries of the judicial system.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{11} Speech by W. Clarke Durant to the American Bar Association Board of Governors in New Orleans (February 12, 1987). Mr. Durant said: “Shakespeare is wrong. We need not kill all the lawyers. We simply need to deregulate them. Open up the profession. Broaden the base. Let more people, let more institutions deliver the services.”
\item \textsuperscript{12} Id. Mr. Durant said: “State unauthorized practice of law statutes should simply be repealed.” He particularly criticized legal education requirements and bar examinations. As to the latter, he said: “In many states, a board of law examiners can and do vary the pass/fail rate as if operating a medieval drawbridge.”
\item \textsuperscript{13} E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 41 (G. Simpson trans. 1933).
\item \textsuperscript{14} Id. at 70-110.
\item \textsuperscript{15} Id. at 111-32.
\item \textsuperscript{16} See E. KRAUSE, THE SOCIOLOGY OF OCCUPATIONS 155 (1971).
\end{itemize}
When an occupation involves a task that is both essential and involves specialized knowledge and training, the occupational group achieves a functional power base.\textsuperscript{17} Because of this power base, the community tends to accept the occupational group’s claim that it has the right to define professional working requirements for itself and to limit professional membership.\textsuperscript{18} The occupational group often seeks legislative and administrative support for the enforcement of its self-generated membership requirements through a system of licensing. The final result is that licensing serves two masters. It serves both to control entrance into the occupation and to enforce professional standards among licensed practitioners. Licensing’s dual purposes create the risk that the occupational group may advance its own interests at the expense of a broader community benefit.\textsuperscript{19}

C. PROTECTION OF THE PUBLIC

As just discussed, the purpose of licensing is twofold: it limits entrance into the occupation and it enforces standards of practice among practitioners. In its broadest context, licensing can be the vehicle by which the state satisfies its obligation to protect the health, safety, and welfare of the public. Economist Milton S. Friedman has examined the policy reasons behind this exercise of police power,\textsuperscript{20} concluding that the validity of lawyer licensing rests solely in its capacity to protect the public. In addition to this defensive purpose, however, lawyer licensing also manifests an affirmative capacity, which can induce the improvement of the profession itself. This affirmative purpose is the subject of the next section.

As a regulatory device, licensing is a means by which the state protects members of the public from injury. Professor Friedman has identified two facets of this defensive public policy as justifications for licensing: the neighborhood effects hypothesis and the paternalism axiom.

The neighborhood effects hypothesis views licensing as a regulatory exercise in the collective best interest of the public. In this context, licensing promotes efficiency and a positive interaction between the occupation and the public. Unqualified practitioners improperly delay and disrupt proceedings, obstruct negotiations, and generally impede the proper resolution of legal matters.\textsuperscript{21} As such, people other than the lawyer’s clients can be harmed by

\textsuperscript{17} See E. Durkheim, Professional Ethics and Civic Morals 8 (C. Brookfield trans. 1958).
\textsuperscript{18} E. Krause, supra note 16, at 168.
\textsuperscript{19} A compilation of more recent writings about the sociology of the professions, including the legal profession, can be found in, R. Dingwall & P. Lewis, The Sociology of the Professions (1983).
\textsuperscript{20} M. Friedman, Capitalism and Freedom 144-49 (1962).
\textsuperscript{21} Of course, the implicit premise in this analysis is that conventional law practice is proper law practice. The validity of this premise is beyond the scope of this article.
a lawyer's malperformance, as can the administration of justice itself. Therefore, lawyer licensing can protect the judicial system against compromise and impairment of its essential function at the hands of a single practitioner with deficient skills.

The collective protection inherent in the neighborhood effects hypothesis is individualized in the paternalism axiom. Under the paternalism axiom, the public is perceived as incapable of being able to distinguish the competent practitioner from the incompetent practitioner because of the complexity intrinsic to specialized occupations. Therefore, the state is expected to provide regulation to protect members of the community from their own ignorance about how to select a qualified lawyer.22

The neighborhood effects hypothesis and the paternalism axiom are both defensive justifications for lawyer licensing, which support licensing as a means of protecting the public from unqualified practitioners. The paternalism axiom, premised on a concern for future clients, involves the classic debate between free-market capitalism and twentieth century liberalism. The neighborhood effects hypothesis, however, seems particularly applicable to lawyer licensing. In an adversary system of justice that is principally directed by lawyers rather than by public officials, any given lawyer's lack of qualifications can harm both other participants and the process itself. In other words, an unqualified lawyer poses a concern for the administration of justice.

D. IMPROVEMENT OF THE PROFESSION

In addition to Professor Friedman's defensive purposes for occupational licensing, which focus on the harm that unqualified practitioners cause, lawyer licensing can serve the positive purpose of improving the abilities of qualified practitioners. Bar admission requirements, particularly education requirements, impose an experience on future lawyers that may help maximize their potential as professionals. Thus, lawyer licensing may not simply keep out the unqualified; it may affirmatively produce better qualified lawyers.

This positive purpose is best exemplified and, perhaps, best served by legal education requirements.23 Law school works as a period of socialization in which each lawyer develops a common base with other members of the profession. Law students acquire the ability to communicate more effectively

22. This view of government is much debated, and the debate need not be reenacted here. Paternalistic government policies, especially as regards licensing, are criticized as seriously disruptive of an efficiently functioning market in professional services. Moreover, critics claim that paternalism does not work; unqualified lawyers are admitted to the bar every day.

with their professional peers. They develop similar strategies for problem solving; they learn the customs and modes of attire that are common in the profession; they are exposed to certain values and mores of the profession.

Even beyond this basic integration into the profession, formal law study in a competitive and demanding environment pushes students to their best efforts. It encourages them to achieve a better understanding of law and legal institutions and of their own potential as lawyers.\textsuperscript{24} In this sense, lawyer licensing requirements can lead to increased competence and professionalism among lawyers by requiring a pre-admission education that goes beyond minimal technical proficiency. This is the essence of the positive purpose of lawyer licensing.

E. OTHER PROFFERED JUSTIFICATIONS

Many people believe that there are too many lawyers. The observations of Derek Bok, President of Harvard University, that the United States has more lawyers than other major industrialized nations and that too many of the most gifted people become lawyers, lends some support to this belief.\textsuperscript{25} In a very different way, this same issue surfaced in an action brought by an unsuccessful bar applicant in Arizona who sued that state's bar examiners. He claimed that the bar examiners set a quota on newly licensed lawyers, presumably to protect economically those lawyers already licensed.\textsuperscript{26} This claim is not too surprising. Richard Posner has identified numerous regulations governing lawyers that result in higher fees for lawyers without providing a corresponding public benefit.\textsuperscript{27} Thus, assuming that it is possible to have "too many" lawyers, the question arises whether lawyer licensing requirements are an appropriate means for regulating the number of lawyers.

Economic self-interest could prompt the legal profession to keep its numbers low through bar admission rules. As a justification for lawyer licensing, the economic welfare of lawyers is not compelling. As long as talented people are drawn to the profession, the goal of maximizing the income of practicing lawyers is not a legitimate basis for lawyer licensing. Indeed, President Bok's complaint that too many of the most gifted people become lawyers is evidence that there is no need to worry about the economic welfare of lawyers. Moreover, as long as the market will pay a premium for especially high

\textsuperscript{24} Of course, this is an appraisal of legal education that many critics would find ridiculously optimistic and forgiving. Nevertheless, even the most strident critics of legal education usually call for its reform rather than its abolition. This suggests a widely shared belief in the potential of formal law study to make a positive difference, even if that potential is unrealized.

\textsuperscript{25} Bok, A Flawed System of Law Practice and Training, 33 J. LEGAL ED. 570, 573 (1983). In fairness to President Bok, it should be noted that his central theme was that too few talented people enter certain other important occupations.

\textsuperscript{26} Hoover v. Ronwin, 466 U.S. 558 (1984).

\textsuperscript{27} R. POSNER, ECONOMIC ANALYSIS OF LAW 346-48 (1973).
quality legal service, the profession will continue to attract capable practitioners. It seems unlikely that any circumstances will soon evolve in which the economic welfare of lawyers would justify lawyer licensing or more restrictive bar admission rules.

Stringent lawyer licensing and bar admission standards have also been justified as likely to improve the public image of the legal profession. This justification is most commonly raised in connection with character and fitness standards. Protecting the image of the profession is seen as important so that the public will not lose confidence in lawyers generally and ultimately in the legal process itself.

This justification fails, however, because it provides no independent, principled basis for lawyer licensing standards. Instead, it defers to public perceptions or, more accurately, to authorities' motions about what the public perceives. As a rationale for lawyer licensing, protecting the public image of the profession is a shadow, offering no meaningful guidelines and condoning flagrantly visceral decision-making.

**F. SUMMARY**

Bar admission rules should be judged by how well they serve the legitimate purposes of lawyer licensing. Lawyer licensing may be justified as serving two defensive purposes and one positive purpose. The defensive purposes are directed toward protection of the public from deficient practitioners. These involve protecting future clients and protecting the administration of justice, including the legal process itself and participants within it. The positive purpose of lawyer licensing involves requirements, particularly related to education, which are intended to increase the competence and professionalism of all lawyers. This positive purpose, unlike the defensive purposes, is not simply to keep out unqualified lawyers, but to help produce better qualified lawyers in the profession as a whole.

Balanced against these justifications for lawyer licensing are three concerns. First, as a matter of fairness if not as a matter of individual liberty, reasonably qualified persons should be allowed to practice their chosen occupation. Barriers to bar admission obviously limit opportunities to practice law. In a free society, we should be highly sensitive to the anti-democratic effect of bar admission rules; they limit or eliminate important options in people's lives.

28. See, e.g., In re O'Hallaren, 64 Ill. 2d 426, 434, 356 N.E.2d 520, 523-24 (1976) ("An attorney's failure to file (income tax) returns and his subsequent conviction of that offense diminish public confidence in the legal profession and tend to bring it into disrepute."). See also 1987 B.C. Stat., ch. 25, 1, 45-46 (member of Law Society of British Columbia may be disciplined for conduct that "harm(s) the standing of the legal profession").

Second, the privileged access to government power permitted by a license to practice law demands that the legal profession achieve racial, ethnic, religious and gender balance. Lawyers effectively control the judicial branch of government. In addition, their knowledge and skills give them uncommon access and influence in government generally. In order that segments of society are not unfairly excluded from access to and participation in government, the legal profession must be highly diverse. Lawyer licensing rules should not be allowed to deprive the profession of needed diversity.

Finally, the number of lawyers should be sufficient to allow economic competition in terms of prices and services. Society is not served by lawyer licensing standards that are so rigorous that they seriously reduce the number of lawyers and consequently reduce access to legal services in terms of cost and availability.

II. THE INTERPLAY OF NATIONAL AND LOCAL STANDARDS

A. CRITERIA FOR BAR ADMISSION

There is general agreement among states on the criteria for bar admission. All states impose character and fitness, education, and testing requirements on some or all bar applicants. Moreover, before *Supreme Court of New Hampshire v. Piper*, residence requirements were commonplace. Finally, applicants are uniformly required to take an oath prior to admission. Thus, the criteria considered for bar admission are and have been (at least in recent

31. AMERICAN BAR ASS'N. & NAT'L CONF. OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1989) [hereinafter COMPREHENSIVE GUIDE].
33. See, e.g., Wis. Sup. Ct. R. 40.15, which provides:

The oath or affirmation to be taken to qualify for admission to the practice of law shall be in substantially the following form:

I will maintain the respect due to courts of justice and judicial officers;
I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;
I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and I will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
I will maintain the confidence and preserve the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;
I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justness of the cause with which I am charged;
I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.
history) generally uniform among the states. The national bar admission debate, then, can be narrowly focused. The debate concerns the extent to which the generally accepted criteria should be uniformly applied throughout the states, and whether law practice experience in one state should satisfy the requirements for admission in another state.

States differ in their application of criteria in that they sometimes apply the same criterion with differing rigor. For example, each state establishes its own passing score for the Multistate Bar Examination. Criteria are also applied by some states in highly idiosyncratic ways. For example, a state may impose a requirement, as part of its education criterion, that bar applicants complete a particular bridge-the-gap course offered only in that state. These examples illustrate a "local standard" at work, i.e., a standard that is developed and applied by a particular jurisdiction and is not consistent with any generally recognized national norm.

While generally accepted criteria often may be applied under local standards, certain national standards have also evolved. "National standards" are those substantive or procedural norms relating to bar admission that are widely used throughout the states. The foremost national standard relates to the educational criterion—the requirement that, in order to be admitted to the bar, a person attain the first professional degree in law from a law school approved by the American Bar Association. Other national standards relate to the testing criterion and involve the widespread use of examinations developed, administered, and scored under rules and procedures used throughout the nation. National standards are even applied to the character and fitness criterion, not only as required by federal constitutional law, but also as a result of investigative services performed by the National Conference of Bar Examiners and used by many states.

Therefore, in considering the national bar admission debate, we must recognize that there are generally accepted criteria for bar admission and that these criteria are applied through an interplay of local standards and national standards. Viewed in this context, the debate over national admission is not a debate about exclusively national control versus exclusively local control. Rather, the debate principally concerns the degree to which each criterion

34. The singular and significant exception to this pattern is the role of law practice experience in another state as a criterion for bar admission.


36. National standards for bar admission certainly could reduce the unnecessary burdens on multistate practice, especially in the area of motion admission. Significant progress would also result from a better understanding of the extra-territorial privileges that attach to a given state's license to practice law. See infra Part IV.
should be applied in each state according to national standards either now in existence or yet to be developed.

Bar admission standards, whether local or national, must be assessed in relation to how well those standards serve the purposes of lawyer licensing. These assessments should not depend solely on the leniency or rigor of a particular standard. Even a rigorous standard that is valid—in that it correlates highly with actual lawyer performance—could be a poor standard if it is so restrictive as to seriously reduce the availability of legal services or seriously increase the cost of those services. Thus, whether a given standard best serves the purposes of lawyer licensing depends upon the validity of the standard, its impact on the cost and availability of legal services, and its demographic impact on the bar. In the sections that follow, this article will explore these questions in relation to each of the central criteria for bar admission: character and fitness, education, testing, and legal experience.

B. THE RELATION OF STANDARDS TO CRITERIA

1. General Concerns

The criteria for bar admission, as developed in the preceding section, constitute those qualifications regarded as relevant to the admissibility of a bar applicant. The generally recognized standards are character and fitness, education, testing, legal experience, and willingness to take an oath.37

Each criterion is applied in each state under a set of standards. These standards constitute the norms against which the acceptability of an applicant's qualifications are measured. Standards for admission are largely a matter of state sovereignty.38 Nevertheless, certain national practices and standards have evolved with respect to each of the criteria and many states have elected to follow some or all of those practices and standards.

The national bar admission debate, as a question of uniform standards, comes into clearer focus if we undertake the following analysis. Initially, we should consider each criterion for bar admission in light of the justifications for lawyer licensing. Secondly, we should identify any national standards for applying that criterion. Thirdly, we should identify the diverse state standards for applying the criterion. Finally, we should assess the degree to

37. Although an oath is usually required, it is not one of the criteria carefully discussed here because it generates so little discussion and disagreement in bar admission circles. It is interesting to speculate on the reasons for this lack of attention. Perhaps, a belief in the indeterminacy of language accounts for applicants' general willingness to take oaths. Or perhaps, bar admission authorities place so little stock in oaths that an applicant's refusal meets no official resistance.

38. See Leis v. Flynt, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.").
which the purposes for lawyer licensing are best served by applying state or national standards to the criterion.

2. Character and Fitness

a) Substantive Standards

All states require as a condition of admission that an applicant meet minimal requirements of good character and fitness for law practice. A series of United States Supreme Court decisions have set first and fourteenth amendment limits beyond which states may not go in denying admission on character and fitness grounds. Generally stated, pre-admission conduct will not provide a basis for denying bar admission unless that conduct has a "rational connection with the applicant's fitness or capacity to practice law." Federal constitutional standards, of course, supply the ultimate national standards when it comes to bar admission. As to the character and fitness criterion, the constitutional requirement of "a rational connection" with "fitness to practice law" still allows states enormous discretion in setting their own standards. Constitutional requirements, however, are not the only source of meaningful national standards.

The best way to bring coherence to the character and fitness requirement is to view it within the context of rules governing the professional conduct of licensed lawyers. Simply stated, bar admission decisions and lawyer discipline decisions should be consistent. Misconduct that would keep a new lawyer out, should remove an already licensed lawyer from the bar, all things being otherwise equal. This position is compelling because the justifications for lawyer licensing apply across the board; they cannot logically support one set of rules for bar applicants and another set of rules for licensed lawyers, based solely on whether a person has crossed the threshold of admission to the bar.

The great majority of states have adopted either the American Bar Association Model Code of Professional Responsibility or the American Bar Association Model Rules of Professional Conduct as the law governing the conduct of licensed lawyers in their state, subject perhaps to a few local amendments. Because character and fitness standards should be logical extensions of the rules governing licensed lawyers, the national legal ethics codes

40. For a more elaborate presentation of this argument see McChrystal, A Structural Analysis of the Good Moral Character Requirement for Bar Admission, 60 NOTRE DAME L. REV. 67 (1984). For an account of the ways in which coherence is lacking in the character and fitness area, see Rhode, Moral Character as a Professional Credential, 94 YALE L. J. 491 (1985).
BAR ADMISSION should provide the major substance of those standards. Thus, the character and fitness criterion should be applied, for the most part, under national standards either imposed by the United States Constitution or as embodied in the American Bar Association’s regulatory codes.

Courts are often superficial when expressing the rationale behind character and fitness decisions. For this and other reasons, the law of character and fitness is marked more by rhetorical flourish than by painstaking analysis. As the law regulating lawyers is increasingly seen to be law rather than intuitive ethics, the tendency toward rhetorical, rather than rational, explanations for these decisions may diminish. Any shift toward analytical decision-making should tend to further “nationalize” standards in the character and fitness area.

b) Decision-Making Process

Character and fitness paperwork is cumbersome and time consuming. It consists of expansive questioning of the applicant and verifications of many types of information from many sources. For the lawyer seeking multiple admissions, centralizing the process appears attractive for the sake of efficiency alone. In fact, some centralization does occur through the investigative functions performed by the National Conference of Bar Examiners. Since 1934, the Conference has furnished confidential character reports on attorneys leaving one state and seeking admission to the bar of another.43 In the 1978-79 fiscal year ending April 30, 1979, investigations were requested for more than seven thousand attorneys in forty-four jurisdictions.44 More than 200,000 investigative inquiries concerning attorneys are mailed by the Conference each year.45 After completing an investigation requested by a state, the Conference issues a report to that state’s bar admission authority. In its official handbook, the Conference describes its character reports:

The Conference makes no recommendations and gives no opinions in its reports. It does refer to facts or statements pertinent to the candidate’s qualifications, it sometimes poses a question on certain lines in order to clarify or amplify information disclosed in the report. Discrepancies between the applicant’s statements and the data in the report are carefully noted.46

States make the final decision concerning whether an applicant meets character and fitness standards. For experienced lawyers who are investigated by the Conference, however, the decision will be substantially influenced by

44. Id. at 170.
45. Id. at 173.
46. Id. at 174.
what the Conference chooses to investigate, what leads it pursues, and how its findings are presented. Thus, for many bar applicants, not only is the character and fitness criterion applied under primarily national standards, but it is applied by a state working in close conjunction with an independent national agency. For many bar applicants, therefore, the character and fitness criterion is already substantially national. Because of this nationalized system, economies of scale may permit better investigations at a lower cost. Moreover, redundant investigations can be avoided when admission is concurrently sought in two or more jurisdictions.

Despite these apparent benefits, there are significant disadvantages. The first disadvantage relates to the privacy interests of bar applicants. Character and fitness investigations can lay bare a person’s history. The National Conference of Bar Examiners’ questionnaire, completed by the bar applicants themselves, consumes eight full pages, as reproduced in the Conference’s Handbook. The Conference also requires the applicant to complete an Authorization and Release that authorizes every person, firm, and governmental agency to provide any documents, records, or other information pertaining to the applicant. Furthermore, the document releases all providers and recipients of information from any form of liability arising out of the investigation. It is difficult to imagine a more sweeping waiver of rights relating to information and reputation. Moreover, it should be remembered that this waiver is compelled upon pain of being denied the opportunity to practice the applicant’s chosen profession.

A substantial body of literature discusses the privacy interest in controlling the dissemination of information about oneself. Difficult issues arise in this context, and categorical solutions to these issues are usually more rigid than wise. Nevertheless, it would be folly to ignore the threats to personal privacy and to an independent bar occasioned by the centralized storage of highly probing and personal information about lawyers. The specter of these threats is not futuristic fiction; it is historical fact. From 1936 until 1976, the National Conference of Bar Examiners and the Federal Bureau of Investigation enjoyed what one document suggests was an “extremely cooperative” relationship involving the secret sharing of information about lawyers. In

47. Id. at 146-53.
48. Id. at 171-72.
49. Id.
particular, the shared information included reports on lawyers' political beliefs and associations and whether they handled civil rights cases. A nationally centralized character and fitness process is more susceptible to this kind of potentially dangerous abuse. In this respect, state-based investigations and decisions are preferable, if only because the impact of any abuse is reduced.

In addition to the issues of privacy and politics, the state-based system permits an appropriate divergence of state approaches on policy matters. Character and fitness standards, even if they are derived from the ABA Model Code or Model Rules, may certainly be applied in different (and contradictory) ways to a given case at hand. Bar admission decisions involve a balance between protecting the public from a potentially high-risk practitioner and giving a lawyer a chance to prove herself on the job. With respect to character and fitness cases, this balance may involve an assessment of whether the applicant's misconduct was isolated or typical, or whether rehabilitation has occurred. One state may tend to be more protective of its citizens against potential wrongdoers while another state may tend more toward protection of the individual's interest in pursuing a chosen occupation. Consistency among states in this respect does not seem a desirable objective in its own right.

c) Summary

Because of its risks to privacy and its potential for abuse, a nationalized system of character and fitness investigations and decisions is particularly worrisome. The state-based system is preferable not only because of privacy risks, but also because of the appropriate discretion it leaves to states to determine the balance between applicants' interests and the public's interests. It must be noted, however, that because licensed lawyers and bar applicants should be treated consistently, and because licensed lawyers are governed by rules generally uniform throughout the states, the character and fitness criterion should generally be applied under standards that are agreed upon nationally.52

3. Education

The education criterion for bar admission, more than any other criterion, implements the goal of leading lawyers to a higher level of competence and professionalism, i.e. the positive justification for lawyer licensing. In addi-

52. This uniformity is not only the product of widespread adoption of ABA promulgated standards governing the conduct of lawyers. In addition, standards governing character and fitness requirements for bar admission have been jointly promulgated by the Association of American Law Schools, the American Bar Association, and the National Conference of Bar Examiners. See Moeser, Amendments to Code of Recommended Standards for Bar Examiners, 56 Bar Examiner, May 1987, at 22, 23.
tion, the education criterion, in some of its applications, provides evidence of minimal technical proficiency. Thus, it also furthers the defensive justifications for lawyer licensing, that is, protecting future clients and the administration of justice.

The education criterion is applied through requirements as to both legal and pre-legal education. Every state's education requirements may be satisfied by completing the first professional degree in law from a law school approved by the American Bar Association. Some states, however, vary from the national standard, permitting admission based upon law office study or study at a law school not approved by the ABA. The national standard, then, is to require a degree from an ABA-approved law school. The majority of states apply the national standard to all bar applicants.

States may vary from the national standard of an ABA-approved degree either by imposing educational requirements in addition to the ABA-approved degree requirement or by allowing admission without an ABA-approved degree. Variations from the national education standard provide excellent cases-in-point for the national bar admission debate.

a) Additional Requirements

Additional education requirements beyond an ABA-approved degree typically consist of specific law school course requirements or completion of a bridge-the-gap course in the state. South Carolina's Rule 5, for example, includes both types of additional requirements. Under the South Carolina rule, bar applicants must have taken courses in fourteen specified subjects, including equity, taxation, trial advocacy and domestic relations. The justification for the rule is that these subjects involve "areas of the law into which [South Carolina lawyers] will most likely be thrown". In addition, South Carolina bar applicants must successfully complete a bridge-the-gap course approved by the South Carolina Supreme Court.

Conventional wisdom suggests that a state may properly exclude from law practice persons unfamiliar with areas of the law which they are likely to encounter in practice. This policy may better protect clients and the administration of justice. The question is, however, whether this policy is well served in states like South Carolina by specific law school and bridge-the-gap course requirements which are imposed on applicants.

54. COMPREHENSIVE GUIDE, supra note 31, at 8-12.
55. Id. at 11.
The answer may depend on whether the purpose of the courses is skills training or the assimilation of valuable information. The extent of an applicant's knowledge in a particular legal field is better determined by testing for that knowledge than by requiring the applicant to take a course. Education requirements are generally ill-suited to assuring that a person possesses a specific compendium of information. In that respect, education requirements are inefficient; independent reading followed by testing is better suited to the goal. Furthermore, unless the specific course content is prescribed, there is no assurance that the course will convey the desired information to its students. On the other hand, if the purpose of the course is skills training rather than the assimilation of particular information, an education requirement may be appropriate. Skills training is extremely expensive to test, and practice skills cannot be effectively self-taught. Thus, course requirements, if skills oriented, may be an appropriate adjunct to the national education standard of a degree from an ABA-approved law school.

The question remains whether additional education requirements, involving skills-oriented law school or bridge-the-gap courses, are worth the effort they require. Law school course requirements can seriously interfere with a person's ability to practice a chosen profession in a chosen locale. In effect, they may require a bar applicant to choose a state for bar admission more than a year in advance of seeking that admission in order that the additional course requirements can be satisfied. The necessity for advanced planning imposes not only a required waiting period but perhaps additional cost.

Bridge-the-gap courses can suffer from similar flaws. They are usually less burdensome than specific law school courses in that they entail more modest time demands. On the other hand, they can be more burdensome because they often require the applicant to be physically present at the particular site and time at which the course is conducted. Thus, depending upon the cost and logistics of a bridge-the-gap course, it too may or may not be worth the effort it requires. All impediments to bar admission limit opportunities to practice law, often with a disparate impact upon minorities and women. It is with this concern in mind that the cost/benefit analysis must be made.

58. This distinction is not always clear-cut. Skills training in legal education generally refers to instruction in certain practical tasks, such as interviewing, counseling, and negotiation. This emphasis is to be distinguished from an emphasis on legal doctrine and policy analysis.

59. But see E.D. Hirsch, Jr., Cultural Literacy (1987). Professor Hirsch's information-based theory of education praises information over critical thinking, at least in certain respects: "The superficiality of the knowledge we need for reading and writing may be unwelcome news to those who deplore superficial learning and praise critical thinking over mere information." Id. at 15.

60. The performance test on the California bar examination experimented with tests of oral skills but found that costs were too high. See Panel Discussion, Performance Testing: A Valuable New Dimension or a Waste of Time and Money?, 52 BAR EXAMINER Nov. 1983, at 12, 16.
In summary, education requirements that add local standards to the national standard of requiring a degree from an ABA-approved law school may serve the legitimate purposes of lawyer licensing, depending upon how well the standards meet their goals and how burdensome the standards are to applicants. Under this balancing approach, local standards establishing specific law school and bridge-the-gap course requirements are most likely to be justified if they are skills-oriented and are reasonable in terms of availability, cost, and logistics.

b) Reduced Requirements

Local standards relating to the education criterion sometimes depart from national standards by permitting admission of applicants not possessing ABA-approved degrees. Lower education requirements increase access to the bar at some sacrifice to the benefits of a formal legal education. Formal legal study may improve a student's competence and professionalism in the ways described in Part II. When education requirements are reduced, the positive purposes of lawyer licensing are compromised, and there is less reason to believe that lawyers are as competent and professional as their natural talents and interests would allow them to be. In this sense, a reduction in education requirements will reduce the quality of the legal profession. Such reduced requirements, however, also tend to increase access to the profession. States currently must strike their own balance between the quality of the legal profession and access to the profession.

This compromise on the quality of the profession may be more appropriate in some states than in others. In a state that has no law school or no public law school, law office study as a substitute for formal legal education may be especially appropriate. Similarly, a state that has a law school unapproved by the ABA may determine that the school is of sufficient quality that its degree should be honored for purposes of bar admission. In these cases, local circumstances may well justify local education standards that represent more modest goals than the national education standard of an ABA-approved degree.

California, with its lax education standards and high failure rate on the bar

61. It is possible for a state not to require an ABA approved law degree but, at the same time, to have the same or "higher" education requirements. The question in all cases is what educational background will meet the requirement. Certainly, the acceptance of some foreign (i.e., non-American) law degrees would not necessarily signal a reduction in requirements; the opposite could be true. For present purposes, it is assumed that if an ABA approved degree is not required, the standards are lower. This is, of course, an important and troublesome assumption, but one that must await defense at another time.

62. States such as Alaska, Nevada and Rhode Island.
examination,\textsuperscript{63} merits special attention as a state with reduced education requirements. California has sixteen ABA-approved law schools, enrolling more than ten thousand law students.\textsuperscript{64} In a geographically large and very populous state, this may not reasonably meet the local demand for legal education at an ABA-approved school. What is interesting to note is the form of trade-off made in California: education as a criterion for bar admission is minimized and testing as a criterion is given enormous weight. While access is broadened in California under a lax education criterion, it is harshly restricted by setting a high passing score on the bar examination.

Although testing may serve the positive justification of lawyer licensing in improving the competence and professionalism of lawyers,\textsuperscript{65} it does so to a far lesser degree than rigorous education requirements. Thus, in substituting a higher testing requirement for the education requirement, California may sacrifice the positive justification for lawyer licensing. Nor can there be compensation, in kind, by raising the required passing score on the bar examination.

The net effect of California's approach, \textit{i.e.}, reducing education standards while increasing testing standards in California's bar examination, serves the defensive purposes of lawyer licensing far more than the positive purposes, at least in comparison to other states. In addition, access to the profession is increased in some respects but decreased in others. In respect to licensing's positive purpose of improving the competence and professionalism of lawyers as a whole, there is a net loss.

c) \textit{Summary}

Most states apply the education criterion under the national standard of requiring a degree from an ABA-approved law school. Local standards may provide reduced requirements, by not requiring an ABA-approved degree, or additional requirements, such as specific required law school courses or bridge-the-gap courses. Local standards providing reduced requirements generally compromise the lawyer licensing goal of improving the competence and professionalism of the bar as a whole. This compromise may be more appropriate in some states than in others, depending on such factors as the degree of access to in-state law schools approved by the ABA. Local standards providing additional requirements beyond an ABA-approved degree may be appropriate if they are well-suited to their objectives and are not unduly burdensome on applicants. Thus, variations from the national norm

\textsuperscript{63} See \textit{Comprehensive Guide, supra} note 31, at 8; \textit{1988 Bar Examination Statistics, 58 Bar Examiner 17-27.}


\textsuperscript{65} See discussion in section III(B)(3)(c).
can be justified even with respect to what is probably the most honored national bar admission standard, the requirement of a degree from an ABA-approved law school.

4. Testing

Bar examinations are used in all states to measure competence to practice law. Testing can serve the defensive purposes of lawyer licensing by identifying bar applicants whose ignorance about the law would make them a risk to future clients and to the administration of justice. In addition, testing serves the positive purpose of lawyer licensing because preparing for the bar examination can improve familiarity with legal principles. Also, some lawyers credit preparation for the bar examination with giving them an overview of the law, something they did not obtain in law school. In these respects, a lawyer's competence and professionalism are potentially improved.

a) The Role of National Tests

Every state devises and administers its own essay examination. Three states (Indiana, Iowa and Washington) rely exclusively on their local essay examinations in testing for bar admission. One state (Louisiana) relies solely on its local essay examination and the Multistate Professional Responsibility Examination (MPRE). Eighteen states use both their own local essay examination and the Multistate Bar Examination (MBE). Twenty-eight states use their own local essay examination, in addition to the MBE and the MPRE. Thus, every state's bar examination has some local content, and almost every state's bar examination has some national content.

The trend is clearly toward giving the national examinations greater weight in the bar admission process. In most states, the percentage of the bar examination devoted to local content decreases as new national examinations are added to a state's requirements. With the first administration of the Multistate Essay Examination (MEE) in 1988, it seems likely that participating states will further reduce the amount of examining time devoted to the local essay examination, probably down to one-half day out of two or more days.

The general purpose of the bar examination is to assess an applicant's ability to legally analyze a factual problem. Standard 16 of the Code of Recommended Standards for Bar Examiners identifies the purpose of the examination as follows:

The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to present a reasoned analysis of the issues and to arrive at a logical

67. Id.
solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of such principles. The examination should not be designed primarily to test information, memory or experience.\textsuperscript{68}

Standard 17 recognizes the value of including within the local essay examination "subjects of substantial local importance," but cautions that the examination should emphasize "basic and fundamental" subjects.\textsuperscript{69}

These national standards appropriately minimize the importance of particular legal rules and emphasize broader intellectual skills. Nevertheless, most applicants prepare for the bar examination by intensely studying legal rules. Moreover, accurate recall of legal rules seems to be a substantial portion of what is tested, particularly on the national examinations.

For example, consider this sample question from materials describing the MPRE:

Attorney is defending Client, who has been indicted for burglary. During an interview, Client stated to Attorney that Client had committed perjury while testifying before the grand jury that indicted him.

Attorney is subject to discipline if she:

A. Continues to represent Client.
B. Continues to represent Client unless Client admits his perjury.
C. Does not inform the authorities of the perjury.
D. Informs the authorities of the perjury.\textsuperscript{70}

The correct answer is listed as D.\textsuperscript{71} If Rule 1.6(b) of the \textit{Model Rules of Professional Conduct} were changed to permit a lawyer to disclose confidential information to rectify a client's perjured testimony, the correct answer to the above question would not be D. Whether an applicant answers correctly depends upon the accuracy of the applicant's recall of the confidentiality rule. The question requires no issue recognition and little reasoned analysis, the skills that bar examinations should require according to Standard 16. In fact, the question largely tests information and memory, in direct contravention of the purpose of bar examinations identified in Standard 16. It should be noted that this question is described as similar to those generally asked on the MPRE and, judging from the other sample questions, this seems to be the

\textsuperscript{68} THE BAR EXAMINERS' HANDBOOK, \textit{supra} note 43, at 206. The Code of Recommended Standards for Bar Examiners was jointly adopted by the American Bar Association, the Association of American Law Schools, and the National Conference of Bar Examiners. Revisions to the Code, concerning character and fitness standards, have recently been approved. \textit{See} Moeser, \textit{supra} note 52, at 22, 23.

\textsuperscript{69} THE BAR EXAMINERS' HANDBOOK, \textit{supra} note 43, at 210.

\textsuperscript{70} NAT'L CONF. OF BAR EXAM., MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION INFORMATION BOOKLET 24 (1986).

\textsuperscript{71} \textit{Id.} at 37.
case.\textsuperscript{72}

The shortcomings of the national examinations in fulfilling the purpose of bar examinations as expressed in the national standards are probably explained by the National Conference's commitment to psychometrically sound testing.\textsuperscript{73} In recent years, prompted by the widespread adoption of the Multistate Bar Examination (MBE), bar examiners have discovered the concept of psychometric reliability. \textit{The Bar Examiner's Handbook} defines "reliability" in the following terms:

Reliability is a statistical concept referring to the extent to which an observed grade for a given candidate corresponds to the grade which most truly represents his ability. In an examination, his observed grade can only approximate his true grade because no single examination can cover the field exhaustively and the candidate's condition at any one examination may not permit him to do his best. In addition to these sources of reliability which affect both objective and essay examinations, there is another one, stemming from the use of graders, which affects only essay examinations. Where multiple graders are used they probably don't agree perfectly among themselves as to grading standards and in any one grader his standards may fluctuate somewhat with time. A candidate's grade will therefore depend to some extent on who grades his paper and when it is graded.\textsuperscript{74}

The message is that objective examinations are more reliable than essay examinations in that they permit more accurate assessments of how examinees perform relative to one another.

According to a past chairman of the National Conference of Bar Examiners, the relative unreliability of essay examinations ought "to scare the bejabbers out of [bar examiners]."\textsuperscript{75} And to a great extent it has. Concern about the reliability of bar examinations, especially the essay component, has prompted new methods of grading examinations. The net result of this new methodology is that objective examinations, and the MBE in particular, are the touchstones of the grading process in many jurisdictions. Essay scores are adjusted to fit the MBE curve, and decisions as to who passes are dictated in large part by the perceived strength of each year's examinee pool, as measured by the MBE.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} at 21.
\item \textsuperscript{73} Webster's Dictionary defines "psychometric" as "(1) relating to the measurement of mental or subjective data; (2) relating to or being a mental test or psychological method whose results are expressed quantitatively rather than qualitatively." \textsc{Webster's Third New International Dictionary of the English Language} (unabridged 1961).
\item \textsuperscript{74} \textit{The Bar Examiners' Handbook}, supra note 43, at 227.
\item \textsuperscript{75} 43 Bar Examiner 135 (1979) (transcript of John Germany's introduction of Dr. Stephen Klein at 1979 Annual Meeting of NCBE in Dallas).
\item \textsuperscript{76} Many states choose to follow this methodology. \textit{See} Klein, \textit{IV. Essay Grading: Fictions,}
The drive for an increasingly reliable and psychometrically sound bar examination has serious implications. As the reliability of the bar examination improves, the validity of the examination may decline. The validity of a test is the extent to which it measures what it sets out to measure. The most valid bar examination would measure a wide array of knowledge and skills important in law practice, so that it would best determine who was qualified for law practice. Great discretion and subjectivity are required to assess an applicant’s broad-based qualifications. Discretion and subjectivity in assessing performances on a test usually dictate psychometric unreliability. By stressing reliability, the bar examination is virtually doomed to a low level of validity.

Moreover, the dominant commitment to psychometrically reliable testing leads to a nationalized examining process, a result already largely achieved. At present, the last bastion of state testing and grading is the essay portion of bar examinations. With the development of the Multistate Essay Examination (MEE) by the National Conference of Bar Examiners, however, this last bastion of state testing has been breached. The MEE was first administered in participating states as part of the July 1988 bar examination, as a complement to the National Conference’s MBE and the Multistate Professional Responsibility Examination.

The national examinations are technically reliable and technically sound. They have led bar examiners out of the dark ages of testing, in which bar examination results were skewed in unintended ways. Moreover, they have increased the fairness and consistency of bar examinations and have generally led to improved production values in all phases of constructing, administering and grading the examination, including the local essay portion.

At the same time, the national examinations tend to make bar admission more technocratic and mechanical. They encourage the systematic elimination of independent professional judgments about the exhibited competence of bar examinees. Examinee performances are lost in a reductionist nightmare of data. Each examinee’s answers are studied as trees, and no one looks at the forest of an examinee’s total performance.

In some states this result is unavoidable. The sheer number of examinees in those states requires a bureaucratic assessment of examination performance. Just because the numbers game is necessary in some states, however, does not make it ideal in every state.

The national examinations, with their high production values and high reliability, make an enormous contribution to sound bar admission testing.


Most states wisely choose to include at least one national examination in their testing program. States with many examinees may have no choice but to construct their testing program with the national examinations as the center point. But other states, because of smaller volume or relatively greater resources, may wish to make independent professional judgments about each examinee in deciding whether or not the examinee should be passed. Any such process will be "unreliable," in the psychometric sense, but it may be superior to testing strictly by the numbers.78

The national tests are dominant in some states because the local essay examination is given less time and weight and because the grading process, especially the curving of grades, depends so heavily upon examinee performances on the MBE. Thus, national tests threaten to pre-empt bar admission testing in terms of content and grading, and, in some respects, have done so already.79

b) The Role of Local Tests

Standard 17b of the Code of Recommended Standards for Bar Examiners provides that "subjects of substantial local importance" may be included on the bar examination. Standard 18 provides that the bar examination should include essay questions in assessing whether an examinee is qualified to be licensed as a lawyer. Moreover, they recognize that knowing enough law to practice in a given state may require knowledge of some idiosyncratic local law.80

With the inauguration of the MEE in 1988, local tests no longer are the only alternative for essay testing. Thus, with a national essay test, local essay examinations must find their justification in some rationale beyond the general benefits of essay testing. The National Conference will probably produce a very good national essay examination, thus causing many to question the purpose of local essay examinations.

The local essay examination requires an applicant to submit to a local test in the admitting jurisdiction under a usually rigid time frame. The local essay examination is the greatest single reason for the heavy cost in time and money exacted by the state-based system of bar admission. Most bar admission restraints on lawyer mobility are easily solved. National test scores should be readily transferable, though some states, for less than compelling reasons, do not allow it. Character and fitness assessments can be continu-

ous, unlike the twice a year schedule for bar examinations. National education standards, once met, are met for all time and in all places. Citizenship and residence requirements, now largely eradicated, no longer restrain lawyer mobility. Thus, one of the major restraints that remains is the local essay examination.

Given Standard 17, it may seem easiest to justify local essay examinations because of their ability to test examinee familiarity with "subjects of substantial local importance." This justification can be extended under Standard 18, which approves questions "in subjects with respect to which local variations are highly significant." The essence of this argument is that a qualified lawyer should know particularly significant local law. The purposes of lawyer licensing are clearly served by requiring lawyers to demonstrate minimal familiarity with fundamentally important legal principles, whether those principles are nationally recognized or only locally recognized.

But the role of local essay examinations is much greater than simply certifying minimal knowledge of fundamentally important local law. Local testing provides state bar examiners with the information they need to decide who should be admitted and who should not.

The process of sorting out a sea of data from the examination provides little insight into which examinee performances should be judged adequate and which insufficient. Unless bar examiners become involved in the construction and grading of some portion of the bar examination, they are forced to make highly abstract and largely uninformed decisions about who receives a license to practice law. They have no clear sense of how good or how bad examinees are and no clear sense of whose interests they serve or disserve in their bar admission decisions.

When bar examiners are immersed in the process of constructing and grading some portion of the bar examination, they develop a basis for arriving at an informed professional judgment about which examinees should pass and which should not. By drafting or reviewing a state essay question, bar examiners can better appreciate how questions can mislead and how critically important it is to know a variety of legal rules, notwithstanding the admonition of Standard 16, i.e., bar examinations should not primarily test for information or memory. In reading state essay answers, bar examiners can hear the voices of examinees as they express certainty and confusion, approval and disgust, simple-mindedness and complex understanding. After confronting the questions and the concerns that naturally arise in constructing and grading state essay questions, bar examination data take on new life. The drawing of pass/fail lines becomes less mechanical, more informed,

81. See supra note 8; see also In re Griffiths, 413 U.S. 717 (1973) (exclusion of resident aliens from practice of law violates equal protection clause of fourteenth amendment).
more intelligently judgmental. The balance can be more thoughtfully struck among protecting the public, allowing applicants to practice their chosen occupation and requiring that applicants experience educational challenges that will not just minimally equip them to practice but better equip them as well. 82

Thus, the state essay examination is necessary in that it enables state bar examiners to make informed professional judgments about who should pass the bar examination and who should not. As long as state bar examiners make the pass/fail decision, the state essay examination is extremely important. A secondary reason for state testing is to determine whether examinees are adequately familiar with fundamentally important local law. 83

c) The Pass/Fail Decision

The primary justification for state testing is that it enables state bar examiners to make informed professional judgments about who should be licensed in their states. If pass/fail decisions were made according to a national norm, the primary justification for state testing would vanish. Thus, it is important to determine whether there are significant reasons for states to set their own local standards for who passes the bar examination and who does not.

States differ as to how high or low they set their passing scores on their bar examinations. For example, in Nebraska, a scaled score of 125 on the MBE is considered passing, while in Vermont, a scaled score of 137 is required. 84 If passing scores were agreed upon under some national standard, local testing might no longer be necessary.

There are significant reasons, however, for the pass/fail decision to be made under local standards. Local standards governing eligibility to take the bar examination vary, most notably with respect to the education requirements imposed. It comes as no surprise that three of the four states which passed fewer than sixty percent of all of their 1988 bar examinees are states that do not require a law degree from an ABA-approved law school. 85 Moreover, demographic differences could lead to different pass/fail standards. For example, the two most populous states, California and New York, have relatively low passing percentages on their bar examinations. 86

82. See Lenel, supra note 77.
83. The same analysis applies to non-objective state tests other than essay examinations, such as "performance tests" in California.
84. COMPREHENSIVE GUIDE, supra note 31, at 20-21.
85. Id. at 8-9; 1988 Bar Admission Statistics, 58 BAR EXAMINER May 1989, at 17-19. The states are Alabama, California, Delaware (ABA-approved law degree required), and Vermont.
86. 1988 Bar Admission Statistics, 58 BAR EXAMINER May 1989, at 17-19 (California had a passage rate of 49.8% and New York had a passage rate of 60.2%).
The number and quality of law schools in a state may play a role as well in determining how high or low the passing score should be set.

The establishment of a national passing score requires significant compromises. How can California reduce its passing score when it permits persons with little formal legal education to take its examination? Why should Mississippi increase its passing score when its experience is that the public is now adequately protected? A national passing score on a national test would in many states shift the balance between access to the profession and the risk to the public. A national passing score would have radically different effects in different states. In some states, access to the profession and risk to the public would be decreased; in other states, the opposite would be true.

d) Summary

National tests such as the MBE make important contributions to bar admission testing by increasing the sophistication and reliability of bar examinations. Nevertheless, local tests remain important because they alone provide bar examiners with the necessary basis for making pass/fail decisions. The value of local tests, however, does not require that all applicants take them. For example, testing requirements could be waived for some applicants, particularly under motion admission rules, without destroying the value of either local or national tests.

5. Legal Experience

Many states impose legal experience requirements either as a substitute for some or all of the testing requirements or as an additional requirement. Legal experience requirements potentially serve both the defensive and positive purposes of lawyer licensing. Thus, for example, a period of active law practice without reported incidents of misconduct or malpractice provides some evidence that a lawyer is not a serious risk to clients or to the administration of justice. Moreover, legal experience tends to improve a lawyer's competence and, perhaps, professionalism. In these respects, legal experience as a bar admission criterion generally fits within the purposes of lawyer licensing.

a) Legal Experience as a Substitute Requirement: Motion Admission

Legal experience as a bar admission criterion usually operates in states allowing admission on motion, where legal experience substitutes for some or all of the testing requirement. Over half of the states allow admission on motion in some cases. Among the factors that can be relevant are the nature of the applicant's legal experience, whether the applicant was licensed to

87. COMPREHENSIVE GUIDE, supra note 31, at 28-35.
practice law in the place and at the time the experience was gained, and the
period of time involved. These factors can be crucial in determining whether
the legal experience requirement actually serves the purposes of lawyer li-
censing, because they determine whether the experience has substance.

Legal experience requirements vary dramatically. At one extreme, the
District of Columbia permits admission on motion by any applicant who has
been an active member in good standing in a state bar for the five years
preceding application, even if during those five years the applicant was
working in a shoe store and did nothing law-related. Moreover, the rule
imposes no education requirement. Thus, any person admitted on any basis
in any state qualifies after five years for admission without testing in the Dis-
trict of Columbia.

The District of Columbia rule obviously fosters a highly mobile bar, an
objective especially appropriate to the District. It requires nothing more
than a state’s determination, once upon a time, that the applicant was qual-
ified to practice there. Moreover, the District of Columbia’s requirement of
active membership in good standing for five years seems to require only that
the applicant had the interest and wherewithal to pay annual licensing fees or
bar dues for a period of time. Thus, the District’s motion admission rule
operates like most federal bar admission rules in deferring wholesale to the
standards of another jurisdiction.

At the opposite extreme, the recently abrogated Illinois rule for motion
admission required a law degree from an ABA-approved law school, a pass-
ing score on the MPRE, residence at the time of practice in the state from
which admission is sought, and continuous and active law practice in that
state for five of the seven years preceding application. In addition, the ap-

88. D.C. Ct. App. R. 46(c)(3) provides in pertinent part:

(3) Admission requirements. Any person may, upon proof of good moral character as it
relates to the practice of law, be admitted to the Bar of this court without examination,
provided that such person:

(1) Has been an active member in good standing of a Bar of a court of general juris-
diction in any state or territory of the United States for a period of five years immedi-
ately preceding the filing of the application. . . .

89. ILL. SUP. CT. R. 705 (1986) provided in pertinent part:

Any person who has been admitted to practice in the highest court of law in any other
State or territory of the United States or the District of Columbia may make applications
to the Board of Law Examiners for admission to the Bar, without academic qualification
examination, upon the following conditions:

(a) The educational qualifications of the applicant are such as would entitle him to
write the academic qualification examination in this State at the time he seeks admis-
sion, and he has resided and actively and continuously practiced law in such other
jurisdiction for a period of at least five years of the seven years immediately prior to
making the application.

(b) In the event the jurisdiction from which the applicant seeks admission requires, as
of the date of the filing of his application in this State, higher qualifications for admis-
applicant had to be an Illinois resident to qualify under the rule. The Illinois rule also contained a reciprocity provision that denied motion admission to applicants from states which do not themselves permit motion admission. Thus, the Illinois rule provided a number of standards which had to be met in order to qualify for motion admission.

With respect to the legal experience criterion, the Illinois rule required, as noted above, that the applicant have "resided and actively and continuously practiced law" in the state where admitted and from which Illinois admission was sought. This standard raises key interpretive questions:

1. What is law practice? The parameters of "law practice" are not well-defined, especially when the practice is not the private practice of law. A job may not qualify as "law practice" if the job description did not require a lawyer to fill the job or if similar jobs in other organizations are held by non-lawyers. Very probing inquiry may be necessary to determine whether the nature of the lawyer's work qualifies as law practice.

2. What is active and continuous practice? The "active and continuous" criterion suggests that there is a minimum standard. At some point, therefore, a lawyer does too little legal work to classify her practice as "active
and continuous," even though the nature of the work is law practice. Determining the extent of a lawyer's practice can be as difficult as determining the nature of the work itself.

3. Was the practice done where admitted? When lawyers spend much of their work time out of state, questions can arise as to whether that part of their practice was done in the state where admitted. Questions also arise if a lawyer works in one state and the client is located in another state. In such situations, it is difficult to say in which state the practice of law occurs.

Thus, the Illinois motion admission rule, like many motion admission rules, raised questions concerning the nature, extent and location of an applicant's law practice.

i. Nature and Extent Requirements. The nature and extent of an applicant’s law practice clearly determine the quality of the applicant’s legal experience. Moreover, as discussed earlier, legal experience is a useful criterion for bar admission because it can establish that the lawyer is not a serious risk to the public and because it can improve a lawyer's competence and professionalism. Experience is not a useful criterion, however, if it involves too little law practice. Therefore, motion admission rules properly establish minimum standards respecting the nature and extent of law practice needed to qualify for such admission. Since it is difficult to express these standards clearly, however, many states define specific types of jobs as constituting law practice. These standards, for example, may prescribe that law teaching, service as in-house corporate counsel, or government agency service constitutes law practice for purposes of motion admission.90

No national standards have been developed to guide states in resolving the many close questions as to whether a given lawyer's work satisfies standards respecting the nature and extent of required law practice. Motion admission applications in which the nature or extent of a given lawyer's practice is at issue can remain on the bar admission docket almost interminably. Tax returns and appointment books may be demanded, as well as letters from clients, lawyers, and judges. Office landlords may be questioned about the regularity of a lawyer's practice. Even court records may be necessary to prove the lawyer's active involvement in a case. Each of these rounds of submissions takes time. The whole process is sometimes punctuated at slow intervals by the monthly or less frequent meetings of the bar examining board and the resulting demands for new proof of active practice. Proving active practice can require almost full-time practice in its own right.

It is ironic that lawyer-employees of private organizations (as opposed to law firms), probably the most mobile segment of the bar, encounter perhaps

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90. COMPREHENSIVE GUIDE, supra note 31, at 28-29.
the greatest difficulty in gaining admission on motion. This difficulty is often caused by the lack of standards for determining the nature and extent of an applicant's law practice. This irony is compounded in that lawyer-employees of private organizations are, by the nature of their work, less of a risk to the public than lawyers in private practice. They do not hold themselves out to the public in an effort to attract clients and thus are less of a risk to future clients. Moreover, their practices tend to involve more preventive law and less direct handling of litigation than many private practices, thereby implicating less often the administration of justice.

Thus, while the nature and extent of an applicant's law practice appropriately bear on a lawyer's qualifications for motions admission, there are few good standards, either national or local, by which such qualifications are judged. It is the absence of standards on both the national and local levels that makes motion admission so unsatisfactory to so many arguably qualified applicants.

Because motion admission by its very nature involves interstate bar admission, motion admission standards are most appropriately developed at the national level. It is curious that so much has been accomplished nationally in respect to the character and fitness, education, and testing criteria, but that legal experience for purposes of motion admission, the one essentially interstate criterion, has been left exclusively to the states. The Code of Recommended Standards for Bar Examiners contains no provision dealing directly with motion admission, and The Bar Examiners' Handbook devotes no text to motion admission.

ii. Location Requirements. In addition to focusing on the nature and extent of a lawyer's practice, many states' motion admission rules are concerned about the location of the lawyer's practice. The rationale for this concern is that if the lawyer's practice occurs in a jurisdiction in which the lawyer is not licensed, then the lawyer is engaged in the unauthorized practice of law. Since it is professional misconduct (and often a crime) for a lawyer to engage in unauthorized practice, it might be argued that such misconduct should not be rewarded by admitting the lawyer on motion.

This black-and-white view of law practice ignores current realities. Many lawyers represent clients from many states. In addition, they may apply the

91. Model Code of Professional Responsibility DR 3-101(B) (1980) [hereinafter Model Code]; Model Rules of Professional Conduct Rule 5.5(a) (1983) [hereinafter Model Rules]. But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 316 (1967) ("It is a matter of law, not of ethics, as to where an individual may practice law. . . . Whether a lawyer from State I can or cannot on a trip to State II draft a contract for his State I client in State II, or whether he can in State II conduct negotiations with another lawyer for that State I client, is not a matter of ethics but a matter of defining what is the practice of law in State II. This must be done by State II.").
law of many states to a given legal matter. In a national economy (to say nothing of an international economy), multistate law practice must occur. Moreover, multistate law practice will occur in ways that make it impossible for the lawyer engaging in that practice to seek and secure bar admission in every state in which she is involved. Any ethical concern about whether a lawyer is licensed in the locations in which the lawyer practices, therefore, should be treated solely as an ethical concern under the character and fitness criterion. It should not be considered in reference to the legal experience criterion. The present practice of viewing these questions in relation to legal experience standards rather than character and fitness standards only muddies the water.

iii. Additional Concerns. Finally, two key concerns relating to motion admission remain to be addressed: first, the propriety of reciprocity rules, by which motion admission standards vary to conform to the rules of the state from which the applicant seeks admission; and second, the refusal of many states to substitute legal experience for testing. In the latter case there is, of course, no motion admission at all.

Reciprocity rules discriminate between equally qualified applicants based on the applicants' state of original admission. This discrimination serves neither the defensive nor positive purposes of lawyer licensing: it neither protects the public nor improves the profession. Moreover, it strongly intimates economic protectionism, an illegitimate purpose for lawyer licensing or bar admission rules. For these reasons, reciprocity provisions are inappropriate to a motion admission rule.

The persistence of reciprocity provisions is an embarrassment to the profession. Consider the argument advanced by the State Bar of Wisconsin in successfully urging the Wisconsin Supreme Court to adopt a reciprocity limitation on its motion admission rule:

Although Wisconsin imposes little or no barriers to the interstate practice of law, other states have continued to impose territorial limitations. Such limitations significantly burden the residents of Wisconsin since, in our national economy, residents' legal problems do not necessarily follow state boundaries. A Wisconsin attorney's inability to service his clients' legal business in several jurisdictions necessitates duplicative work by different attorneys and increases the cost of legal services. The proposed change for admission on foreign license from comity to reciprocity provides the incentive for other jurisdictions to adopt rules for admission similar to Wisconsin's.

In other words, recognizing that Wisconsin residents are damaged by bar

92. Brief of State Bar of Wisconsin at 10, In re Amendment of SCR Chapter 40: Admission to the State Bar, 144 Wis. 2d xiii (1988).
admission barriers in other states, the Wisconsin State Bar proposes to inflict equivalent damage on the residents of those other states. This eye-for-an-eye approach is intended as an incentive for more enlightened bar admission rules elsewhere.

A second rationale for reciprocity is advanced in the same State Bar brief:

[A]lthough attorneys from [neighboring] states can usually be admitted to practice in Wisconsin after only three years of practice, Wisconsin attorney [sic] cannot practice in any one of them unless they take the bar examination or meet other special conditions.93

This rationale, protecting local lawyers from unfair competition by lawyers from other states, is probably the more common reason for limits on motion admission, including reciprocity provisions.

Notice that neither rationale is directed primarily at benefitting the public. The first rationale is directed at punishing residents of recalcitrant states and the second rationale is to protect local lawyers. Of course, neither rationale fits within the justifications for bar admission discussed previously in the article. Reciprocity rules are particularly offensive because they so clearly advance lawyer self-interest in the most provincial way while, at the same time, defaulting on the profession's commitment to serve the public.

On the other hand, states that refuse to substitute legal experience for testing may have sound reasons for their refusal. Most importantly, bar examinations serve the purposes of lawyer licensing, and should not be waived lightly. Moreover, sound motion admission standards have not been developed, thus making motion admission difficult to administer. Nevertheless, states that reject motion admission should carefully consider how little they may gain by doing so, and at what cost to the public and to the bar applicants.

Consider how little the public stands to lose by motion admission. Most experienced lawyers have taken the national bar tests, so by requiring such lawyers to take their bar examinations, non-motion states are only adding the assurance that the lawyer has not forgotten what other law she knew when she passed her original state's bar examination. However, sound standards respecting the nature and extent of a motion applicant's law practice experience should overcome any concern about how much the lawyer has forgotten. Whether the lawyer knows fundamentally important local law could be tested soon after admission as easily as just before, with little additional risk to the public.

It should also be noted that the public is served by bar admission rules that are not unduly burdensome on applicants. The market for legal services must be regulated in many ways if the purposes of lawyer licensing are to be

93. Id. at 7-8.
served. But over-regulation of the market increases the cost of services and reduces their variety and availability. If a state's refusal to admit experienced lawyers on motion has no sound justification, then refusal harms the public just as surely as any other senseless economic regulation would cause harm.

b) Defining "Law Practice": The Relation of Motion Admission to Unauthorized Practice

The essence of lawyer licensing and bar admission rules is to prohibit people from practicing law. As discussed previously, "law practice" must be defined for purposes of motion admission, because such admission usually depends, and should depend, upon the quality of the applicant's legal experience. To qualify for motion admission in most states, applicants must establish that they were actively "practicing law." Even so, few standards have evolved in the bar admission area to define "law practice."

On the other hand, "law practice" has been extensively defined for purposes of determining whether the performance of various tasks by non-lawyers constitutes the "unauthorized practice of law." A researcher notes the following activity in the period 1920-1960:

The organization of the profession to combat the unauthorized practice of law produced notable results, not the least of which was a dramatic increase in discussion of the subject. In addition to the stream of articles published in the Unauthorized Practice News (an ABA committee publication), there was a great upsurge of writing on the topic in other publications. No fewer than 24 feature articles appeared during this period in the American Bar Association Journal. The writers in state and local bar journals and in other periodicals were even more prolific, producing at least 358 articles on the subject. Topics relating to unauthorized practice were treated in no less than 232 law review notes, comments and feature articles. And unauthorized practice of law was the subject of 16 annotations in the American Law Reports.94

This extensive body of literature stirs hope that "law practice" may yet be helpfully defined, with two significant implications: first, motion admission standards would be more efficient and reliable; and second, lawyers would know when licensure in a second state was necessary in order to perform certain services in that state. Part IV of this Article addresses the second of these concerns.

c) Legal Experience as an Additional Requirement: Clerkship and Trial Experience Requirements

Legal experience requirements have been imposed in a handful of jurisdictions as an additional requirement beyond character and fitness, education and testing requirements. In South Carolina, applicants for admission must prove that they attended a variety of trials in South Carolina courts before they may appear alone in the actual conduct and trial of a case.\textsuperscript{95} Some federal district courts have also adopted requirements of this sort, notwithstanding the federal courts' usual deference to state courts on bar admission matters.

The historical preference for state regulation of bar admissions is based, in part, on the fact that federal district courts are courts of limited jurisdiction. As such, they are empowered to hear only federal criminal cases, cases against foreign states, and civil actions involving a federal question or diversity of citizenship. The result of such limited jurisdiction is that federal courts hear less than one percent of the litigation in this country.\textsuperscript{96} Moreover, federal district courts are required to apply state substantive law in

\textsuperscript{95} S.C. Sup. Ct. R. Exam. & Prac. Law Rule 5B provides:

An attorney, though admitted to practice, may not appear alone in the actual conduct and trial of a case unless and until he or she . . . has had at least eleven trial experiences.

A trial experience is defined as:

(1) actual participation in a full trial under the direct supervision of a member of the Bar, or
(2) an observation of an entire contested testimonial-type hearing in a South Carolina Tribunal.

The required trial experiences may be gained by any combination of (1) or (2) but must include the following:

3 civil jury trials in Court of Common Pleas, or 2 in Common Pleas plus 1 in the U.S. District Court, and
3 criminal trials in General Sessions Court, or 2 in General Sessions plus 1 in the U.S. District Court, and
1 trial in equity heard by a judge, master, or referee, and
3 trials in Family Courts, and
1 trial before an industrial commissioner or other administrative officer.

The certificate shall specify by name the cases and dates and tribunals involved, attested by the respective judges, masters or referees, or hearing officer. The Clerk's acknowledgement and approval of the certificate shall be the attorney's authority to thereafter conduct and try cases without the supervision of a member of the Bar.

These trial experiences may be had at any time after completion of 2/3 of the credit hours needed for law school graduation.

An attorney who has for three years practiced law in another state, and who has been admitted to practice in South Carolina, may exempt the trial experiences required by submitting proof satisfactory to the Clerk of the South Carolina Supreme Court of equivalent experience in the other state.

The provisions of Rule 5B shall apply to all persons admitted to practice after March 1, 1979.

\textsuperscript{96} Weinstein, \textit{Proper and Improper Interactions Between Bench and Law School: Law Student Practice, Law Student Clerkships, and Rules for Admission to the Federal Bar}, 50 St. John's L. Rev. 441, 458 (1976).
diversity cases, reinforcing the states' interest in regulating admission to practice.

Despite the appeal of deference to the states in administering bar admission standards, substantial concern has been expressed over the degree of incompetency exhibited by lawyers practicing before the federal courts. This concern prompted then Chief Judge Bazelon of the D.C. Circuit Court of Appeals to remark that many young advocates in criminal law are "walking violations of the sixth amendment."97 Although most commentators have not gone so far, they nevertheless agree that there is a need for improvement in the quality of advocacy in the federal system. This consensus has led to many proposals for improved federal bar admission standards.

In 1974, the Judicial Council of the Second Circuit appointed a committee to propose changes in the rules for admission to practice in the federal courts. The Clare Committee, as it was called, recommended that any applicant for admission demonstrate that he has either participated in the preparation of four proceedings on the merits or has observed six trials.98 This trial experience requirement would be additional to membership in a state bar.

Subsequently, in 1979, the Devitt Committee comprised of federal judges, lawyers, law professors, and law students, issued its own recommendations. Like the Clare Committee, the Devitt proposals included a requirement of minimum trial experience which could be met by observing trials, second-chairing a trial with a lawyer already admitted to practice, or completing a trial advocacy course in law school. The Devitt Committee also proposed a federal bar exam covering federal procedural rules and the Model Code of Professional Responsibility, a student practice rule allowing third-year law students to practice under a license limited in scope, and a state-wide peer review system.99

At last count, thirteen districts have adopted special admission rules like those proposed by the Devitt Committee.100 Among the proposals in use are a federal law bar examination, trial experience requirements, continuing legal education requirements, and a system of peer review. The districts, however,

100. Chaset, Implementing Attorney Admission Rules in the Federal Trial Courts: A Status Report On King Committee Activities, 31 FED. B. NEWS & J. 429 (1984) (the King Committee was appointed to help implement recommendations of the Devitt Committee). See also Comprehensive Guide, supra note at 31, at 42 (listing sixteen federal district courts with special bar admission requirements).
have not all adopted the same requirements. Thus, while deference to the states is being slightly curtailed, decentralization remains.

The benefits and burdens of trial experience requirements can vary greatly from applicant to applicant. The benefits vary with the extent of the applicant's prior legal experience and the quality of the proceeding which the applicant attends. The burdens vary according to whether the applicant must travel to attend the required proceedings, whether the right type of proceedings are conducted on a convenient schedule, and how long and involved the available proceedings are.

The other form of additional legal experience requirement is a pre-admission clerkship.101 Like trial experience requirements, pre-admission clerkships provide varying benefits and burdens to different applicants. In addition, they effectively institute residence requirements, in that the clerkships must be performed in the office of a locally licensed lawyer.

Both clerkship and trial experience requirements serve the purposes of lawyer licensing. However, they suffer from two serious flaws: first, it is difficult to control the quality of the experience; and second, there can be an extreme burden on some applicants in effectively requiring a period of residence prior to admission. Neither of these flaws is necessarily fatal to the usefulness of these legal experience requirements, but the need for thoughtful implementing standards is obvious.

d) Legal Experience Summary

The legal experience criterion has much to commend it, both as a substitute for testing and as an additional requirement. As a substitute requirement applied through motion admission rules, the criterion inherently involves multistate bar admission and therefore should be guided by national standards. No national standards are presently recognized, and this may partially explain the unsatisfactory operation of motion admission rules and the refusal of many states to adopt them.

As an additional requirement applied through trial experience or clerkship requirements, the legal experience criterion can unduly burden some appli-

101. See Del. Sup. Ct. R. 52(c), which provides:

(c) Clerkship. No person shall be admitted to the bar without having served a satisfactory clerkship. . . . The 5-month period need not be continuous; however, no part of a clerkship shall qualify unless it shall have been served after the applicant shall have matriculated at a law school. . . . The Board shall prepare and furnish to any person desiring to qualify for admission to the Bar a checklist of legal activities and practical experience to be accomplished by the applicant during his clerkship. Prior to the admission of any applicant as a member of the Bar both the applicant and his Preceptor shall certify to the Board that the applicant has completed the required list of study.
cants. The burden is great because these requirements often effectively impose a pre-admission residence requirement on applicants.

C. SUMMARY

Bar admission rules are the product of both national and local standards. In most respects, national standards have led the way toward better bar admission rules and practices. In respect to the character and fitness criterion, national standards in the form of the American Bar Association Model Code and Model Rules establish the substantive bases for denying admission. In respect to the education criterion, the national standard of requiring a degree form an ABA-approved law school has improved the quality of legal education and, in turn, improved the quality of the bar. In respect to the testing requirement, national standards in the form of multistate tests have produced a sophistication and reliability that were previously lacking.

The one criterion for bar admission for which no national standards have evolved is the legal experience criterion. As an inherently interstate criterion, the absence of national standards is sorely felt. Many states avoid use of this criterion altogether, and other states often use it in an ad hoc fashion.

Notwithstanding the enormous contributions of national standards, states remain in the best position to balance the competing concerns of protecting the public, improving the profession, allowing applicants to practice their chosen occupation, and permitting a free, albeit regulated, market in legal services. Local conditions can dictate variations from national standards in bar admission. In particular, varied conditions dictate that states set their own passing scores on the bar examination, and this, in turn, dictates that a local essay examination be conducted. Moreover, privacy and liberty concerns dictate a state-based system for character and fitness investigations and decision-making. In developing local standards, however, states must be careful that they do not adopt unduly burdensome requirements. Local education and legal experience standards particularly run this risk. Unduly burdensome requirements not only fail to adequately serve the purposes of lawyer licensing, they are also unfair to applicants and are a disservice to the public.

IV. MULTISTATE PRACTICE ON A SINGLE STATE LICENSE

The proposition that lawyer licensing should be state-based establishes only a starting point for a host of lawyer licensing issues. In particular, a variety of policy concerns influence whether or how a state should regulate the activities of a lawyer who is licensed in another state. This part of the article explores some of those concerns.
A. LAWYERING ACTIVITIES AND STATE LICENSING INTERESTS

For non-lawyers, the question of what activities are subject to lawyer regulation is the ultimate question. Any activity which is within the exclusive domain of "law practice" is, presumably, a forbidden activity as to non-lawyers.102 For out-of-state lawyers, a more complex analysis is necessary. Most of what lawyers do professionally is "law practice,"103 and so whether the activity qualified as "law practice" is not usually the crucial question. Rather, the more difficult problem may involve whether the lawyer's activity involving a second state is authorized by her license to practice in a first state.

This issue of extra-territoriality can be analyzed initially by assessing the ways in which a state's licensing interests may be implicated by various forms of lawyer activity.104 Among the relevant considerations are whether the activity is geographically occurring within the state, whether the client is a state resident, whether the legal matter is before the state's court or administrative system, and whether the law of the state is being or will be applied in the matter.

1. Site of Legal Activity

Legal activity occurring within a state's borders may, but does not always, implicate the state's licensing interest. Consider the lawyer who is licensed in State A and who interviews a prospective expert witness in State B. If the client is a resident of State A and the legal matter involves the law of State A and will be tried in a State A court, none of the justifications for licensing lawyers in State B is invoked by the lawyer's activity in interviewing the witness, even though the activity geographically occurs in State B. Thus, while the geographic location of the lawyer's activity may be a factor as to whether the lawyer must be licensed in the state in which the activity occurs, it should not constitute an independently determinative concern.

This is one of the striking respects in which the accepted realities of law

102. The limits of that domain are difficult to discern. As Professor Rhode has noted, "[a] number of jurisdictions simply proscribe, without defining, the practice of law. Other states employ a circularity scarcely less cryptic: The practice of law is what lawyers do." Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 45 (1981).

103. In some cases, an activity is "law practice" if performed by a lawyer even though it would not be "law practice" (or at least not the unauthorized practice of law) if performed by a non-lawyer. See C. Wolfram, Modern Legal Ethics 897-98 (1986) (lawyer engaged in dual practice of law and another occupation is subject to lawyer regulation even as to activities performed as part of the other occupation).

104. For present purposes, it is assumed that the activities referred to constitute the "practice of law." What constitutes law practice has been variously, and usually expansively, defined. See supra note 101.
practice and the law of unauthorized practice are at odds. Many unauthorized practice rules and statutes prohibit any form of law practice within the state unless bar admission or pro hac vice admission, when applicable, has been secured. In Wisconsin, for example, it is illegal to "render . . . any legal service for any other person"\textsuperscript{105} "without having first obtained a license to practice law as an attorney of court of record in this state."\textsuperscript{106} Of course, lawyers from other states, who are unlicensed in Wisconsin, render legal services in Wisconsin everyday; the state's economy could not survive without it.

2. Residence of Client

One of the justifications for licensing lawyers is the protection of future clients from unskilled or unethical practitioners. Presumably, under a state-based system, each state is concerned only with its own residents and others who may seek legal services within its boundaries. Does the state have any legitimate licensing interest in out-of-state lawyers who represent state residents but who do not enter the state to do so?

There is certainly nothing to stop a resident of a one state from crossing the state line to retain and confer with a lawyer in a second state. It is difficult to imagine any basis of which the first state could assert regulatory authority over the lawyer in such circumstances.\textsuperscript{107} The situation may be different, however, if the lawyer attempted to attract clients in the state in which the lawyer was not licensed, for example by advertising her services in that state. The effort to develop a clientele in a state strongly implicates that state's interest in protecting its residents from unskilled or unethical lawyers.\textsuperscript{108} Thus, while the mere acceptance of employment from a state's resident may not justify the state's invoking its regulatory powers against the lawyer, an effort by the lawyer to attract a clientele in the state may be adequate justification, at least in relation to the purposes of lawyer licensing.\textsuperscript{109}

\begin{quote}
\textsuperscript{105} Wis. Stat. § 757.30(2) (1985-86).
\textsuperscript{106} Wis. Stat. § 757.30(1) (1985-86). But see Appell v. Rainer, 43 N.J. 313, 316, 204 A.2d 146, 148 (1964) (negotiations conducted by New York lawyer in New Jersey were not illegal practice of law in New Jersey).
\textsuperscript{107} See Kowalski v. Doherty, Wallace, Pillsbury & Murphy, 787 F.2d 7 (1st Cir. 1986) (New Hampshire court could not assert personal jurisdiction over Massachusetts law firm in legal malpractice action brought by New Hampshire client where underlying matter was solely within the jurisdiction of the Massachusetts courts). See also Annotation, 11 Prof. Liab. Rep. 930, 932-33 (1986) (Illinois court does not have jurisdiction over out of state attorney who failed to file an administrative appeal in Illinois).
\textsuperscript{108} See cases cited supra note 8. See also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978).
\textsuperscript{109} What types of advertising and solicitation justify regulation by the second state is a complex question. Advertising by the lawyer may be through media located in the lawyer's home state but received in the second state. It may be national advertising or, at the other extreme, targeted direct mail advertising sent into the second state. Moreover, advertising can either succeed or fail in
\end{quote}
3. Venue of Matter

If the connection between the out-of-state lawyer and the state is the lawyer's representation of a client in a matter pending before a state court or administrative agency, the state's licensing interest in protecting the administration of justice in the state is implicated. A concern for the administration of justice in the state is one of the acceptable justifications for lawyer licensing.

Most states assert their regulatory interest over out-of-state lawyers who are engaged in a matter litigated in the state by requiring the out-of-state lawyer to be admitted pro hac vice in the matter and to associate with local counsel to assist in the representation. Pro hac vice admission, especially coupled with the local counsel rule, has serious deficiencies; nevertheless, the justification for state interference with locally unlicensed practice before state courts or agencies is clear.

4. Applicable Law

A client who is active in a state may rely upon an out-of-state lawyer for advice respecting that activity. For example, an out-of-state lawyer may prepare documents necessary to comply with the state's securities laws or may draft a will for a state resident knowing that the will is going to be probated ultimately in the state's court system. In such circumstances, the locally unlicensed lawyer's only significant nexus with the state is in interpreting, applying, and advising the client with respect to the state's laws.

This relationship between an out-of-state lawyer and the state is probably insufficient to justify the state's assertion of its licensing interest. If any of the licensing justifications does apply, the most likely is concern for the administration of justice in the state. Even this link is tenuous, however, when


111. Accord C. WOLFRAM, supra note 102, at 867.
the only activity by the out-of-state lawyer is advising the client with respect to applicable state law.

An out-of-state lawyer's activities in interpreting or applying the state's law, therefore, do not necessarily justify the state's assertion of regular jurisdiction over the lawyer.

5. Summary

A state is not justified in regulating the practice of an out-of-state lawyer merely because one of the following occurs: the lawyer is present on business within the state; the client is a state resident; or the lawyer is applying the state's law to a client matter. On the other hand, an appearance by the out-of-state lawyer before a state court or other tribunal may, without more, justify the state's regulatory involvement.

B. THE EXTRA-TERRITORIAL AUTHORITY OF A STATE LICENSE

The Model Rules of Professional Conduct address the issue of multistate practice by making three points: by establishing that the state in which a lawyer is licensed has disciplinary jurisdiction over the lawyer's extraterritorial conduct, by noting that "lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice," and by warning that "activity in another jurisdiction [that] is substantial and continuous" may violate unauthorized practice rules. The Model Rules also recognize that each state determine for itself which activities constitute the practice of law for which a license is required.

The "substantial and continuous" standard suggested by the Model Rules is far more lenient than the standards found in most states' unauthorized practice statutes. On the other hand, it may accurately reflect the standard employed by states in enforcing their standards. It may also reflect the prevailing view as to the appropriate limits on extra-territorial practice held by lawyers engaged in multistate practice.

The unacceptable status quo is that lawyers frequently violate the letter of

112. MODEL RULES Rule 8.5 comment (1983) (cross-referencing Rule 5.5, concerning the unauthorized practice of law).
113. Id. Rule 5.5 comment (1983).
115. Professor Wolfram has concluded:

[S]everal states have tolerated in-state law practice if the client is a regular client for whom the lawyer typically performs work in the lawyer's own licensed state and either (1) the lawyer's presence is an isolated occurrence and the work is not extensive in duration or (2) the in-state practice is more extensive but is 'incidental' to advising a client on a multi-state problem.

C. WOLFRAM, supra note 102, at 867-68 (footnotes omitted).
unauthorized practice statutes. In addition, the spirit of those statutes generally seems protectionist, and in that respect, lawyers frequently violate their spirit as well. Lawyers face a serious dilemma in acting within such an inadequate legal framework. The customary practice is well-described by the "substantial and continuous" standard of the Model Rules, but this standard is not generally sanctioned by written law. Thus, lawyers are constantly at jeopardy while engaged in multistate practice. This jeopardy is fairly limited in that courts usually impose no greater sanction than the requirement that local counsel be retained. (Of course, this "sanction" may cost the client thousands of dollars, and in that respect it is not nominal.) Nevertheless, lawyers must balance client interest and self-interest in a legal environment in which technical law violations are the norm.

A direct legal challenge to the highly restrictive unauthorized practice statutes is not likely to prevail. The closest Supreme Court pronouncement on point, offered in Leis v. Flynt, is discouraging:

There is no right of federal origin that permits [out-of-state] lawyers to appear in state courts without meeting that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis.

Thus, one state's license to practice law apparently provides few extraterritorial rights respecting law practice in a second state. The question is one of sound state policy, not of established federal right.

C. REGULATING LAW PRACTICE THAT IS NOT "SUBSTANTIAL AND CONTINUOUS"

Extra-territorial practice by a licensed lawyer in a foreign state should not require formal admission in that foreign state unless the practice is "substantial and continuous," the standard suggested in the Model Rules of Professional Conduct. The one troublesome question is how (or whether) to

116. The standard appears in a comment to the Model Rules and thus is not part of the written law even of those states that have adopted the Model Rules.
118. Id. at 443. But see Fuller v. Diesslin, 868 F.2d 604, 607 (3d Cir. 1989) ("The Supreme Court has considered whether an out-of-state attorney has a fourteenth amendment due process right to practice in a state in which he is not a member of the bar and held that there is no such right. The Court, however, made it clear that it had not addressed the issue of whether a litigant's right of counsel of choice includes the right to out-of-state counsel. . . . Thus, we conclude that the right to counsel pro hac vice is encompassed analytically within the right to counsel of choice, and as such should be examined within the analytic framework generally employed in right to counsel of choice cases.") (citations omitted).
regulate extra-territorial practice that is less than "substantial and continuous."

Pro hac vice admission is the common device for regulating limited law practice by a lawyer regularly licensed in a foreign jurisdiction. Pro hac vice regulation, as it generally operates, suffers from many serious flaws: it applies only to law practice incident to litigation; the availability of pro hac vice admission is ad hoc and within the often-unbridled discretion of a trial court judge; and local counsel must be retained to assist in the matter, often at considerable additional expense.

These problems with pro hac vice admission must be resolved before multi-state law practice will be effectively regulated. Resolving these problems means addressing three central issues:

1. If, when a lawyer's practice in a state is "substantial and continuous," regular bar admission should be required, what lower threshold of activity by an out-of-state lawyer should trigger the requirement for a limited form of admission (e.g., pro hac vice admission)?
2. Who should be responsible for approving limited admission and what standards should be applied?
3. Should local counsel requirements be imposed in some or all limited admission cases?

1. When to Require Limited Admission

As outlined earlier, whether a state is justified in regulating an out-of-state lawyer's practice cannot be based categorically on whether the lawyer is physically present within the state, whether the client is a state-resident, or whether the state's law is being or will be applied in the matter. Nevertheless, each of these factors has some bearing upon whether the state may be justified in regulating a given lawyer's practice.

Limited admission, like pro hac vice admission, should be restricted with respect to the matters that the out-of-state lawyer is permitted to handle. Pro hac vice admission permits the lawyer to practice with respect to a particular matter pending before a particular court. Limited admission might similarly

120. A recent count revealed that "twelve states have statutory provisions on pro hac vice admission, twenty-nine have court rules, two are covered by bar rules, five have a combination of statute and court rule, two have a bar rule and a statute, and one state is without any explicit provision." Michelman, Pro Hac Vice Regulation—In The National Interest? 4 (1984).


122. See supra Part IV(A).
be restricted to a particular matter, or related group of matters, on behalf of a particular client. Limited admission might also be restricted by time constraints, so that after the established time period, the limited admission would lapse if not renewed.

The key to an effective system, and the ingredient now most lacking, is bright-line standards separating unregulated extra-territorial practice from regulated extra-territorial practice. Pro hac vice rules usually accomplish this in litigation settings by requiring pro hac vice admission in order to make an appearance as counsel. For other forms of practice, new standards are needed. Those standards may be expressed as time limits. For example, if a lawyer spends all or part of fifteen days of one year in a foreign state on a particular client’s business, the lawyer could be subject to that state’s limited admission requirements. Perhaps different bright line standards could be developed based on something other than time spent in the jurisdiction. The point is to define the extent to which law practice by an out-of-state lawyer may be undertaken in the state without any formal requirements and to provide some safeguards if the lawyer’s activity is more extensive.

2. Standards and Procedures for Limited Admission

Limited admission should be granted as a matter of right to those who meet the standards. The central criterion should be whether the lawyer has a valid and active license to practice law from another state. The lawyer should complete a short questionnaire that elicits directory-type information, identifies the client, and identifies the matter or matters for which limited admission is sought. Verification should be secured from the client and from bar authorities in the state where the lawyer is licensed. No further investigation should be done; the lawyer’s license in her home state should be security enough. In short, an expedited process is recommended in which limited admission is granted as a matter of course upon receipt of a short application from the lawyer, verification of representation by the client, and certification of bar membership by bar admission authorities in the lawyer’s home state.

This limited admission process would be most efficient if administered by the state bar admission authority. Pro hac vice admission could become a part of the overall limited admission process, with the court in which the matter is to be heard being advised of the out-of-state lawyer’s limited admission status.

3. Local Counsel Requirements

The requirement that local counsel be retained significantly increases the

123. Obviously, this time expenditure falls well short of the “continuous and substantial” standard that triggers a requirement for regular admission.
cost of legal services. Given that the client must foot the bill, it seems ter-
ribly presumptuous to defend this practice by asserting that it protects the
client. More plausibly, local counsel requirements can be justified as protect-
ing the administration of justice in the state. The theory underlying this jus-
tification is that out-of-state lawyers are less familiar with local substantive
and procedural law and are more likely to delay or disrupt proceedings, ob-
struct negotiations, or otherwise impede the proper resolution of legal mat-
ters. These are not trivial concerns, especially when the state has not itself
assessed the lawyer's competence and character.

On the other hand, local counsel requirements have at least two harmful
effects: they significantly increase the cost of legal services and they require
clients to enter into lawyer-client relationships against their will and not for
their own benefit.\(^\text{124}\) It would be unjustifiable to impose local counsel re-
quirements in all limited admission cases, even in all matters involving litiga-
tion. The stakes and risks in particular matters often will not justify the costs
(financial and other) of local counsel.

When and why local counsel requirements should be imposed in limited
admission cases requires further study and discussion. The very lawyers
whose multistate practices require their frequent affiliation with local counsel
also often serve as local counsel to other firms. Many lawyers are exper-
ienced and objective respecting the local counsel issue, and their views should
be sought.

D. SUMMARY

A state-based system of bar admission does not have to unreasonably re-
strict multistate law practice. A sensible system would recognize that an out-
of-state lawyer's activities in a state where he is not licensed may fall within
any of three categories. First, it may be "substantial and continuous," a
standard suggested in the *Model Rules of Professional Conduct*, in which case
regular bar admission should be required. Second, it may be significant but
involve only a single matter or related group of matters, in which case a
limited license procedure, akin to *pro hac vice* admission, would be appropri-
ate. Third, it may not rise to the level of significance requiring limited admis-
sion, in which case the activity is permissible extra-territorial practice based
on the lawyer's home license.

If states appropriately define and regulate these three levels of practice
activity, they will better protect the public and allow lawyers to better serve
the public.

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124. This latter situation sometimes occurs with criminal defendants, except that then it is gener-
ally because they are not otherwise represented by counsel. Local counsel requirements are differ-
ent in that the client is not *pro se*, but has retained counsel.
V. Conclusion

The movement toward national standards in bar admission is unmistakable and, for the most part, beneficial. The need for continued movement in this direction seems urgent when developments in the economy, and society as a whole, prompt changes in law practice to which state bar admission rules are slow to respond. In part, the slow response reflects the vulnerability of the state-based system to protectionist urges. In addition, it reflects the fundamental division of the legal profession into two hemispheres, one comprised of lawyers who represent large organizations and the other of lawyers who represent individuals.125 Lawyers in the first hemisphere often engage in multistate practice and those in the second rarely do. As Heintz and Lauman have suggested, "the simple view of the bar as a single, unified profession no longer fits the facts."126

National organizations, particularly the American Bar Association and the National Conference of Bar Examiners, should organize a study of multistate practice issues. This study should be directed toward standards for motion admission and limited bar admission. States have displayed a willingness to adopt meaningful and appropriate national standards in many areas of bar admission. Strong national leadership in developing balanced standards for multistate practice is urgently needed.


126. Id. at 72.