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State Supreme Courts as Regulators of the Profession Part II: The Future of Bar Admissions and the State Judiciary

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II. THE FUTURE OF BAR ADMISSIONS AND THE STATE JUDICIARY

Erica Moeser*

It is an honor and a pleasure to appear before the Conference of Chief Justices to discuss the future of bar admissions and the state judiciary. It is a speech for which I have prepared in one way or another for twenty years, and I must admit to having rehearsed pieces of these remarks (usually to myself) many times over the last decade.

I begin with the premise that there is not much I will tell you that you do not already know; instead I will propose a reordering of what you already know, to bring into focus its significance for the future of your courts; and I will suggest that this is not the time to ignore the issues surging into the heretofore somewhat sleepy world of bar admissions.

The strength of state courts as institutions and the stability of the bar admissions process over time offer a great deal of security. That is not to say that the course of bar admissions is not in doubt, or that the role of the state courts in effectively regulating bar admissions is not subject to increasingly aggressive external pressures. They are, and I hope you are concerned about that.

The regulation of lawyers derives from the federal and state constitutions. The most common model places the bar admissions process within the framework of state court administration, with decisions typically made by the courts or by bar examiners who function under the direct delegation of the courts. This is not uniformly the case, however; in California, for example, much of the authority for bar admissions is exercised by the legislative branch.

For the majority of jurisdictions in which bar admission is regulated by the courts, when the legislative or the executive branches invade the territory of judicial prerogative, there is a jagged pattern of resistance and acquiescence to these unwelcome initiatives. For example, when the West Virginia legislature voted to abolish the diploma privilege as a pathway to bar admission ten or fifteen years ago, the West Virginia court stepped in to nullify the action because of the unavoidable separation of powers issue. Having asserted its authority in this area, the West Virginia court then proceeded to sunset the diploma privilege on its own motion.

From place to place and from year to year, there are small incursions on the prerogatives of the courts that courts choose to ignore out of prudence in some cases, or, in other cases, out of a failure to

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appreciate the weakness of a strategy that permits other branches of government to nibble away at the cookie that represents the area of the courts' proper authority. One needs to know, in the words of the song, "when to hold 'em, and when to fold 'em," and reasonable minds differ about this at any given time. I suggest to you that it is unwise to assume that the courts should operate on a standing order to "fold 'em."

The traditional sources of challenge to the state judiciary in bar admissions matters have come from two places: other branches of government and the federal courts. The West Virginia scenario I just described evidences the occasional reach of the legislative branch. In Wisconsin we dealt with a claim by the executive branch to control a fund reserve that we had generated over time at the Board of Bar Examiners. (This was resolved by settlement after our court commenced an action to recover the funds.)

Intervention by the federal courts is illustrated by the line of cases that began with *Piper v. New Hampshire*,¹ in which the United States Supreme Court held that the Privileges and Immunities Clause of the United States Constitution barred the states from asserting state residence as a requirement for admission by bar examination. This removed from state court authority the matter of deciding whether residence could be used for the purpose of consumer protection of clients.

Shortly thereafter the Supreme Court let stand a Seventh Circuit decision arising out of Illinois, *Sestric v. Clark*,² thereby permitting states to require state residence of applicants for admission on motion; however, within a few years, in *Supreme Court of Virginia v. Friedman*,³ the Court eliminated residence as a requirement for bar admission by persons seeking admission on motion, again citing the Privileges and Immunities Clause. I mention those cases here because they serve as a reminder that federal appellate courts have in the past used constitutional provisions such as those illustrated by these cases of the 1980s to erode the scope of state court authority.

Different issues face us today, and some of them deserve your attention. First, there is the impact of federal statute and federal regulatory power on bar admissions. This issue transcends bar admissions, so for those of you who lack a keen interest in bar admissions but share my interest in a strong and healthy state judiciary, there is a message here for you.

² 765 F.2d 655 (7th Cir. 1985), cert. denied, 474 U.S. 1086 (1986).
The classic piece of federal legislation that has directly affected bar admissions, and clearly regulated bar admissions at the federal level notwithstanding what you consider to be the state judiciary's authority, is the Americans with Disabilities Act. The ADA directly reaches licensing and directly reaches the work of governmental agencies, including state court agencies, in a way that its predecessor legislation did not. Together with the awesome power of federal enforcement, the ADA has changed bar admissions; and curiously, most state courts appear to have paid scant attention to what is going on.

The objective of the ADA is of course laudable, and I personally feel it was a welcome piece of legislation. But I am surprised that the state judiciary has not responded with any perceptible force to the notion that the federal government now sits as a partner in deciding which applicants are qualified to test, the conditions under which they may test, who is fit for admission, and who is qualified to practice law.

The impact the federal government has had on bar admissions affects two types of decisionmaking: test accommodations and fitness determinations. And the type of influence the ADA brings to bear takes two forms: direct involvement in individual cases, and the threat of resource-draining and otherwise paralyzing enforcement actions.

Let us look first at test accommodations. The ADA has reached into the states to create a number of presumptions that overcome the authority of state courts to determine who may sit for an examination. Applicants with a burgeoning number of disabilities, especially related to learning disabilities, cognitive development, and attention deficit disorder, are seeking extra time, extra days over which the test is administered, private testing quarters, and spell-check capabilities on computers—to name only a few demands—in order to level the playing field.

Agencies that have historically been under-funded are struggling to obtain and devote money to evaluating requests for special accommodations, and to retaining fairness and equity in testing. They do so out of a strong commitment to all test-takers, but they do so under a gun not contemplated, I think, by a state judiciary that still sees itself as maintaining exclusive control over the admission process. In fact, some states have yielded to the Department of Justice out of fear of the crippling effect that an enforcement action can have: once an agency is the subject of an investigation, let alone an enforcement action, there are simply inadequate resources with which to fight. The fights that have occurred, and the capitulations that have occurred,
are tainted by the fact that the might of the federal government makes weaklings of us all. In only a few places—Kansas and Michigan among them—has the question of state court authority been raised in litigation.\(^5\)

Let me give you two real-life examples to illustrate the everyday effect of the ADA. In the first, an applicant who had taken a bar examination in State A wanted to take another type of test also required for bar admission. He offered little documentation, but what he did offer ran along the same lines as what he had offered in State A. The candidate asked for unlimited time on the second test, which was denied. It was subsequently learned that he had received only time-and-a-half on the test he took and passed in State A. This applicant went to federal court the week before the second test was to be administered, and before there was any examination of the facts, the federal district judge effectively required settlement. Settlement involved more documentation and an agreement to give the applicant double time.

Here is the second case. The applicant requested a private room and an attendant on a licensing test. The reason for the request was that the applicant, a law student, was prone to become violent when under stress. This accommodation had been permitted while the applicant was in law school. While one might ordinarily go to the mat on the question of reasonable accommodations, here the course was clear: the interests of other applicants compelled that the applicant be so accommodated. In my view one might reasonably question whether this applicant possessed the fitness to be licensed.

The fear of litigation lurks underneath many individual ADA decisions. And the fear of federal enforcement involvement lurks behind many policy decisions being made by the state boards. In one jurisdiction, where the Department of Justice entered the fray on the subject of inquiries about mental health, I understand that the members of the state board now feel that if they had to do it over again, they would acquiesce, not fight, because of the toll that the engagement took, financially and otherwise. To the extent it matters to the state judiciary that a significant chunk of regulatory decisions are now being made by the federal government under color of a law applied to the courts, this may be the time to reflect on whether the courts view that as a benign development.

But these remarks are not about the ADA or its merits; they are about the extent to which federal legislation has preempted state

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court regulation in an area previously reserved to the state courts, an area that you in this room may believe you still regulate.

There are other examples of federal preemption. One, not related to bar admissions but to the regulation of lawyers, derives from the Thornburgh Memorandum\(^6\) and the contest of wills over who can regulate federal prosecutors.

Another example reaching bar admission relates to NAFTA.\(^7\) Are you aware of the extent to which this tripartite agreement interjects the federal government into policy questions of who may be authorized to work as a lawyer in the United States, and who will determine the limits of what individuals so authorized may do? NAFTA has had a relatively slow start for the legal profession, but that start has been under the radar of most state courts. As legislation NAFTA has much to recommend it, but, as with the ADA, that is beside the point. For our purposes the point is that one day it may dawn on the state courts that significant decisions driven by treaty and economics have reshaped access to the practice of law.

So much for federal legislation as it overlays the role of the state judiciary.

There is another issue in the future of the state courts, and it involves the admission of foreign-trained lawyers. There is more to this than meets the eye. Many of you are familiar with the emergence over the past decade of the creature known as the "foreign legal consultant." In response to the importunings of the international law sections of the various state bars, courts have been urged to permit the registration of foreign legal consultants. These were individuals who would be permitted to give advice on the law of their home country while in a United States jurisdiction, but who were precluded from practicing the law of the United States jurisdiction. There are several models out there; all devote ink to expressing affirmatively what a foreign legal consultant may do or to expressing what such a consultant is forbidden from doing.

The motivation for creating this category of consultant was the economic interest of members of our bars in achieving access to overseas legal markets. To do this, the strategy was to demonstrate that lawyers from overseas had access to American legal markets, too.

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One thing that the state courts should recognize from an examination of the growth and development of foreign legal consultants is that globalization and the economics of international law practice have the potential to be potent influences on state court policy with respect to all bar admissions. The globalization of the practice of law and its impact on bar admissions deserves thoughtful consideration and forward thinking and planning. It is ironic that the likely response to international practice, presumably the elimination of barriers to foreign-trained lawyers, may force some of the traditional domestic practice barriers down lest it become easier for a lawyer from overseas to be licensed in New York, for example, than it is for a lawyer from New Jersey to be licensed in New York. (What we are observing is the result of an effort to eliminate economic barriers from a bar that has previously been accused, quite reasonably at times, of using economic barriers.)

We know that relatively few foreign legal consultants are actually licensed (there were only forty-eight persons so designated in all of 1995, thirty-three of them from Florida, New York, and California), and as a movement this seems to have stalled notwithstanding the success of the ABA's International Law and Practice Section in steering a model foreign legal consultant rule through the ABA's House of Delegates in August of 1993.

But foreign-trained lawyers seem unappeased by the foreign legal consultant designation, and the push these days is to full licensing. The foreign legal consultant credential is now being encouraged as something of an apprenticeship credential that will lead to full licensing after the passage of time. This is especially curious in view of the fact that traditional motion admission models exchange a quantum of experience for a showing of competence on a bar examination. With the foreign legal consultant, a showing of no experience in the law of the host country is now being suggested as the prerequisite for either full licensure without a test or access to the bar examination.

The reason that knowledge about foreign legal consultants is significant beyond the fact that they exemplify the extent to which economic interests are driving admission policy is that they constitute the raveling that will lead the courts to one of the major issues they will confront over the next decade.

The issue is the retention of the requirement of some type of educational credential as a prerequisite to taking a licensing examination. If, for example, policy changes occur that permit foreign-trained lawyers to be admitted by examination or on motion, this will un-
doubted the argument that bar examinations should be administered only to graduates of accredited American law schools. If the gates of the profession are to be opened to persons other than those who have completed formal training at an institution meeting minimum educational standards, then the test or tests that are administered will need to provide more exhaustive coverage than they do now. Today's bar examination only works, in my opinion, because there is something besides the bar examination—an acceptable education—available to separate the wheat from the chaff. A new paradigm may emerge that places more reliance on a comprehensive examination at the gate of the profession.

It is critical that the public interest not be lost as change occurs. Imagine this scenario: The court authorizes foreign legal consultants, satisfied that the rules preclude them from engaging in the unauthorized practice of law. The court then moves to permit these consultants to be admitted on motion or to sit for the bar examination. Graduates of unaccredited American law schools then argue that their credentials are equivalent to those of foreign-trained lawyers. (Here you must understand that the world is full of legal training credentials. If in your mind's eye you picture only Oxford or Cambridge graduates, you have an incomplete view.)

It is the state courts that will ultimately determine whether the educational-underpinning model survives. There is no answer in approaching the problem that has begun to surface with a waiver mentality, because waivers will assume the place of policy in very short order—how else can the process be fair, and how wise is it to require bar admissions agencies to defend denials of waivers in appeal after appeal? If courts wish to maintain an educational component in licensing, the approach must be comprehensive and the approach must acknowledge the law school graduate from accredited and unaccredited institutions; the applicant who did not attend law school at all; and the foreign trained lawyer (encompassing the range of variation in credentials and in training and in institutions) who may or may not have held a foreign legal consultant credential. It will not be simple, and the wisdom that courts bring to their policy-making roles will depend upon their ability to understand a much bigger picture than the one normally presented when one applicant, or one rule, is at issue.

Another issue with which courts are going to be required to contend relates to making determinations about an applicant's character and fitness. Some of the effort to change the screening of applicants for fitness in response to the ADA have focused on the desirability of using conduct, not status, as a means of making such determinations.
There seems to be little resistance to that notion except as to current treatment, which some courts and boards view as a germane take-off point of inquiry.

The interesting aspect of the conduct-versus-status discussion is that in some jurisdictions status is becoming a defense to bad conduct in the lawyer disciplinary area. A concrete example has been noted in the District of Columbia, where lawyers have escaped sanctions for their dishonest conduct by raising addiction as a defense. Courts will be asked to decide if an alcoholic applicant who is admitted because there is no evidence of bad conduct (and in fact many alcoholic lawyers do no harm to their clients) will subsequently be held harmless from, say, stealing client funds on the basis that the now-licensed lawyer is addicted to alcohol.

A final trend that is positive and noteworthy is that state courts are displaying more attention to bar admissions than at any time I can remember. Courts have become more proactive in asking boards of bar examiners about processes and tests, and an increasing number of members of the state judiciary are becoming actively involved in admissions issues. A classic example occurred in 1994, when the Iowa Supreme Court undertook an exhaustive review of the bar examination in that state. The result was a reconfigured examination that was superior to its predecessor. Its chance of success, and its likelihood of acceptance, were enormously advanced by the attention the Iowa court brought to the project.

As testing of performance skills emerges on the national level, I predict that courts will ask their bar examiners to investigate the viability of the concept. We are marking a time when courts are reaching down to examine the examination, and that will ultimately benefit and protect the public.

I hope these ideas have sparked your own. No, the role of the state judiciary in bar admissions need not change drastically. It is past time, however, for the courts to ignore the trail signs as bar admission is beset with challenges. This is a time for leadership, and leadership requires of those of you in this room that you place bar admissions on your court's agenda if it is not already there.

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