

# The Dramatic Effects of U.S. Principles of Federalism on Efforts to Loosen Restraints on International Competition in the Provision of Legal Services

John Cary Sims  
University of the Pacific, McGeorge School of Law  
3200 Fifth Avenue  
Sacramento, California 95817  
(916) 739-7017  
jsims@pacific.edu

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Large international law firms that are based in the United States or that have a major presence there have much to gain from modern trends toward loosening restraints on international competition in the provision of legal services. Those firms often provide legal services to the largest multi-national corporations and to the largest governmental and corporate entities that do business or want to do business with the multi-nationals. Given the worldwide scale on which many such clients and potential clients operate, firms that already have or can quickly establish a credible presence in the far corners of the world are at a great advantage.

In providing representation to individuals with routine legal matters (property transfers, divorce, criminal cases, small business matters) the practice of law is intimately related to the local culture, and often at least indirectly related to the realities of the local political system, and lawyers from out of town, much less from another country, would rarely be of any use to clients. However, in handling the complex and specialized matters for which the large international law firms compete, the nationalities of the lawyers involved may make little difference. At a

minimum, however, an international law firm must be careful to assure that it is in compliance with national and local restrictions on the practice of law, lest charges of unauthorized or illegal provision of legal services become an embarrassing obstacle to the acquisition or retention of clients. The dramatic loosening of restrictions on the practice of law within the European Union has made it much easier for lawyers within the E.U. to participate in the open market in legal services within that realm, and the stepped-up competition among attorneys has in turn led to substantial changes in the ethical standards applied within the various member states of the E.U. *See generally* John Cary Sims, Book Review, 16 TRANSNATIONAL LAWYER 395 (2003) (attached).

While competition in the provision of legal services has intensified within Europe, with firms tied to the United States also aggressively seeking to expand their involvement, the question of reciprocal entry by foreign firms into the United States market remains somewhat shadowy. Many of the realities of the U.S. market for legal services are closely tied to the principles of federalism that apply very dramatically with regard to regulation of the Bar within the United States. For those attempting to discern when and how foreign firms will be able to enter the U.S. market in a meaningful way, it is useful to understand in more precise detail how the United States regulates attorneys, and in particular how it controls admission to the practice of law.

There is no Bar of the United States. Each of the 50 States (and additional jurisdictions such as the District of Columbia, Puerto Rico, and the Virgin Islands) has its own Bar. While there are some variations from State to State, the Supreme Court of each State has the ultimate responsibility for setting and enforcing the rules under which attorneys are admitted, regulated,

and (if necessary) disciplined or disbarred. Federal constitutional law has been interpreted to place some limits on how the States handle bar admissions matters. For example, the States have long been forbidden to exclude non-citizens of the United States from Bar membership, *In re Griffiths*, 413 U.S. 717 (1973), nor are they allowed to deny Bar admission to an otherwise-qualified applicant simply because he or she is a resident of some other State. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Some States administer very rigorous Bar examinations, while others apply standards that are much easier to meet. The central government of the United States, acting through Congress, presumably has the power under the Commerce Clause of the Constitution to set uniform national standards for admission to the Bar (at least for many purposes) but such a national approach has never been implemented.

There is also wide variation in how States treat Bar applicants who are already admitted to practice in another State. About two-thirds of the States admit other attorneys “on motion” when they have a minimum amount of experience, often four or five years during the most recent six or seven years. Out-of-state attorneys admitted on motion are excused from taking the Bar examination altogether. Some jurisdictions, most notably the District of Columbia, admit attorneys who are already admitted elsewhere without requiring legal experience in the other State. The relaxed motion standards in D.C. meant that in 2006 more than ten times as many attorneys were admitted on motion (3,621) as succeeded on the Bar examination (334).

While many States allow motion admission under some circumstances, a number of important States grant admission only to those who pass the Bar examination. Although erecting barriers to the admission of out-of-state attorneys would be illegal if done for the purpose of protecting in-state lawyers against competition, a number of States insist that even the most

highly qualified and experienced out-of-state lawyers take the Bar examination in order to be admitted, and so far no legal assault on this practice has been successful. Thus, Arizona, California, Delaware, Florida, Hawaii, New Jersey, and a number of other States require the Bar examination of all applicants. A cynic might note that it tends to be the sunniest of the States – and thus those that may be most likely to attract emigrants, especially as retirement age approaches – that are the most determined to resist motion admission. A mild deterrent to this anti-competitive approach is offered by the fact that some States allow motion admission on a reciprocal basis only, with the result that experienced California attorneys are denied motion admission in New York solely because California denies motion admission to New York lawyers (and others).

Bar admission in the United States is further fragmented by the fact that each federal court – that is, each court operated under the authority of the United States rather than by one of the States – has its own Bar. One might expect that, despite the splintered authority over admission to practice in the State courts, at least there would be a coherent approach to admission to practice before the federal courts. However, no such uniformity exists. Each federal district court (which covers a State's territory or part of a State) sets its own standards for admission to its Bar. These standards require admission to the Bar of a State, and generally do not require taking an additional Bar examination, but many federal courts choose to adopt restrictive admission requirements that are both illogical and anti-competitive. For example, about half of the U.S. district courts limit admission to those attorneys who are admitted in the State in which the federal court sits. This means that even the most capable New York attorney will be denied admission to any of the four federal district courts in California, since each court

requires not merely that an applicant be a qualified attorney who is admitted to practice in some State, but that the attorney be admitted *in California*.

Although the admission requirements are generally not onerous in the federal appellate courts, there is a requirement that one be admitted separately to each such regional court. Thus, an attorney who is admitted to practice in California and who is also admitted in one of the federal district courts in California must additionally obtain admission to the United States Court of Appeals for the Ninth Circuit in order to handle the appeal of a case decided by a California federal district court. If the case goes on to the Supreme Court of the United States, a separate Bar admission is required to practice before that Court.

Because Bar admission authority is shared among so many different State and federal courts within the United States, an attorney from outside the United States who seeks to practice law in the United States faces formidable challenges. Whatever the difficulties may be in obtaining the right to practice law in, for example, California – which involves a very difficult three-day Bar examination consisting of six hour-long essays, 200 multiple-choice questions, and the two three-hour practical projects in the “performance” portion of the examination – a successful applicant earns only the right to practice in California and its courts. Although there has been some added leeway given by recent adoption of “multijurisdictional practice” rules, in general a California attorney who attempted to practice law in New York would be considered to be engaged in the unauthorized practice of law. *See generally* ABA Model Rule 5.5.

The overall effect created by the principles described above is to make it difficult if not impossible for a foreign attorney, no matter how well qualified, to freely practice law in the United States as a whole. Of course, the rules described are not designed to disadvantage

attorneys from outside the United States. Most of those hurt by restrictive Bar admission practices are U.S. attorneys who might want to relocate or engage in multistate practice (and of course the clients who might want to retain them). In fact, it would seem odd, and perhaps unfair, if foreign attorneys were treated better than attorneys from other States. Nonetheless, the result of the highly decentralized Bar admission policies followed in the United States is to greatly impede efforts by foreign lawyers to practice law in the United States.

Despite all the difficulties described above, the ongoing process of the internationalization of the Bar is affecting the United States to a much greater degree than might immediately be apparent. For many years, foreign attorneys have been allowed to qualify as “foreign legal consultants” allowed by a State to provide very limited legal services related to the law of the attorney’s home country. The FLC process involves so many restrictions that it has had almost no impact on the practice of law within the United States, and the number of FLCs has remained small. However, foreign attorneys are increasingly discovering that it is not that difficult to gain full Bar admission in the United States, and the admission of foreign-educated attorneys has particularly become notable in New York. In 2006, 1,235 of the 7,655 applicants passing the New York Bar were educated in law schools outside the United States. Of course there is no easy way of determining how many of these attorneys will actually practice law in New York, but it is remarkable that almost one-sixth of all the attorneys admitted in that State are foreign attorneys. Once admitted, these foreign attorneys are as entitled to practice law as any United States citizen. The New York experience is not typical – in 2006, California had only 103 foreign-educated applicants passing its examination, less than 2% of the total – but given the high profile of New York in international commerce, finance, and law, eventually other

States will either emulate New York or be left behind.

Over the past 35 years, the market for legal services within the United States has been substantially opened to competition. In addition to the invalidation of restrictive Bar admission practices, as described above, lawyers were stripped of the claimed authority to engage in price-fixing, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and the long-standing prohibitions on advertising by lawyers were superseded. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Substantial restrictions remain, often going far beyond regulation that is legitimately needed to protect clients against unscrupulous or incompetent attorneys. More recently, pressure has mounted for easier access to the U.S. legal market by qualified foreign attorneys. For example, Australia has been particularly aggressive in attempting to use its bilateral trade agreement with the United States to gain easier admission for Australian attorneys in the various States. *See, e.g.,* Conference of Chief Justices, Resolution 7, *Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations* (Feb. 7, 2007) (urging that each State supreme court consider permitting Australian lawyers to sit for the Bar examination and, if successful, be admitted). *See generally* Laurel S. Terry, *Current Developments Regarding the GATS and Legal Services: The Suspension of the Doha Round, "Disciplines" Developments, and Other Issues*, 76 BAR EXAMINER 27 (2007).

It seems unrealistic to predict that the efforts of foreign attorneys, even if bolstered by GATS and bilateral trade agreements, will themselves cause a radical restructuring of the way in which the Bar is regulated in the United States. However, the efforts by qualified New York attorneys to be admitted on reasonable terms in California or Delaware do bear a substantial relationship to the claims of qualified attorneys from outside the United States who ask to be

evaluated on their own merits rather than being excluded in order to protect the interests of those already admitted. The European Union has already moved substantially in the direction of a free market in legal services. Although the process in the United States has been slow, uneven, and sometimes maddeningly illogical, similar trends have appeared.

An applicant should be admitted to practice law, or denied admission, based on education, experience, competence, and moral character, not because of nationality or the location of the applicant's law school. The traditional Bar admission practices in the United States stand in opposition to this core principle, but those historical anti-competitive and anti-client practices have been eroding in recent years. By 10 or 15 years from now, qualified foreign attorneys may well be able to practice law within the United States without having to encounter excessive barriers to admission. Perhaps, by then, even a lawyer from one State who wishes to practice in another State will be able to do so without running the gauntlet of traditional restrictions that unduly favor the parochial interests of lawyers.