

# TOWARD NATIONAL CRIMINAL BAR ADMISSION IN U.S. DISTRICT COURTS

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## INTRODUCTION

In a nation with a busy and successful Uniform Law Commission, one of whose mottoes is *e pluribus unum*, it is not surprising that there have been repeated calls over past decades for nationalization of the bar. There have been many arguments for national bar admission,<sup>1</sup> as well as for a single federal bar.<sup>2</sup> Weighing in favor of these arguments is the rise of the Uniform Bar Examination<sup>3</sup> and the generalizable nature of legal training and skills, coupled with the unfortunate fact that certain aspects of bar regulation, historically, have been protectionist and exclusionary.<sup>4</sup> On the other hand, it

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1. See, e.g., Marvin Comisky & Philip C. Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L.Q. 945 (1982).

2. See, e.g., Ingrid Epperly, *Who's Afraid of a Uniform Federal Court Bar: Dispelling Fears About Standardizing Admission and Regulation of Attorneys in Federal Courts*, 22 GEO. J. LEGAL ETHICS 811 (2009); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453 (1997); John Okray, *Attorney Admission Practices in the U.S. Federal Courts*, FED. LAW., Sept. 2016, at 41, 41 (“While there has been a very slow but steady march toward modernization of the legal profession, several pockets of outmoded and protectionist rules continue to plague the practice. This article focuses on attorney admission requirements for practicing in the various federal courts, and specifically who are the leaders and laggards in this area.”); Gene A. Petersen, *Why Not a National Bar Examination?*, 55 A.B.A. J. 426 (1969).

3. See generally Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1 (2019); Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PRO. LAW., no. 2, 2014, at 43; Jonathan Lippman, *Embracing the Uniform Bar Exam in New York: Toward a More Rational Bar Admissions Process Promoting Essential Lawyer Mobility*, 23 PRO. LAW., no. 3, 2016, at 8.

4. Sup. Ct. v. Friedman, 487 U.S. 59, 70 (1988) (“We hold that Virginia’s residency requirement for admission to the State’s bar without examination violates the Privileges and Immunities Clause. The nonresident’s interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause.”); Sup. Ct. v. Piper, 470 U.S. 274, 288 (1985) (“We conclude that New Hampshire’s bar residency requirement violates the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution.”); Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975); *In re Griffiths*, 413 U.S. 717, 722 (1973); Comment, *The South’s Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L.J. 1613, 1613 (1963).

can be argued that lawyers should be familiar with—and tested on—the laws of a particular jurisdiction, especially where those laws tend to be different from those in other states or territories.

In the extensive litigation over bar admission in federal district courts, courts have upheld state bar membership requirements.<sup>5</sup> Nevertheless, the changes to legal practice flowing from the COVID-19 pandemic—the disconnection between workplace and residence, the ability to meet and to hold court proceedings by video, and the unjustifiability of charging clients time and travel for brief, perfunctory in-person meetings and conferences that could be handled effectively and expeditiously online—will make these questions ever more serious.

No commentator appears to have measured the arguments for and against broader, unified bar admission and membership with respect to the proposition that at least there should be a single, unified federal criminal bar. This Essay proposes that there are compelling reasons that a lawyer regularly admitted to the practice of law in a state or territory and to a federal district court should be able to participate in a criminal case in any U.S. district court, as counsel, cocounsel, or amicus. Similarly, practitioners with a regular federal criminal practice in one state wishing to exercise the right to relocate between states<sup>6</sup> should be able to move to another district and engage in regular practice there—even if the state bar in a lawyer’s new home will not admit them—or, if the lawyer chooses, practice exclusively in federal court.

Under the current state of the law, fifty-seven federal districts require membership in the state bar where the district is located and thirty-eight admit lawyers admitted to other states or districts.<sup>7</sup> The laws of all but eight states allow an out-of-state lawyer with between three and five years of experience to waive in without sitting for a bar examination,<sup>8</sup> and in the other forty-two states, it is possible to waive in to the state bar and thereby gain admission to the federal court.<sup>9</sup> Accordingly, the issue is most significant in the fifteen districts that require state bar membership for federal practice and are located in states that do not allow admission to the state bar on motion: California, Delaware, Florida, Hawaii, Louisiana, Nevada, Rhode Island, and South Carolina.<sup>10</sup>

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5. *See Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Simandle*, 658 F. App’x 127, 130 (3d Cir. 2016).

6. *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (“Permissible justifications for discrimination between residents and nonresidents are inapplicable to a nonresident’s exercise of the right to move into another State and become a resident of that State.”).

7. *See Yuki Hirai*, *Reciprocity for Attorney Bar Admission in the USDCs 2* (Sept. 9, 2020) (unpublished manuscript) (on file with author).

8. NAT’L CONF. OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* 42 (Judith A. Gundersen & Claire J. Guback eds., 2020), [https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020\\_021820\\_Online\\_Final.pdf](https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf) [<https://perma.cc/X7ZL-TRTU>] (detailing admission on motion, years of practice, and definition of practice).

9. *Id.*

10. *See id.*

Much of the task of challenging restrictions on multijurisdictional practice has been taken up by the National Association for the Advancement of Multijurisdiction Practice (NAAMJP) and its leader, who have raised many constitutional challenges to state and federal bar admission practices without notable success.<sup>11</sup> Given the modest demands of rational basis review, perhaps almost no local restriction would be held unconstitutional; borrowing from egregious rational basis cases, perhaps membership could even be restricted to multigenerational families of lawyers,<sup>12</sup> or those who scored too high on some test or another could be rejected.<sup>13</sup>

But the duty of the federal courts is not achieved once the threshold of “not unconstitutional” has been surmounted. Instead, Congress has charged the federal courts with “the effective and expeditious administration of justice.”<sup>14</sup> Accordingly, for example, in *Frazier v. Heebe*,<sup>15</sup> without finding a statutory or constitutional violation, the U.S. Supreme Court invoked its supervisory authority to void a local rule in the Eastern District of Louisiana excluding bar applicants “residing and having their office out-of-state, who are otherwise qualified to join the Bar of the Eastern District.”<sup>16</sup> The Court explained that its “supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state-court bars is limited to enforcing federal constitutional requirements.”<sup>17</sup> The judicial councils of the circuits have similar supervisory authority over the local rules of district courts.<sup>18</sup>

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11. As the D.C. Circuit recently explained: “The National Association for the Advancement of Multijurisdiction Practice (‘NAAMJP’) has conducted a thirty-year campaign to overturn local rules of practice limiting those who may appear before a particular state or federal court.” Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Howell, 851 F.3d 12, 16 (D.C. Cir. 2017); *see also* Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Simandle, 658 F. App’x 127, 130 (3d Cir. 2016) (noting NAAMJP has “crisscrossed the United States, challenging local bar admission rules”); *Blye v. Cal. Sup. Ct.*, No. CV 11-5046, 2014 WL 229830, at \*2 n.3 (N.D. Cal. Jan. 21, 2014) (collecting cases dating back to 1987). Other circuits have joined the chorus of judicial opinions rejecting these futile challenges. *See, e.g., Simandle*, 658 F. App’x 127; Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Lynch, 826 F.3d 191 (4th Cir. 2016); *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990). It appears that the Supreme Court has never opined on these challenges. *Cf. Frazier v. Heebe*, 482 U.S. 641, 644 n.1 (1987) (noting that petitioner “also contended that the local Rules violated the Commerce Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the First and Fourteenth Amendments of the Federal Constitution” but granting relief on another ground).

12. *See Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 562 (1947) (discussing a similar rule for pilot licenses).

13. *See Jordan v. City of New London*, No. 97CV1012, 1999 WL 780977, at \*1 (D. Conn. Sept. 2, 1999) (“Plaintiff was denied a job opportunity because he had scored higher than average on a written examination used to screen applicants and, as a result, was deemed overqualified for the position.”).

14. 28 U.S.C. § 332 (d)(1).

15. 482 U.S. 641 (1987).

16. *Id.* at 646. Here, “Petitioner d[id] not challenge the requirement of Rule 21.2 that an attorney must be a member in good standing of the Louisiana Bar.” *Id.* at 646 n.5. Accordingly, that issue was left open.

17. *Id.* at 648 n.7.

18. *See Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Howell*, 851 F.3d 12, 18 (D.C. Cir. 2017) (“[A] rule of a district court . . . remain[s] in effect unless modified or

Although there has been much discussion of the issue,<sup>19</sup> perhaps it can be accepted, at least arguendo, that being admitted to one state bar and passing a character and fitness investigation is valuable and reasonable for all attorneys in all areas of practice.<sup>20</sup> In addition, federal civil practice often involves state law issues,<sup>21</sup> so even though the question remains debatable, it is understandable that federal district courts might want civil practitioners to have passed a state bar examination.<sup>22</sup> There is an additional consideration in the civil context. Many civil cases can be initiated in either federal or state courts. However, an attorney admitted only to the federal courts in a particular state would have to sue in federal court or not at all. This, judges of a district court might reasonably conclude, might increase the federal filing of marginal cases or cases where federal jurisdiction is proper but where a disinterested lawyer would have found it beneficial to the client to file in state court.<sup>23</sup>

These problems do not arise in criminal practice. Criminal defendants do not elect the jurisdiction in which they are prosecuted, so there is no risk that a federal-only defense attorney will forum shop. Similarly, an assistant U.S. attorney generally can file charges only in federal court but likely can refer

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abrogated by the judicial council of the relevant circuit.” (second and third alterations in original) (quoting 28 U.S.C. § 2071(c)(1)).

19. See, e.g., Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383 (2019).

20. Cf. William Wesley Patton, *Admitting Law Graduates by Bar Examination Versus by a Diploma Privilege: A Comparison of Consumer Protection* (Sept. 3, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3686252> [<https://perma.cc/VRK7-7BHZ>].

21. See Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Simandle, 658 F. App’x 127, 137 (3d Cir. 2016) (stating “federal courts often sit in diversity and apply state substantive law, so familiarity with state law is a rational basis on which to admit attorneys to the federal bar of that same state”); see also *Giannini v. Real*, 911 F.2d 354, 360 (9th Cir. 1990) (justifying California federal bar admission rules by acknowledging that “questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction”).

22. The requirements governing eligibility for admission to the bar of the District of Puerto Rico are in turn prescribed by Local Rule 83A: “Any attorney who is of good personal and professional character, and who is an active member in good standing of and eligible to practice before the bar of the highest court of a state . . . is eligible for admission to the bar of this Court . . .” D.P.R. LOCAL CIV. R. 83A(a). Passing a written examination “as determined by the District Bar Examination Committee” is the standard path for gaining admission to this district. *Id.* r. 83A(a)(1); see also *Mateo v. Empire Gas Co.*, 841 F. Supp. 2d 574, 576–77 (D.P.R. 2012).

23. See *In re Roberts*, 682 F.2d 105, 108 (3d Cir. 1982) (per curiam) (“Counsel appointed to represent the district court points out also that tying district court admission to state bar membership tends to protect the interests of the public. For example, when a choice of either a federal or a state forum is available in a particular case an attorney admitted only to the federal court may choose that forum solely for that reason, possibly disregarding the interests of his client. Moreover, issues of state law are often dispositive in federal tax cases, further supporting the application of the state bar requirement to lawyers specializing in federal taxation.”). Balanced against these considerations is the fact that many districts allow admission of members of any state bar, including those of other states. Diligent research has revealed no evidence of studies or reports indicating that “open” district court bars have inferior levels of practice, more attorney discipline, or other problems.

cases to state colleagues. With both federal prosecutors and defense attorneys, then, professional access to a state forum is irrelevant.

What other reasons, consistent with their role in the federal system, might lead federal judges to want lawyers practicing before them to be members of the state bar?

### I. UNIFORM FEDERAL CRIMINAL LAW

Federal criminal practice, unlike state practice or federal civil practice, draws on a uniform, national body of substantive law that is largely independent of the criminal law of the states. As the Supreme Court explained:

Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal-court practice than they are in the area of state-court practice, where laws and procedures may differ substantially from State to State. There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries.<sup>24</sup>

The Supreme Court has long recognized “the need for uniformity and consistency of federal criminal law” in both “interpretation and application.”<sup>25</sup> For this reason, the Court has applied a strong presumption that federal criminal law does not turn on state law.<sup>26</sup> In evaluating a federal sentencing enhancement turning on a prior conviction for “burglary,” the Court rejected the claim that sentencing turned on state law definitions of crimes because of the inconsistent results that would follow:

[A] person imprudent enough to shoplift or steal from an automobile in California would be found, under the Ninth Circuit’s view, to have

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24. *Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987) (citation omitted) (first citing *Comisky & Patterson*, *supra* note 1, at 960–64; and then citing Jerry Simonelli, *State Regulation of a Federal License to Practice Law*, N.Y. ST. BAR J., May 1984, at 15, 15).

25. *Tafflin v. Levitt*, 493 U.S. 455, 464–65 (1990) (citing *Ableman v. Booth*, 21 Haw. 506, 517–18 (1859)); *see also* *United States v. Bergeman*, 592 F.2d 533, 537 (9th Cir. 1979) (“In the absence of an expression to the contrary, Congress generally intends federal criminal law to receive a uniform application.” (first citing *Jerome v. United States*, 318 U.S. 101, 104 (1943); and then citing *United States v. Patz*, 584 F.2d 927, 930 (9th Cir. 1978))). Many scholars have also recognized this point. *E.g.*, Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 525–26 (2011) (noting the desire of the U.S. Department of Justice “to have a central, uniform approach to federal criminal law”); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 421 (noting that “federal criminal law dictates uniform, national answers” to questions of what conduct is prohibited); Rory K. Little, *Good Enough for Government Work?*, 14 FED. SENT’G REP. 7, 9 (2001) (“Should federal criminal sentencing take into account, and seek to accommodate, differing geographic or community opinions regarding the appropriate punishments for federal crimes? Or is the national applicability and formal uniformity of available federal criminal punishments (like the uniform *definition* of federal crimes) a tenet so basic to the concept of ‘federal criminal law’ that it ought not be tampered with?”); Wayne A. Logan, *Creating A “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 66 (2006) (noting “the efficiency and fairness benefits associated with uniform application of federal criminal law”).

26. *See* *United States v. Turley*, 352 U.S. 407, 411 (1957).

committed a burglary constituting a “violent felony” for enhancement purposes—yet a person who did so in Michigan might not. Without a clear indication that with the 1986 amendment Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses, we do not interpret Congress’ omission of a definition of “burglary” in a way that leads to odd results of this kind.<sup>27</sup>

To be sure, in some unusual cases, state law is relevant to federal criminal liability, but even when, for example, the Assimilative Crimes Act<sup>28</sup> borrows state criminal law for federal enclaves, its meaning and interpretation remain a federal question.<sup>29</sup> In addition, because of venue rules, the potentially relevant state law might not be the law of the state where the federal court is located.

Not only is the substantive criminal law uniform in the federal system—uniformity is also a goal of the application and interpretation of the federal sentencing guidelines.<sup>30</sup> This means, as in the context of substantive criminal law, “applying the Guidelines without strict reference to state criminal law definitions.”<sup>31</sup> The Supreme Court has also noted the importance of the “uniform administration of the Federal Rules of Criminal Procedure.”<sup>32</sup> In

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27. *Taylor v. United States*, 495 U.S. 575, 591–92 (1990) (“[A]bsent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, ‘because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control.’” (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119–20 (1983))); *Turley*, 352 U.S. at 411 (“[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.”).

28. 18 U.S.C. § 13 (original version at ch. 241, 54 Stat. 234, 234 (1940)).

29. *See United States v. Collazo*, 117 F.3d 793, 795 (5th Cir. 1997) (“Prosecution under the [Assimilative Crimes Act] does not enforce state law but rather federal law assimilating state law. Thus, a state court’s interpretation of an assimilated state law is merely persuasive authority.” (citation omitted) (first citing *United States v. Brown*, 608 F.2d 551, 553 (5th Cir. 1979); and then citing *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982))).

30. *See United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1248 (9th Cir. 2003) (noting “the need for national uniformity in interpreting the sentencing guidelines”); *United States v. Lauer*, 148 F.3d 766, 769 (7th Cir. 1998) (noting “that the Sentencing Commission has the power and the duty not only to interpret specific provisions of federal statutes regulating criminal punishment, such as section 2507 of the Crime Control Act of 1990, but also to establish, in its discretion except insofar as that discretion is cut down by statutes fixing minimum and maximum penalties, standards designed to promote uniform and rational federal sentencing” (first citing 28 U.S.C. §§ 991(b), 994(a), (f); and then citing *Mistretta v. United States*, 488 U.S. 361, 367–70 (1989))).

31. *United States v. Brown*, 314 F.3d 1216, 1224 (10th Cir. 2003) (quoting *United States v. Brunson*, 907 F.2d 117, 121 (10th Cir. 1990)); *see also United States v. Diaz-Bonilla*, 65 F.3d 875, 877 (10th Cir. 1995) (“A federal criminal law is not generally construed so that its application is dependent on state law. The purpose of the Guidelines would be frustrated by an interpretation that gave effect to a state statutory definition, because its application is nationwide and the federal program’s objective of uniformity would be impaired.” (citation omitted) (citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983))).

32. *United States v. Robinson*, 361 U.S. 220, 222 (1960); *see also, e.g., United States v. Cole*, 496 F.3d 188, 195 (2d Cir. 2007) (“[O]ne purpose of the Federal Rules generally is to promote uniformity . . . .”); *United States v. Weinstein*, 452 F.2d 704, 715 (2d Cir. 1971) (“The Federal Rules of Criminal Procedure were designed to provide a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirements of justice and sound administration.”); *United States v. Gray*, 448 F.2d 164, 167 (9th Cir.

prior centuries, federal criminal trials applied state rules of evidence.<sup>33</sup> Now, however, federal evidence law has been consolidated in the Federal Rules of Evidence, which courts agree “should apply uniformly and not vary depending on the state in which the defendant resides.”<sup>34</sup>

Of course, there are local variations in federal criminal practice, including those set out in local rules. While many district courts require certification of familiarity with local rules, few require examination on them. Local rules are not so voluminous or individuated that state bar membership can be demanded to ensure familiarity with them. This is particularly so because no state bar, it seems, tests on the local rules of the local U.S. district courts located in the state.

Bar admission rules themselves make clear that knowledge of state law is unnecessary for federal criminal practice. Many local rules allow lawyers employed by the United States to appear without formal admission to the bar so long as they are admitted in some state.<sup>35</sup> Similarly, an attorney admitted to any state or federal bar is allowed to practice as a prosecutor or defense attorney before U.S. military courts-martial.<sup>36</sup> Military courts are

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1971) (“While the rules are not, and were not intended to be a rigid code having an inflexible meaning irrespective of the circumstances, they were designed to simplify existing procedure and to make uniform certain practices in all district courts.” (citation omitted) (first citing *Fallen v. United States*, 378 U.S. 139, 142 (1964); and then citing *United States v. Debrow*, 346 U.S. 374, 376 (1953))).

33. See *Vance v. Campbell*, 66 U.S. (1 Black) 427, 430 (1861) (“The thirty-fourth section of the judiciary act provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States. This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law not within the exceptions therein mentioned.”); *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851) (stating “the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed”), *overruled in part* by *Rosen v. United States*, 245 U.S. 467 (1918).

34. *United States v. Chase*, 340 F.3d 978, 988 (9th Cir. 2003) (“Using federal rules of evidence and procedure and case law promotes the uniform disposition of criminal matters in the federal system.” (quoting *United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988))); see also *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993) (discussing “Congress’ intent that the Federal Rules of Evidence have uniform nationwide application”); *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989) (stating that “the Federal Rules of Evidence are intended to have uniform nationwide application”); *Hale v. United States*, 435 F.2d 737, 749 (5th Cir. 1970) (explaining that Federal Rule of Criminal Procedure 26 “contemplates a uniform law of evidence for the district courts; as a consequence, the criminal procedure of the state in which the district court is located is inapplicable” (citing *Burney v. United States*, 339 F.2d 91 (5th Cir. 1964))).

35. Typical is Northern District of Alabama Local Rule 83.1(c):  
 Appearance on behalf of United States or by Federal Public Defender’s Office. Any attorney representing the United States or any agency thereof, having the authority of the government to appear as its counsel, may appear specially and be heard in any case in which the government or such agency is a party, without formal or general admission. Likewise, any attorney of the Federal Public Defender’s Office may appear specially in any case when appointed to represent a defendant in this District without formal or general admission.  
 N.D. ALA. LOCAL R. 83.1(c).

36. See 10 U.S.C. § 827(b) (stating that military trial counsel and defense counsel “must be a member of the bar of a Federal court or of the highest court of a State,” among other requirements); JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL, UNITED

“exclusively criminal courts,”<sup>37</sup> which have jurisdiction over charges of “violating generally applicable federal criminal statutes” as well as violations of military law contained in the Uniform Code of Military Justice.<sup>38</sup>

## II. STATE ATTORNEY REGULATION OF FEDERAL PRACTICE AND THE AMERICAN BAR ASSOCIATION’S LATEST WORD

State attorney regulatory systems cannot prohibit authorized attorneys from appearing in federal courts.<sup>39</sup> The key case is *Sperry v. Florida ex rel. Florida Bar*,<sup>40</sup> which held that state bar authorities could not charge a federally enrolled patent agent or attorney working in Florida, even if not a member of the Florida bar, with the unauthorized practice of law.<sup>41</sup> “*Sperry* therefore stands for the general proposition that where federal law authorizes an agent to practice before a federal tribunal, the federal law preempts a state’s licensing requirements to the extent that those requirements hinder or obstruct the goals of federal law.”<sup>42</sup>

*In re Desilets*,<sup>43</sup> from the Sixth Circuit, nicely lays out an application of the rule. Allan Rittenhouse was a lawyer admitted to practice in Texas but not in Michigan.<sup>44</sup> He was, however, admitted to the bar of the U.S. District Court for the Western District of Michigan and participated in bankruptcy litigation there.<sup>45</sup> An opposing party insisted that Rittenhouse was not an “attorney” entitled to participate or accept fees.<sup>46</sup> Per Judge Danny Boggs, the majority held that “[w]hen state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way.”<sup>47</sup> The court further stated that “[b]ecause Rittenhouse was properly admitted to the federal bar under the applicable rule, and because federal standards govern practice before the federal bar, we reject the bankruptcy court’s determination as adopted by the district court.”<sup>48</sup>

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STATES R. 502(d)(2)(B)(i) (2019), [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf) [<https://perma.cc/M3WR-95BH>] (stating that civilian defense counsel may practice if “a member of the bar of a federal court or of the bar of the highest court of a State”).

37. *Porter v. Richardson*, 50 C.M.R. 910, 912 (C.M.A. 1975) (Cook, J., dissenting).

38. *United States v. Forney*, 67 M.J. 271, 277 (C.A.A.F. 2009) (Effron, C.J., concurring) (citing *United States v. Wolford*, 62 M.J. 418, 423 (C.A.A.F. 2006)).

39. *See Theard v. United States*, 354 U.S. 278, 281 (1957) (“The two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.”).

40. 373 U.S. 379 (1963).

41. *Id.* at 384–85.

42. *Surrick v. Killion*, 449 F.3d 520, 530 (3d Cir. 2006); *see also People v. Shell*, 148 P.3d 162, 174 (Colo. 2006) (“It is certainly true that the Colorado federal courts can allow individuals to engage in legal practice in federal courts who would not otherwise be allowed to practice law in Colorado state courts.”).

43. 291 F.3d 925 (6th Cir. 2002).

44. *Id.* at 927.

45. *Id.*

46. *See id.* at 926.

47. *Id.* at 930.

48. *Id.* at 931.

Similarly, the Third Circuit held in *Surrick v. Killion*<sup>49</sup> that an attorney not authorized to practice law in a state could not be prohibited from operating a law office in that state representing clients before a federal court to which he was admitted.<sup>50</sup>

Judge Gilbert S. Merritt Jr. vigorously dissented in *In re Desilets*, astonished that a lawyer admitted by one state could practice in federal courts in another and concerned about who would monitor the attorney's professional conduct:

I did not know until I read Judge Boggs' opinion that for lawyers it is now a regular, everyday practice—part of the profession's "quotidian forms of practice" (to use the court's words)—for lawyers to practice daily in the federal courts of State A, say Michigan or Tennessee, while living and being licensed to practice only in State B, say New York or Florida.

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In addition, if we follow Judge Boggs' reasoning for the court, licensing in federal court becomes an exclusively federal matter without giving credence or comity to the licensing requirements of the state courts. . . . We do not need an elaborate national agency to regulate licensing, removing and disciplining federal lawyers, and the federal courts themselves are not equipped to handle this task alone without the help of the state courts and their rules of practice.<sup>51</sup>

*In re Desilets* was decided in June 2002.<sup>52</sup> In August 2002, the American Bar Association (ABA) Commission on Multijurisdictional Practice addressed these issues by proposing amendments to the Model Rules of Professional Conduct, which were approved by the ABA House of Delegates and have been adopted by many states.<sup>53</sup> The new rules were consistent with *In re Desilets* in that they contemplated allowing lawyers to open offices for regular federal practice in states where they were not licensed.<sup>54</sup> The

49. 449 F.3d 520 (3d Cir. 2006).

50. *Id.* at 533 ("We agree with the District Court that maintaining a law office is 'reasonably within the scope of the practice authorized' by 28 U.S.C. §§ 1654 & 2071 and the local rules and that the state's regulation of such conduct hinders Surrick's federal license to practice law." (quoting *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 402 n.47 (1963))).

51. *In re Desilets*, 291 F.3d at 931–32 (Merritt, J., dissenting) (quoting *id.* at 931 (majority opinion)).

52. *Id.* at 925.

53. See AM. BAR ASS'N CTR. FOR PRO. RESP., CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/financial\\_mjp\\_rpt\\_121702\\_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/financial_mjp_rpt_121702_2.pdf) [<https://perma.cc/U26J-5VAX>]; Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—an Interim Assessment*, 43 AKRON L. REV. 729, 737 (2010).

54. ABA Model Rule of Professional Conduct 5.5(d) states:

A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof . . . may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when

amendments solved the problem of regulatory authority by granting states where the practice occurs disciplinary jurisdiction.<sup>55</sup> As a result, federal courts rely on state enforcement but, under anti-commandeering principles, presumably cannot require state enforcement against lawyers in their jurisdictions who are members of the state bar and those who are not members of the state bar in precisely the same way. On the other hand, the ABA did not extend the privilege of federal practice without a state license to lawyers disbarred or suspended in any jurisdiction.

### III. THE SIXTH AMENDMENT RIGHT TO PRACTICE

In drafting, applying, and reviewing rules, federal courts should consider constitutional values and requirements. In criminal cases, bar admission has constitutional overtones. “A criminal ‘defendant’s [Sixth Amendment] right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*.’”<sup>56</sup> As the Third Circuit explained, the United States enjoys

“a highly mobile bar that has at its disposal modern transportation and communication.” Therefore, the number of occasions on which a defendant will desire to be represented by counsel *pro hac vice* is frequent and will be increasingly so. Arbitrarily to deny a defendant the right to obtain counsel from outside the state would untowardly limit the possible choices the defendant might have. 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.<sup>57</sup>

Accordingly, courts have required the relaxation of otherwise applicable court rules, such as limits on the number of *pro hac vice* appearances permitted.<sup>58</sup>

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performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

MODEL RULES OF PRO. CONDUCT r. 5.5(d) (AM. BAR. ASS’N 2020).

55. See *id.* r. 8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”).

56. *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (alteration in original) (quoting *United States v. Walters*, 309 F.3d 589, 591 (9th Cir. 2002)); see also Note, *The Criminal Defendant’s Right to Retain Counsel Pro Hac Vice*, 57 FORDHAM L. REV. 785, 801 (1989).

57. *Fuller v. Diesslin*, 868 F.2d 604, 607 (3d Cir. 1989) (quoting the district court opinion).

58. See *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987) (first citing *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285–86 (5th Cir. 1964); and then citing *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1968)); *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1968) (finding it “difficult to see how the concern of the District Court in decorum, dignity,

However, in *Leis v. Flynt*,<sup>59</sup> the Supreme Court held that an attorney had no individual constitutional right to pro hac vice admission in a state court; the opinion expressly noted that it was not deciding whether the prospective client's Sixth Amendment interests would require admission.<sup>60</sup> In *United States v. Gonzalez-Lopez*,<sup>61</sup> a California attorney sought pro hac vice admission to a U.S. district court in Missouri to defend a drug prosecution.<sup>62</sup> The Supreme Court held that erroneous refusal was a structural error to which harmless error analysis did not apply.<sup>63</sup>

*Gonzalez-Lopez* seemed to endorse the holding that pro hac vice admission in criminal cases is of constitutional dimension. While the Court noted that the right to counsel of choice was not unlimited, including that a defendant may not "insist on representation by a person who is not a member of the bar," the Court found that neither that nor other "limitations on the right to choose one's counsel is relevant here."<sup>64</sup> That is, the "not a member of the bar" exception was inapplicable because the lawyer at issue was admitted to the California bar, even though he was not a member of the bar of the particular federal court where the case was pending.

#### IV. WHAT ELSE?

Several other possible reasons for requiring state bar membership are suggested by *Russell v. Hug*,<sup>65</sup> a Ninth Circuit case upholding a membership requirement for participation on the Criminal Justice Act Panel.<sup>66</sup> The plaintiff was a member of the bar of the district court and had "sixteen years experience prosecuting federal criminal cases as an Assistant United States Attorney, including six years in the Northern District of California," but was not a member of the California bar.<sup>67</sup>

The court held that even if the "California bar membership requirement is an attempt to limit competition," that would be irrelevant under an equal protection analysis.<sup>68</sup> But presumably under the Supreme Court's or a judicial council's supervisory authority, a naked desire to increase the

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competency, good character or amenability to service and discipline is served by a numerical limitation").

59. 439 U.S. 438 (1979).

60. *Id.* at 442 n.4 ("The dissenting opinion also suggests that a client's interest in having out-of-state counsel is implicated by this decision. The court below, however, 'did not reach the issue of whether the constitutional rights of Flynt and Hustler Magazine had also been violated,' recognizing as it did that a federal-court injunction enjoining a state criminal prosecution on a ground that could be asserted by the defendant in the state proceeding would conflict with this Court's holding in *Younger v. Harris*, 401 U.S. 37 (1971)." (citations omitted) (first citing *id.* at 445 n.2 (Stevens, J., dissenting); and then quoting *Flynt v. Leis*, 574 F.2d 874, 877 (6th Cir. 1978))).

61. 548 U.S. 140 (2006).

62. *Id.* at 142.

63. *Id.* at 151–52.

64. *Id.* at 152.

65. 275 F.3d 812 (9th Cir. 2002).

66. *Id.* at 815.

67. *Id.* at 816.

68. *Id.* at 820.

incomes of lawyers who are members of the state bar would not be a legitimate federal interest.

The court noted that bar membership aided disciplinary enforcement.<sup>69</sup> However, now that it is clear that state disciplinary authorities can act against nonmembers and members for their actions in federal court and that states have taken on those responsibilities,<sup>70</sup> this rationale is no longer persuasive.<sup>71</sup>

Another rationale was that California had particularly high bar standards, which the district court could reasonably adopt:

Because there are more than fifty bar examinations in the United States, the minimum standard of competence required to be a “lawyer” arguably varies considerably among the states. Requiring membership in the California Bar allows the Northern District of California to be sure that all attorneys assigned to its Indigent Defense Panel are at least capable enough to clear the standard required in California—a standard with which the Northern

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69. *Id.*

70. California Rule of Professional Conduct 8.5(a) states:

Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.

CAL. PRO. CONDUCT R. 8.5(a); *see also In re Gadda*, 4 Cal. State Bar Ct. Rptr. 416, 2002 WL 31012596, at \*2 (Bar Ct. Aug. 26, 2002) (“In this regard, the California Supreme Court clearly held more than 60 years ago that, “[i]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court.” (alteration in original) (quoting *Geibel v. State Bar*, 79 P.2d 1073, 1074 (Cal. 1938) (en banc))). Another Ninth Circuit case relied on state disciplinary assistance as a ground for requiring State Bar of Arizona membership in the district court. *Gallo v. U.S. Dist. Ct.*, 349 F.3d 1169, 1182 (9th Cir. 2003). Since then, Arizona, like California, assumed disciplinary jurisdiction over lawyers practicing in federal court. ARIZ. PRO. CONDUCT R. 5.5(h) (“Any attorney who engages in the multijurisdictional practice of law in Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.”).

71. *See* MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS’N 2020); *State ex rel. York v. W. Va. Off. of Disciplinary Couns.*, 744 S.E.2d 293, 303 (W. Va. 2013) (“Principles of federal preemption *do not* prohibit state action, however, where such state action does not interfere with the requirements of federal law. In *Kroll v. Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001), for instance, the United States Court of Appeals held that an attorney practicing patent law in New York and also a member of the state bar was subject to state disciplinary authority, with no violation of federal preemption principles.”); *see also, e.g., State v. Lang*, 323 P.3d 740, 744 (Ariz. Ct. App. 2014); *Ky. Bar Ass’n v. Brooks*, 325 S.W.3d 283, 285 (Ky. 2010). *But cf. Disciplinary Couns. v. Harris*, 996 N.E.2d 921, 925–26 (Ohio 2013) (“Here, the United States Bankruptcy Court for the Northern District of Ohio exercised its authority and declined to sanction Harris or order the disgorgement of attorney fees for his representation of Skeel in bankruptcy proceedings. Because the alleged misconduct involving Skeel occurred before the United States Bankruptcy Court for the Northern District of Ohio and because that court has the power to discipline Harris for his practice before it, we dismiss this charge in deference to the disciplinary authority of the United States Bankruptcy Court for the Northern District of Ohio.”).

District is familiar, and a standard that is quite possibly higher than that of many other states.<sup>72</sup>

This rationale gets to the heart of the matter. Can federal judges hold that practice in their districts is different and special, requiring a higher class of attorneys than those tolerated in slower, dumber federal districts? The idea seems inconsistent with a federal system of uniform laws and rules. And if federal courts in California can require California membership, what is it that justifies the other states in the Ninth Circuit requiring state bar membership, when obviously they should at least allow the superior lawyers licensed in elite California to practice?

Criminal law tends to be poor people's law, at least the application of rules of this sort.<sup>73</sup> The United States generally will not, for lack of funds, fail to muster whatever legal resources it deems necessary for a particular criminal matter. Appropriately, federal attorneys get special consideration in the admission process<sup>74</sup> and are often specially accommodated in the local rules. Wealthy defendants will have no difficulty fielding teams of *pro hac vice* and local counsel. The burden of this practice will fall on defendants, and defendants only, and only those who are of modest means.

For this reason, *pro hac vice* admission is an unsatisfactory substitute, as the Supreme Court held in *Frazier*:

Respondents contend that nonresident lawyers are not totally foreclosed from Eastern District practice because they can appear *pro hac vice*. In *Piper*, however, we recognized that this alternative does not allow the nonresident attorney to practice “on the same terms as a resident member of the bar.” An attorney not licensed by a district court must repeatedly file motions for each appearance on a *pro hac vice* basis. In addition, in order to appear *pro hac vice* under local Rule 21.5, a lawyer must also associate with a member of the Eastern District Bar, who is required to sign all court documents. This association, of course, imposes a financial and administrative burden on nonresident counsel. Furthermore, it is ironic that “local” counsel may be located much farther away from the New Orleans courthouse than the out-of-state counsel. Thus, the availability of

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72. *Russell*, 275 F.3d at 819.

73. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1032 (2006); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1565 (2020). Although federal judicial officers are generally of exceptional ability and character, possibly some have the frailties afflicting other humans. See Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 CALIF. L. REV. 965, 966 (2020); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2584 (2013); Susan L. Wynne & Michael S. Vaughn, *Eligibility for Court-Appointed Counsel in Federal Cases: A Review of Legislation and Case Law*, 80 ALB. L. REV. 899, 899 (2017).

74. *United States v. U.S. Dist. Ct.*, 791 F.3d 945, 958 (9th Cir. 2015) (“Because Judge Jones did not articulate a valid reason for his *pro hac vice* admission policy, comments like these created a real risk that the policy would, rightly or wrongly, be viewed as an encroachment on the domain of the political branches.”).

appearance *pro hac vice* is not a reasonable alternative for an out-of-state attorney who seeks general admission to the Eastern District's Bar.<sup>75</sup>

#### CONCLUSION

In 2009, the Ninth Circuit held that a lawyer admitted only in Oregon could collect a fee based on work done in the central district of California, in association with attorneys admitted there, despite that lawyer's lack of admission.<sup>76</sup> The court noted that even in decades before, when "there were no personal computers, no Internet, no Blackberries, no teleconferencing, no emails, and the only person who had a two-way wrist radio was cartoon character Dick Tracy," a leading judge "observed that we live in an 'age of increased specialization and high mobility of the bar.'" <sup>77</sup> The court concluded that "[c]urrent law does not compel us to be judicial Luddites, and we may properly accommodate many of the realities of modern law practice, while still securing to federal courts the ability to control and discipline those who practice before them."<sup>78</sup>

Because federal criminal practice involves application of a single body of substantive criminal law, evidence, procedure, and sentencing law, an attorney admitted to one U.S. district court should be permitted to defend criminal cases in any district in the United States. Federal courts are perfectly capable of identifying and remedying inadequate professional practice or disciplinary violations that occur before them and can use their own disciplinary machinery or borrow that of the states, as they prefer. Increasing the ranks of the lawyers available to defend criminal cases and pursue postconviction relief would mitigate the crisis of indigent representation.

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75. *Frazier v. Hebee*, 482 U.S. 641, 650–51 (1987) (citations omitted) (first quoting *Sup. Ct. v. Piper*, 470 U.S. 274, 277 n.2 (1985); and then citing *In re Frazier*, 594 F. Supp. 1173, 1177 (E.D. La. 1984)); see also Robert L. Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change*, 67 CORNELL L. REV. 345, 345 (1982) ("The supporters of local association apparently justify these rules on two bases: protection of the client and protection of the power and dignity of the court. In practice, however, local rules do not protect the interest of clients; rather, they affirmatively encroach upon the client's right to choose his counsel.").

76. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 817 (9th Cir. 2009).

77. *Id.* at 819 (quoting *Spanos v. Skouras*, 364 F.2d 161, 170 (2d Cir. 1966)).

78. *Id.* at 820.