ABA Reciprocity Reform:

A Nationwide Need for the Primacy of the First Amendment Rights to Advocate, Associate, and Petition In The New Millennium

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America was created on the principle all men are created equal, and they are endowed by their creator with the unalienable rights to life, liberty, and the pursuit of happiness. Our Founding Fathers met in Philadelphia to associate together to further these self-evident truths, and to jointly petition for the redress of their grievances. From the beginning King George III and his minions passed laws forbidding the colonists from associating together. Their right to petition was ridiculed. King George III declared it was treason for the thirteen colonies to associate and petition together.

As a result of our Founding Fathers' first-hand experience with tyranny, the sacred rights to speech (also known as advocacy), association, and petition for redress of grievances were enshrined in the First Amendment. This Amendment declares Congress shall not abridge these rights. Later, these First Amendment safeguards were applied to States and local governments. The rights to equal liberty, which at the founding encompassed only "white men," have in mature reflection been extended to include women and all Americans.

In this historical foundation, and the present new millennium technology that can be summed up by the adage, "have laptop and cell-phone will travel," it is submitted the American Bar Association task force on MJP should endorse the following policies:

1. a sister-state attorney, who on a temporary basis renders legal services in a State he or she is not licensed, is entitled to collect their fee and they are not guilty of any crime;
2. a sister-state attorney with three or four years experience who moves to another State on a permanent basis should be presumed competent and entitled to be admitted to that State's bar on motion. The wheel should not have to be re-invented.

The first obvious advantage of these suggested policies would be to bring the legal profession in harmony with the 21st century. The licensing boards supervising other learned professions regularly provide for reciprocal licensing. For example, in the State of California reciprocal licensing for learned professionals, based on another State's license, is provided by statute for CPA's, engineers, psychologists, geologists, geophysicists, licensed nurses, veterinarians, dentists, chiropractors, board certified doctors, and doctors with four years experience. Foreign country attorneys are certified on application to practice foreign law in California. It is only experienced sister-state attorneys in California who are denied reciprocal bar admission. And

that disparate policy is in the process of being re-examined. The California legislature last year passed SB 1782 endorsing reciprocity, and requesting the California Supreme Court to appoint a task force to make recommendations regarding reciprocity.

Those States that have policies denigrating the ability and fitness of sister-state attorneys damage the profession of law in today's cable access society. If American doctors, dentists, and CPA's view themselves as created equal, and do not debase their colleagues, neither should lawyers. Mutual respect has the reciprocal advantage of facilitating mutual respect.

The compelling need for comity and reciprocal licensing can be further demonstrated by analogy. Assume a lawyer with skills comparable to golfer Tiger Woods. Assume his name is Tiger Cochran or Tiger Spence. Is there any reason why lawyers recognized as esteemed professionals in one State should not be authorized to practice their craft in another State -- on a part-time or full time basis -- other than local politics and its cousin competition protection? Does any professional sports franchise, academic institution, or industry limit its search for proven talent to any one State? It is only the legal profession that has not advanced into the 21st Century.

The MJP task force should endorse these suggested reciprocity proposals because it is the right thing to do, and also because it may be against the law not to do so. Americans have First Amendment rights to speech (advocacy), to associate with whom they choose, and to choose whom they want to petition for redress of grievances with. Lawyers are Americans. Therefore, American lawyers have First Amendment rights. It takes two people to associate. It was commonly accepted by all even before the First Amendment was adopted that an attorney is necessary to petition.

The Supreme Court has expressly recognized that these First Amendment rights belong to lawyers and their clients. In *Mine Workers v. Illinois Bar Assn*., 389 U.S. 217 (1967), the Illinois State Bar Association filed a Complaint, the essence of which was that a union, by employing a licensed attorney on behalf of its members, constituted the unauthorized practice of law. The Illinois Supreme Court held this bar restriction did not violate the *Mine Workers*' First Amendment constitutional rights of speech, assembly, and to petition for redress of grievances. The Supreme Court reversed. It held, "The freedom of expression guaranteed against state interference by the Fourteenth Amendment includes the liberty of individuals to not only speak but also to unite to make their speech effective. The latter right encompasses the right to join together to obtain judicial redress." *Id*. at 226.

Mine Workers, admittedly was decided by the Warren Court, not the Rehnquist Court. However, in light of the principles expounded in *Mine Workers* it appears to be a glaring violation of law for federal district courts by local rule to deny reciprocal *general* admission to sister-state attorneys. There is no compelling need for federal district courts to enlarge and modify the First Amendment rights of local practitioners, and shrink the First Amendment rights of out-of-state attorneys and their clients. Federal substantive law and procedure is uniform. Federal Judicial Conference studies have concluded that competence as an attorney is directly correlated with experience. The Supreme Court has squarely held difficulty in supervising a nationwide bar does not justify discrimination in bar admission.[1] These discriminatory federal

district court admission rules are obviously not narrowly tailored as approximately one-third of the federal district courts provide reciprocity to all sister-state attorneys. The federal courts of appeal and federal administrative agencies also provide full reciprocity. The fact that novice attorneys from the forum State are automatically granted *general* admission, and experienced attorneys from outside the forum State are automatically denied *general* admission, is proof positive that these local federal rules have nothing to do with fitness or competence. Out-of-state attorneys clearly do not present a clear and present danger that would justify these prior restraints on First Amendment birthrights. Likewise, many of the State licensing rules that protect local attorneys and exclude experienced sister-state attorneys could not pass the heightened scrutiny test applied in *Mine Workers*.

The MJP should also endorse State reciprocity in light of American Bar Association House of Delegates Recommendation 8A. There, in 1995, the ABA endorsed federal district court reciprocity. The House of Delegates conclusion was "Given the global nature of law practice today, parochial local rules are inefficient, unduly costly to clients and/or lawyers and anti-competitive." If the ABA has found good cause to endorse federal district court reciprocity, it logically follows that it should also endorse State reciprocity. The First Amendment textually stated rights, and our creed "all men are created equal" provide additional support.

The argument against reciprocity is couched to the effect that sister-state attorneys have not passed the local bar exam, and are therefore presumed not competent or morally fit to practice local law. This argument does not bear up under even under modest scrutiny. Cicero, Ancient Rome's most famous lawyer, over two thousand years ago in speaking about lawyers aptly declared: "Just as in the other arts, when the hardest portions of each have been taught, the rest, through being either easier or just like the former, call for no teaching; as in painting, for instance, he who has thoroughly learned how to paint the semblance of a man, can without further lessons paint one of any figure or time of life, nor is there any danger that he, who would paint to admiration a lion or bull, will be unable to do the like with many other four-footed animals (there being no art whatever wherein all its possibilities require professorial teaching, since those who have rightly learned the general principles of fundamental and established things attain the rest without difficulty and unaided).[2]

An attorney who knows how to research law in one State learns how to research law in any state. What lawyer who has practiced law for any number of years is not more fit to serve as counsel than the first day he was admitted to practice? The Supreme Court has repeatedly held that it will not presume that out-of-state attorneys will conduct their practice in a dishonest manner or disserve their clients.[3] In a nutshell, the claim that sister-state attorneys are inherently incompetent or unethical is nothing more than a pretext to provide monopoly protection for local attorneys.

Additionally, American citizens should be presumed qualified to select and exercise their own First Amendment rights. Clients are protected against attorneys by the right to sue, and the right to institute disciplinary complaints. State attorney disciplinary punishments meted out are generally reciprocal, and parallel the enforcement of full faith and credit judgments in other states.

Another reason refuting the local bar exam pre-condition is that ninety-eight percent of experienced attorneys are competent and honorable men and women. Men and women, who usually have earned *juris doctorate* degrees. Men and women, who have often dedicated their lives to the legal profession, and have become instruments or agencies to advance the ends of justice. Men and women, who have a constitutional obligation to vindicate federal rights including their own First Amendment rights.[4] The possible abuse by a few bad apples does not make the grove rotten.

It is time for the legal profession to respect itself. In *Loving v. Virginia*, 388 U.S. 1 (1967), a white man who married a black woman challenged his conviction under the State of Virginia's miscegenation statute. The Court invalidated this statute and held, "Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State." *Id*. at 12. There is no right to marry textually embedded in the Constitution. There are, however, plainly stated textual rights embedded in the First Amendment to advocate, associate, and petition for redress of grievances. This trinity of constitutional rights is as important as the right to choose whom one marries, if not more so in light of their being embedded at the apex of our constitutional hierarchy, and our Founding Father's experience with laws declaring it treason for citizens to associate and petition together.

Former Supreme Court Justice Robert Jackson has declared, "Any legal doctrine which fails to enlist the support of well regarded lawyers will have no real sway in this country."[5] It is time for the well regarded American Bar Association, whether it be construed as a matter of human decency, technological necessity, fundamental liberty, or based on the First Amendment guarantees — to declare that: (1) a sister-state attorney, who on a temporary basis renders legal services in a State they are not licensed, is entitled to collect their fee and they are not guilty of any crime; and (2) a sister-state attorney with three or four years experience who moves to another State on a permanent basis should be presumed competent and entitled to be admitted to that State's bar on motion.

Endnotes

1. *Barnard v. Thorstenn,* 482 U.S. 546 (1989)

2. Cicero, *De Oratore* (Harvard University Press Loeb Classical Library 1996) Book II p. 249

3. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985)

4. *Ibid.*

5. Eugene C. Gerhart, *America's Advocate: Robert Jackson* (1958 Publisher Bobbs Merrill) p. 46