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Residency Requirements for Attorneys: Home Is Where the License Is?

by Neal Devins

Supreme Court of New Hampshire

v.

Piper

(Docket No. 83-1466)

To be argued October 31, 1984

ISSUES

In our federal system, states' rights frequently conflict with our interstate marketplace and the rights of American citizens to be afforded the same "privileges and immunities" in each state of the union. *Supreme Court of New Hampshire v. Piper* depicts one of these conflicts—the ability of states to regulate the practice of law. More specifically, the *Piper* case is concerned with the Supreme Court of New Hampshire's rule prohibiting nonresidents from becoming members of the state bar.

Residence requirements are troublesome because free market principles temper the Constitution—principles which condemn anticompetitive practices. At the same time, our nation is a conglomerate of fifty individual states, each of which has unique laws, unique court systems and unique standards for lawyer competency. Consequently, our federal system demands that states have leeway to structure their legal system.

Where national values end and states' rights begin is the subject matter of *Piper*. Should deference be given to plausible state justifications for the residency requirement, or must the state affirmatively demonstrate its need for the residency requirements? Since lawyers are "officers of the [state] court," should the state have more leeway in regulating the legal profession? And what, if any, weight should be accorded to the Supreme Court's recent trend of approving government rulemaking?

The Court should provide answers to these questions in this case. *Piper* concerns the Privileges and Immunities clause, which protects out-of-state workers' rights to seek employment in the open marketplace. It questions both the applicability of this protection to the New Hampshire residency requirement and the standard used in implementing this protection.

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FACTS

Kathryn Piper, a Vermont resident, sought to become a member of the New Hampshire bar. After signing a statement of intent to establish residency in New Hampshire, Piper took and passed the February, 1980, New Hampshire bar. She subsequently requested dispensation from the residency requirement because of alleged personal circumstances. The New Hampshire Supreme Court denied her request.

In March of 1982, Piper brought suit in federal district court, alleging that the residency requirement violated, among other things, the Privileges and Immunities Clause. The district court upheld her claim (539 F. Supp. 1064 (D.N.H. 1982)). A divided panel of the First Circuit United States Court of Appeals reversed this ruling (708 F.2d 825 (1st Cir. 1983)). However, this initial appellate court ruling was reversed upon en banc reconsideration (*i.e.*, a proceeding in which all the First Circuit appellate judges participated) (723 F.2d 98 (1983)).

The thrust of Piper's claim concerns the constitutional requirement that: "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." According to the Supreme Court, this provision "prevents a state from discriminating against citizens of other states in favor of its own." (*Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (1939)). Piper, citing several Supreme Court cases, claims that: "To justify discrimination under the Privileges and Immunities Clause, the state must establish the existence of a 'substantial reason' and as part of this justification show that nonresidents 'constitute a peculiar source of evil at which the discrimination is aimed' ... [as well as] show that 'the degree of discrimination bears a close relation' to the reasons presented, as justification." For Piper, the state has failed to meet this burden of justification.

The state, however, challenges Piper's position on two grounds. First, it claims that its residency requirement does not implicate the Privileges and Immunities Clause. It supports this argument with the allegation that "state court control over bar membership involves an activity which is directly connected and bound up with the state's exercise of its judicial power, rather than an interest fundamental to the promotion of interstate harmony." For the state, its requirement is not an economic regulation. Thus, according to New Hampshire, state concerns outweigh the need to apply the Privileges

and Immunities Clause. In support of this claim, the state points to the Supreme Court's admonition that "the national government will fare best if the states and their institutions are free to perform their separate functions in their separate ways." (*Younger v. Harris*, 401 U.S. 37 (1971)).

The state's second argument, that it has adequate justification for prohibiting nonresident applications to the state bar, centers around the standards that should govern Privileges and Immunities Clause analysis. The state claims that deference should be accorded to the New Hampshire Supreme Court ruling that New Hampshire's substantial interest in promoting "the continued validity of a competent, stable and well informed state bar" supports the residency requirement. The state further notes that the residency requirement is substantially related to the New Hampshire Supreme Court's views of the obligations of New Hampshire lawyers. The state then delineates the "peculiar evils" posed by nonresident applicants: "[N]onresident attorneys, once admitted, are less likely to remain familiar with legal rules and procedures and less likely to keep attuned to local conditions which may affect the needs of their local clients. Similarly, nonresident attorneys are less likely to be subject to local peer pressure which imposes informal, but powerful curbs on unethical or incompetent conduct through the regular practice of law in a relatively small and closely knit legal community. Also, nonresident attorneys are less likely to be available for court appearances, disciplinary proceedings and participation in the voluntary activities of a unified bar." Because of these alleged dangers, the state argues that its residency requirement places a justifiable burden on out-of-state applicants.

Piper disputes both claims proffered by the New Hampshire Supreme Court. First, she argues that the New Hampshire residency rule is indeed subject to scrutiny under the Privileges and Immunities Clause. Citing the Supreme Court's 1984 ruling in *United Building v. Camden* (104 S.Ct. at 1028), that the clause is triggered by "discrimination against out-of-state residents on matters of fundamental concern," Piper argues that the Privileges and Immunities Clause is not restricted to economic regulation. She further argues that there should be no "political function" exemption because lawyers are "officers of the court." To support this contention, Piper points to a Supreme Court Equal Protection Clause ruling which held that a law license does not "place one so close to the core of the political process as to make him a formulator of government policy." (*In re Griffiths*, 413 U.S. 717, 729 (1973)).

After arguing that the Privileges and Immunities Clause should apply to her case, Piper contends that the state cannot justify its residency requirement under the clause. Upon reviewing the state's proffered justifications for the residency rule, she concludes that the state

has "failed to provide any legitimate substantial reason for its residency rule which is closely related to the actual terms of that rule." Specifically, Piper alleges: 1) residency is not necessarily related to where an attorney intends to practice, for she intended to join a New Hampshire law office; 2) since residents, upon leaving the state, do not lose their bar membership, the residency requirement is not rationally related to the Supreme Court's stated objectives; 3) there is no reason to think that the bar exam could not adequately test nonresidents' familiarity with local rules and procedures, and 4) there is no reason to think that out-of-state attorneys are either unconcerned with their reputations or unavailable for court appearances or other required activities. In addition to suggesting that the state has failed to adequately support its residency requirement, Piper notes that less restrictive alternatives are available to the state to ensure adequate commitment to the New Hampshire Bar. For example, she suggests that nonresident attorneys could be compelled to maintain a New Hampshire office.

BACKGROUND AND SIGNIFICANCE

The holding in *Piper* will be significant for several reasons. Most obviously, the case will have great practical impact on nonresident attorneys interested in being licensed in states with residency requirements. Several states now require (or are considering requiring) that bar applicants must either be a resident of the state or intend to open a law office in the state. For this reason, *amicus* briefs supporting the New Hampshire Supreme Court were filed by several states, including Tennessee, Iowa, Virginia, Missouri, and Ohio. For identical reasons, an *amicus* brief in support of Kathryn Piper was filed by the Vermont Bar Association.

Piper also is noteworthy to consumers of legal services. New Hampshire's residency requirement is, in part, a consumer regulation. In its brief, the state suggests that nonresident attorneys will provide inadequate legal services. Yet Ralph Nader's Public Citizens, Inc. and the American Corporate Counsel Association filed *amicus* briefs arguing that the state residency requirement improperly interferes with consumer choice. Public Citizens claims that the end of "assuring that clients will be well served by honest and capable attorneys" is best accomplished "by allowing qualified nonresidents to become members of the New Hampshire Bar and thereby increase the pool of attorneys available to represent clients." The consumerism argument advanced by the American Corporate Counsel speaks to the needs of corporations to have in-house attorneys represent them in court, on the reasoning these attorneys are intimately familiar with both the internal workings of the corporations they represent and the industries served by those corporations.

In addition to these practical aspects, *Piper* will give

the Court an opportunity to speak generally about such concerns as the nature of legal practice and the balancing of states' rights with constitutional protections against anticompetitive state practices. Of particular interest is the question of whether bar examiners increased reliance on multistate examinations combined with the growth of "national" law firms has weakened the state's interest in regulating the legal profession.

The case also raises a significant issue that could impact on future Privileges and Immunities Clause jurisprudence. When government largesse is at issue, should the state be accorded more deference in regulations impacting on nonresidents than when free-standing regulations are at issue? Last term, the Supreme Court approved a residency requirement imposed by Camden, New Jersey, on public works contracts. If the Court now upholds Piper's claim, the largesse-regulation distinction could prove dispositive.

ARGUMENTS

For Kathryn Piper (Counsel of Record, Jon Meyer, 116 Lowell Street, P. O. Box 516, Manchester, NH 03105; telephone (603) 668-7272)

1. The New Hampshire residency rule is subject to Privileges and Immunities Clause scrutiny.
2. The New Hampshire residency rule violates the Privileges and Immunities Clause as the state has failed to

provide any legitimate, substantial reason for the residency rule which is closely related to the actual terms of the rule.

3. The New Hampshire residency requirement violates the Commerce and Equal Protection Clauses. (These issues were not of such significance as to merit discussion.)

For the Supreme Court of New Hampshire (Counsel of Record, Martin L. Gross, 9 Capitol Street, P. O. Box 1256, Concord, NH 03301; telephone (603) 224-2341)

1. New Hampshire's residency requirement is bound up with the state's exercise of its judicial power and thus does not trigger Privileges and Immunities Clause scrutiny.
2. If the Privileges and Immunities Clause is invoked, substantial deference should be accorded the policy determination made by the state of New Hampshire.
3. New Hampshire satisfies the Privileges and Immunities Clause test since the residency requirement is substantially related to the state supreme court's view of the obligations of New Hampshire lawyers.

AMICUS ARGUMENTS

Parties and positions of the amici have been summarized in the "Background and Significance" section.