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CONSTITUTIONAL LAW

By Neal Devins

N.H. Bar's Residency Requirement Faces a Constitutional Challenge

On Oct. 31, the U.S. Supreme Court heard oral arguments in a case that will determine whether states can prohibit non-residents from becoming members of the state bar. The case, Supreme Court of New Hampshire v. Piper, involves a challenge under the Constitution's privileges and immunities clause to New Hampshire's residency requirement.

The privilege of non-residents to practice law in New Hampshire is aimed, "or to keep attorneys to practice in state courts. Since a residency requirement is the most extreme form of state regulation against out-of-state residents, the state must justify such a requirement with practical reasons — not lofty rhetoric about federalism.

New Hampshire has articulated several "peculiar evils" posed by non-resident attorneys. "Non-resident 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, non-resident 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, non-resident 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, New Hampshire claims that its residency requirement placed a justifiable burden on out-of-state applicants.

The state, however, has failed to introduce any evidence to support any of its proffered justifications. Additionally, there are strong intuitive arguments that rebut each of New Hampshire's justifications.

First, there is no reason to think that the New Hampshire bar exam could not adequately test non-resident's familiarity with local rules and procedures. Also, any possible state concerns of non-resident attorneys forgetting state law could be addressed by requiring non-resident attorneys to take periodic competency exams. Second, competition in the economic marketplace and commonly shared standards of professionalism contradict New Hampshire's presumption that out-of-state attorneys are either unconcerned with their reputations or unavailable for court appearances or other required activities. In addition to this common-sense conclusion, New Hampshire still would have authority either to disbar or to discipline attorneys who breach their responsibilities.

New Hampshire's stated justifica-

Interests of the national marketplace and adequate legal representation could support invalidation of the residency requirement.

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Continued on following page
Can N.H. Keep Non-Residents From Joining Bar?

Continued from preceding page

...tions seem especially spurious in light of the details of the Piper case. An attorney, who lived only 400 yards from the New Hampshire state line, intended to join a New Hampshire law firm. Additionally, lawyers in bordering states are, in many instances, equally accessible to New Hampshire residents as they are to home-state residents.

Finally, New Hampshire, by not imposing a continuing residency requirement upon practicing attorneys, appears less than fully committed to the objectives sought to be furthered by the residency requirement.

It thus appears that New Hampshire's residency requirement is subject to former American Bar Association President Chesterfield Smith's criticism that "many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."

A side from being an unfair restriction on an attorney's right to practice his trade, New Hampshire's residency requirement is unfair to legal consumers who rely on in-house counsel, multistate law firms or "specialist" law firms.

As Justice John Paul Stevens noted in 1979 in Out v. Flynn: "The 'change in the character of law practice from a generalist skill to an increasingly specialized one' means that modern legal practice "transcends" jurisdictional boundaries and the legal competence of local generalists." Additionally, New Hampshire residents can reap the benefits of economic competition between New Hampshire lawyers and lawyers from bordering states.

This "consumerism" aspect of the Piper case has brought together two unlikely bedfellows, Ralph Nader's Public Citizen and the American Corporate Counsel Association — both of which filed amicus briefs arguing that the state residency requirement improperly interfered with consumer choice.

Public Citizen claims that the end of "assuring that clients will be well served by honest and capable attorneys" is best accomplished "by allowing qualified non-residents 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; for these attorneys are intimately familiar with both the internal workings of the corporations they represent and the industries served by those corporations. Such "consumerism" concerns undercuts much of state's argument that its residency requirement ensures competent legal representation.

The interests of the national marketplace as well as adequate legal representation support the invalidation of New Hampshire's residency requirement. Constitutional protections against anti-competitive state practices combined with the growth of "national" law firms has weakened the state's interest in regulating the legal profession.

At the same time, the state has great authority to regulate its bar. It may demand continued legal education, pro bono work and competency examinations. Additionally, the state may discipline or disbar attorneys who do not comply with reasonable rules designed to preserve the integrity of the state bar. In other words, the invalidation of the residency requirement need not be equated with a defeat for states' rights.