

Attorney Admission Practices in the U.S. Federal Courts

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Does your state follow the common law rule against perpetuities, does it use the common law rule with the “wait-and-see” modification, has it adopted the Uniform Statutory Rule Against Perpetuities, or does it follow a different standard? Is the punishment for burglary in your state enhanced if the premises was inhabited or if the entry was at night? Even if you are a licensed attorney, there is a good chance you do not know these answers off the top of your head. The good news is that you are trained to conduct legal research and can find out relatively quickly. Nevertheless, some state bars and federal courts still require experienced attorneys to run the bar exam gauntlet multiple times to show they can grasp these concepts more than once.

Various Courts, Various Requirements

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. It is worth briefly reviewing the present attorney admission requirements in the various federal courts.

Supreme Court of the United States. An attorney may be admitted to the Supreme Court if they are a member in good standing, for at least three years preceding the application, of any U.S. state, commonwealth, territory, possession, or the District of Columbia.

Regional Circuit Courts of Appeals (First through Eleventh and the District of Columbia). The regional circuit courts of appeals generally follow Rule 46 of the Federal Rules of Appellate Procedure regarding the admission of attorneys, which states: “An

attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands....” An applicant is also required to take an oath or give an affirmation and pay a fee.

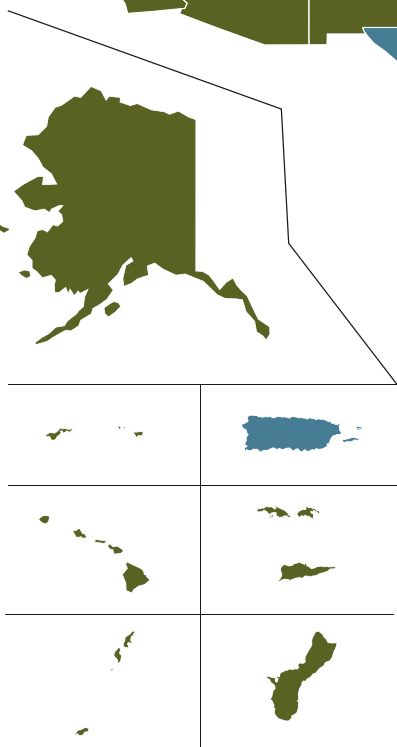
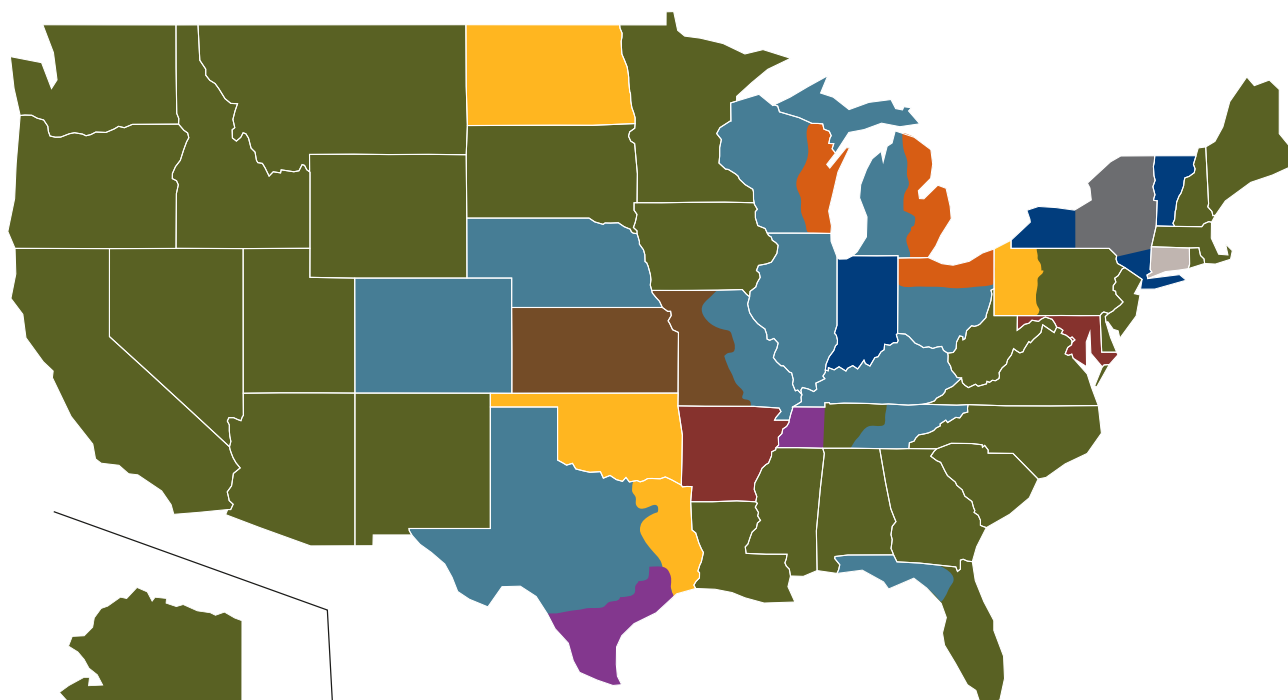
Court of Appeals for the Federal Circuit (Court of International Trade, Court of Federal Claims, and Court of Appeals for Veteran Claims). The U.S. Court of Appeals for the Federal Circuit hears appeals from the Court of International Trade, Court of Federal Claims, and Court of Appeals for Veterans Claims.¹ All of these courts allow for admission of attorneys licensed in any state. The U.S. Court of Appeals for Veterans Claims even allows for certain non-attorneys to appear before it.

Court of Appeals for the Armed Forces (Air Force Court of Criminal Appeals, Army Court of Criminal Appeals, Navy-Marine Corps Court of Criminal Appeals, and Coast Guard Court of Criminal Appeals). The U.S. Court of Appeals for the Armed Forces hears appeals from the four intermediate military courts of criminal appeals. All of these courts allow admission for attorneys licensed in any state or who are members of any federal court.

U.S. Tax Court. The U.S. Tax Court allows for admission of attorneys licensed in any state.

Foreign Intelligence Surveillance Court of Review and Foreign Intelligence Surveillance Court. An attorney appearing before the Foreign Intelligence Surveillance Court of Review must be a member of any state bar, the District of Columbia, or any U.S. District Court or Circuit Court of Appeals. Attorneys appearing before the Foreign Intelligence Surveillance Courts must be a member of any U.S. District Court or Circuit Court of Appeals. Additionally, attorneys representing the United States in either of these courts are not required to have any other federal bar membership.

Map of Reciprocity Admission Rules of the U.S. District Courts



	No Reciprocity Jurisdictions	56
Reciprocity Jurisdictions	Principal Law Office	4
	Any State	13
	Any U.S. District Court	2
	Any State OR any U.S. District Court	3
	Any State AND any U.S. District Court	2
	Any State OR the U.S. Supreme Court	2
	Any State or Any Federal Court	5
	Specific Jurisdiction	6
	Any U.S.D.C. or State of Residence	1

U.S. District Courts

So far we have seen a fairly uniform and permissive approach for attorney admissions in the federal courts. This ends with the district courts (and their corresponding bankruptcy courts).² In 2015, after conducting a survey of all 94 district courts, the U.S. District Court for the District of Maryland released its “Survey of Admission Rules in Federal District Courts.”³ The survey focused on whether the district courts allowed out-of-state attorneys to become members of the court through some form of reciprocity. The research showed that 56 districts (60 percent) did not allow for reciprocity while 38 districts (40 percent) did. The reciprocity jurisdictions were further broken down into several different subcategories.

The map on the previous page highlights the various admission rules across the district courts.

Across the district courts that allow for some form of reciprocal admission, the following chart further illustrates what percentage each type represents.

There are numerous problems with the hodgepodge of district court admission practices, and in particular those that have not adopted a reasonable reciprocity regime. It is worth noting that in 1995 the American Bar Association House of Delegates passed the following resolution:

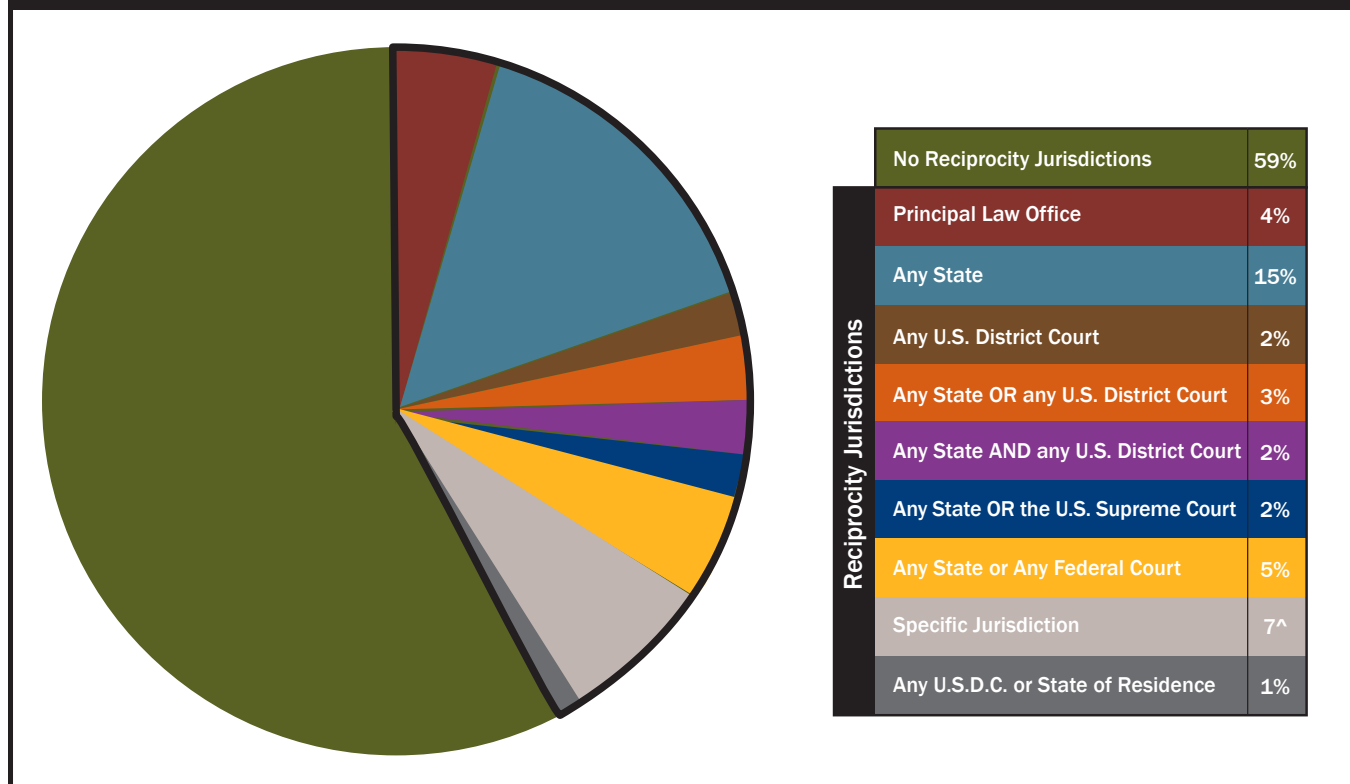
RESOLVED, That the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases of U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.

Lack of Attorney Mobility

Attorneys who want to practice in more than one federal court or who want to move from one state to another often face unreasonable impediments. For example, there are inconsistent admission practices across district courts within the same circuit and sometimes even within the same state. More importantly, there are inconsistent attorney admission and reciprocity requirements to become a member of various state bars.

Many states allow for a seasoned attorney in good standing in another state to be admitted on motion to that state’s bar. However, several will only provide admission on motion if an attorney is coming from a state that offers admission on motion to attorneys from its state. Even worse, some states do not allow for any form of reciprocity. For example, let us say that Attorney Jane has been practicing law for 20 years in Oregon. She wants to move to Florida with her family and practice law there. Unfortunately, Florida does not allow for admission on motion so if she wants to practice law in state courts she would have to study for and pass another bar exam. If she wanted to practice in the federal courts in the Northern District of Florida this would be allowed since that district court allows for reciprocity. However, no such luck in the Middle or Southern U.S. District Courts in Florida since they do not allow for reciprocity. Since the Florida bar evidently does not want out-of-state attorneys moving to the state, she considers moving to New Hampshire, it is the “Live Free or Die” state after all. Actually, that won’t work either. While New Hampshire allows for admission on motion to attorneys from numerous states, it does not have reciprocity for attorneys from 14 states, including Oregon. Furthermore, she cannot become a member of the U.S. District Court in New Hampshire either since it also does not provide for reciprocity.

Breakdown of Attorney Admission Rules



Below are a couple of other examples:

- Attorney Jane is the spouse of a member of the U.S. military. The military spouse is transferred from Oregon to South Carolina. Fortunately, South Carolina recently passed a rule allowing for attorney spouses of servicemembers to be admitted to the state bar. This is especially beneficial for Attorney Jane since the U.S. District Court for South Carolina requires membership in the state bar to become a member of the court. What if Attorney Jane's spouse were instead a commercial airline pilot, FBI agent, physician, minister, or teacher? Sorry, Attorney Jane will need to take the South Carolina state bar exam again if she wants to practice in state or federal court. What if the servicemember spouse was later transferred to Louisiana? Unfortunately, since that state does not allow for admission on motion or have a special rule for servicemember spouses, passing the bar exam is required.
- A litigator represents a corporation that conducts business in multiple states. Depending on the states and courts involved, the attorney may face several hurdles in representing her or his client in the various U.S. district courts.

Those are just a few of examples of the irrational attorney admission practices across some of the states. This matters in federal district courts because those courts that do not allow for reciprocity have essentially abdicated their authority to the state bar. If a district court that does not allow for reciprocity is located in a state with a protectionist state bar regime that similarly does not allow for admission on motion, then the federal practitioner is simply out of luck unless she or he wants to take another bar exam or wait for the state bar to adopt admission on motion rules. On the other hand, if a federal district court not allowing general reciprocity is located in a state that allows for admission on motion to its state bar, then the federal practitioner can waive into the state and then become a member of the federal court without taking another bar exam.

Practice Requirements for District Court Judges—Or Lack Thereof

Pursuant to various rules, attorneys generally need to have obtained their bachelor's degree, law degree, and pass the bar (or sometimes multiple bar exams if they want to practice in district courts in multiple states). This article would not be complete without briefly reviewing what the formal requirements are to become a U.S. district court judge. Interestingly, while they are arguably the most important legal practitioner in the courtroom, the technical requirements to become a federal district court judge, or even Supreme Court Justice, are minimal:

No constitutional or statutory qualifications are stipulated for serving on the Supreme Court or the lower federal courts. The constitution merely indicates that “the judicial power of the United States, shall be vested in one Supreme Court” as well as in any lower federal courts that Congress may establish (art. III, § 1) and that the president “by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court” (art. II, § 2). Congress has applied the same selection procedure to the appeals and the trial courts. There are no exams to pass, no minimum age requirement, no stipulation that judges be native-born citizens or legal residents, and no requirement that judges even have a law degree.⁴

While one would hope that the president and Congress would only select highly qualified individuals to serve as Article III judges, there are no formal requirements to do so. There have been numerous instances in the past where justices on the Supreme Court did not complete law school. The lack of formal requirements to become a federal judge has not created a public outcry or any mainstream effort to bolster the requirements. However, if an attorney cannot serve as an advocate in a U.S. district court without her or his law degree and in many instances passing the bar exam in the state where that federal district court sits, for the protection of the public, should these requirements not also explicitly apply to U.S. district court judges (*sarcasm added*)?

The Simple and Obvious Solution

The district courts themselves, or Congress, should align district court attorney admission standards with those of the circuit courts of appeals, or certainly not allow them to be any more restrictive than the Supreme Court's. The attorney mobility problem is largely caused by the state bars that want to keep their guild-like rules that discourage attorneys from moving to their state and creating potential competition (luckily this is now a clear minority of states). Furthermore, it also requires out-of-state attorneys to seek *pro hac vice* admission and pay local law firms, with the principal result simply being an unwarranted increase in the cost of providing legal services.

This type of Byzantine attorney licensing regime across the states and district courts may have been acceptable a century ago, but the fact that it persists today to any extent is not something of which we should be proud. For the good of the profession, intellectually dishonest arguments for maintaining restrictive attorney admission requirements should be ignored and a common sense, uniform reciprocal attorney admission standard adopted. U.S. district courts need not, and should not, defer to state bars to determine whether an attorney should practice in federal court. The federal courts, other than the district courts, have allowed for broad reciprocity and this has not appeared to cause any miscarriages of justice or the creation of additional federal bar exams or other admission requirements.

There is one caveat that is necessary to mention. While many states are arguably overzealous with their admission rules (at least for out-of-state attorneys), there are exceptions on the other extreme. For example, in Wisconsin, graduates of Wisconsin Law School and Marquette University Law School may be admitted to the state bar without a bar examination (so-called “diploma privilege”).⁵ When states do not have robust state bar admission practices it undermines the argument for reciprocity and admission on motion across all state bars and U.S. district courts. Should aspiring attorneys be required to graduate from ABA-accredited law schools—yes. Should there be a robust bar examination consisting of the Multistate Bar Examination, an essay examination, and the Multistate Professional Responsibility Examination—yes. Should continuing education be required—yes. Should diploma privilege be allowed—no. Should correspondence or online law school be sufficient—no. So long as all states and U.S. territories maintain rigorous attorney admission programs, states and U.S. district courts should take comfort in granting universal reciprocity for attorneys from other U.S. jurisdictions.

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Conclusion

It is no longer reasonable to require attorneys to pass multiple bar exams in our modern era of interstate commerce and disputes, with the much greater likelihood of someone not spending her or his entire career working in one state. Many states have adopted common sense reciprocity rules and/or the Uniform Bar Examination. In the laggard states that have not, it would be refreshing to see those U.S. District Courts lead the way in modernizing our profession, rather than the possibility of the Supreme Court or Congress eventually settling this issue. ☺



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Endnotes

¹The U.S. Court of Appeals for the Federal Circuit also hears appeals from U.S. District Courts related to patent and trademark disputes.

²JOHN OKRAY, U.S. FEDERAL COURTS: ATTORNEY ADMISSION REQUIREMENTS (2011).

³*Survey of Admission Rules in Federal District Courts*, U.S. District Court for the District of Maryland (Jan. 2015), www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf (last visited May 29, 2016).

⁴*Outline of the U.S. Legal System*, Bureau of International Information Programs, U.S. Department of State (2004), available at ipdigital.usembassy.gov/media/pdf/books/legalotln.pdf.

⁵See www.wicourts.gov/services/attorney/bardiploma.htm (last visited May 29, 2016).

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