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## Residency Requirements for Admission to the Bar

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decision in *Shapiro* and stands as firmly as ever on this issue.<sup>48</sup>

*Philip Franke*

### RESIDENCY REQUIREMENTS FOR ADMISSION TO THE BAR

A state has a legitimate interest in assuring that only qualified attorneys are admitted to practice law.<sup>1</sup> To further this policy, states have established criteria for admission to the bar.<sup>2</sup> Generally, admission has been conditioned upon a lawyer's knowledge of state law, a showing of "good moral character," and proof of state residency.<sup>3</sup> However, the long-standing residency requirements for admission to practice have been challenged as violative of the privileges and immunities clause of the United States Constitution.<sup>4</sup> This article will review the most significant of such chal-

<sup>48</sup> See *Koffler*, *supra* notes 30-33 and accompanying text.

<sup>1</sup> See *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (states have power and strong interest in controlling state's legal profession); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872) (power to regulate and control practice of law is province of state not federal government). See also *In re Griffiths*, 413 U.S. 717, 722-23 (1973) (state has interest "to assure the requisite qualifications of persons licensed to practice law"); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971) (Court affirmed New York requirement that attorneys "possess . . . character and general fitness"); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (state can require high standard of qualifications to admit applicant to bar). See generally *Brakel & Loh, Regulating Multistate Practice of Law*, 50 WASH. L. REV. 699, 708 (1975) (state has interest in assuring that attorneys who practice are competent and skilled in local practice); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831, 832-33 (1971) (purpose of residency requirement is to guard citizens from inept practice of law).

<sup>2</sup> See *Schware*, 353 U.S. at 239 (states may impose qualifications which have a "rational connection with the applicant's fitness or capacity to practice"). See, e.g., *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 273, 397 N.E.2d 1309, 1313, 422 N.Y.S.2d 641, 645 (1979) (states have created criteria for admission to bar through exercise of their police power); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (qualifications required should be "appropriate to the calling or profession").

<sup>3</sup> See *Brakel & Loh, supra* note 1, at 707 n.28 (residency requirement is prime issue in multi-state practice); Note, *supra* note 1, at 833-837. Knowledge of the local laws and customs is usually tested through a bar examination. *Id.* at 833. Moral character is important in protecting not only the public but the "character and integrity of the bar . . ." *Id.* at 834-35. Residency requirements have been characterized as the "most patently unreasonable and discriminatory requirement[s], in terms of both theory and practical consequences." *Id.* at 836.

<sup>4</sup> U.S. CONST. art. IV, § 2, cl. 1. "The Citizens of each State shall be entitled to all Privi-

lenges in light of the United States Supreme Court's recent decision on the topic - *Supreme Court of Virginia v. Friedman*.<sup>5</sup>

### *Residency Requirements*

Typically, states have chosen to impose either a "simple" or "durational" residency standard.<sup>6</sup> A simple residency requirement merely prescribes that an attorney be domiciled in the state in which admission is sought, while a durational residency requirement necessitates that the applicant reside in the state for a fixed period of time prior to application, examination, or admission.<sup>7</sup> States have justified such regulations on grounds that they en-

leges and Immunities of Citizens in the several States." *Id.* The purpose of the Clause was originally set forth in the Articles of Confederation, which stated:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . .

ART. OF CONFED. art. IV, cl. 1.

Traditionally, the clause encompassed what are termed "fundamental" or "natural" rights. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). These rights included the right to pass through or reside in any state "for purposes of trade, agriculture, or professional pursuits . . . ; to institute and maintain actions of any kind in the courts of the state"; and to take, hold and dispose of real or personal property. *Id.* at 552. The scope of the Clause was later broadened to include not only "fundamental rights" but also those rights which "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

The Supreme Court has since interpreted the Clause to bar a state's preferential treatment of residents in certain employment opportunities and in issuing commercial licenses. *Hicklin v. Orbeck*, 437 U.S. 518 (1978). The privileges and immunities clause prohibits states from discriminating against nonresidents solely to further their own parochial interests. *See Gordon*, 48 N.Y.2d at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646. *See also* Note, *The Future of State Bar Residence Requirements Under the Privileges and Immunities Clause*, 26 S.D.L. REV. 79, 80-81 (1981). Due to infrequent litigation over the privileges and immunities clause, the scope of the privilege was not readily ascertainable. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7.2-4, at 415-25 (1978) (discussing privileges and immunities clause's dormant periods).

The Clause does not prohibit states from differentiating between residents and nonresidents under all circumstances, only those which bear "upon the vitality of the Nation as a single entity . . ." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

<sup>5</sup> 108 S. Ct. 2260 (1988).

<sup>6</sup> *See* Note, *supra* note 4, at 79-80; Cox, *Requirements of Residency Requirements for Admission to the Bar Under the Code of Professional Responsibility*, 40 UNAUTH. PRAC. NEWS 260 (1977). The fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands all require some form of these criteria. *Id.*

<sup>7</sup> *See* Note, *supra* note 4, at 80.

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courage an attorney to become familiar with local customs and practices; permit the attorney's peers to observe his or her behavior to determine moral character; afford the attorney a deeper sense of community responsibility; and accord the applicant an opportunity to prove an intention to become a permanent resident.<sup>8</sup>

In the past, a majority of courts upheld or indicated strong approval of state durational residency requirements of six months or less.<sup>9</sup> Over the last few decades, however, such requirements have been attacked as violative of the equal protection clause, the due process clause, the Sherman Act and most recently, the privileges and immunities clause.<sup>10</sup>

### *New York Abolishes the Residency Requirement*

In *Gordon v. Committee of Character and Fitness*, New York's durational residency requirement was challenged as unconstitutional.<sup>11</sup> Gordon had been a New York resident for over two years when he sat for and passed the state's bar examination.<sup>12</sup> During the period subsequent to the examination and prior to his application for admission, the plaintiff was transferred by his employer to North Carolina.<sup>13</sup> Gordon's admission to the bar was denied solely

<sup>8</sup> See *id.* at 85; Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1480 (1979) (states' interest supporting residency requirements identified as administrative convenience, need to observe behavior and character, familiarity with local court procedures and customs, ease of service of process, and availability for bar discipline).

<sup>9</sup> See Note, *The Constitutionality of State Residency Requirements for Attorneys Under the Privileges and Immunities Clause: The Attack Continues*, 60 NEB. L. REV. 200, 201 (1981). "A majority of courts in this century have upheld or strongly indicated approval of state residency requirements of six months or less." *Id.*

<sup>10</sup> See, e.g., *Martin v. Walton*, 368 U.S. 25 (1961) (Kansas rule disallowing lawyer who regularly practiced in Missouri from appearing in Kansas court without Kansas lawyer attacked on equal protection grounds); *Smith v. Davis*, 350 F. Supp. 1225 (S.D. W. Va. 1972) (invalidated one year residency requirement on due process grounds); *Lipman v. Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971) (one year residency requirement violated equal protection clause); *Kennan v. Board of Law Examiners*, 317 F. Supp. 1350 (E.D. N.C. 1970) (one year residency requirement violated right to travel); *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980) (thirty-day residency requirement for bar examination violated privileges and immunities clause). See also Note, *The Sherman Act and Bar Association Residence Requirements*, 8 U. MICH. J.L. REF. 615 (1975) (residency requirements attacked as violative of Sherman Act).

<sup>11</sup> 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

<sup>12</sup> *Id.* at 269-70, 397 N.E.2d at 1310-11, 422 N.Y.S.2d at 643.

<sup>13</sup> *Id.* Gordon felt that his prior New York residence qualified him for admission to the bar and subsequently filed with the Committee of Character and Fitness of the First De-

on his failure to retain residence in New York for the six month period immediately preceding his application.<sup>14</sup> The New York Court of Appeals found the six month residency requirement violative of the privileges and immunities clause.<sup>15</sup>

The court reasoned that the state's restriction which impaired the nonresident's ability to pursue his occupation failed to pass two constitutional hurdles.<sup>16</sup> First, the state's interest in procuring discriminatory action through residency requirements was not substantial; nonresidents did not present an "evil to which the statute is aimed."<sup>17</sup> Second, assuming that the nonresidents presented an evil to state interests, the statutory method for protecting that interest was not the least restrictive alternative available for achieving its goal.<sup>18</sup>

The state legislature responded by amending the New York Civil Practice Law and Rules to abolish the residency requirement for both applicants seeking admission by bar examination<sup>19</sup> as well

partment for admission to practice. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The court found that N.Y. Civ. Prac. L. & R. 9406(2) required an attorney to give up his occupation for at least six months and move to New York in order to be admitted to practice in New York. *Id.* at 272-73, 397 N.E.2d at 1312-13, 422 N.Y.S.2d at 645. The court further found that an attorney who engaged in multi-state practice was prevented from doing so under the statute. *Id.* "The disparity of treatment between residents of this state and non-residents is manifest; given two equally qualified candidates who have passed the bar examination . . . and possess the requisite character and fitness, the rule would deny one admission based solely on residence." *Id.* at 273, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645.

<sup>16</sup> *Id.* The court realized that states have a legitimate interest in assuring that only qualified attorneys are admitted to the bar. *Id.* However, the court found that the residency requirement was not the least restrictive alternative available to the state in assuring that attorneys are properly supervised and discipline. *Id.* at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646. In lieu of the residency requirement, the state could instead require non-resident attorneys to appoint an agent in the state for service of process. *Id.* Also, state disciplinary remedies such as contempt, suspension or revocation of license, and malpractice actions were available as a means of disciplining nonresident attorneys. *Id.*

<sup>17</sup> *Id.* at 273, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645. The court found "no valid reason [was] proffered as to why admission to practice law before the courts of [the] state must be dependent upon residency." *Id.* The court viewed the purpose of the residency rule as mere "administrative convenience and not closely tailored to a legitimate state interest." *Id.* at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.

<sup>18</sup> *Id.* at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646. The state had other remedies to insure that nonresident attorneys were properly supervised and disciplined short of an absolute prohibition of non-residents. *Id.* See *supra* note 16.

<sup>19</sup> Act of June 18, 1985, ch. 226, § 6 (1985) N.Y. Laws 556 (codified as amended at N.Y. Civ. Prac. L. & R. 9406 (McKinney Supp. 1988)).

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as for those seeking reciprocal admission on motion.<sup>20</sup>

### *The Supreme Court's Reaction*

In 1985, the United States Supreme Court followed New York's lead by declaring residency requirements for admission to the New Hampshire Bar unconstitutional under the privileges and immunities clause in *Supreme Court of New Hampshire v. Piper*.<sup>21</sup> Piper, a Vermont resident, successfully completed the New Hampshire Bar Examination and applied for admission to the bar.<sup>22</sup> Admission was denied on the ground that Piper had failed to establish a residence in New Hampshire.<sup>23</sup> The Supreme Court confirmed that the ability to practice one's profession is a fundamental right within the meaning of the privileges and immunities clause.<sup>24</sup> The Court also found no substantial state interest for discrimination against nonresident applicants to the bar sufficient to pass constitutional muster,<sup>25</sup> and the residency rule was invalidated.<sup>26</sup>

<sup>20</sup> N.Y. JUD. LAW § 90 (1)(b) (McKinney Supp. 1988). Under the statute, any person admitted to practice law in any other state or territory or the District of Columbia may be admitted without taking the regular bar examination, provided the applicant possesses the character and general fitness requisite for an attorney. *Id.* In addition, the applicant must have been admitted to practice in the highest court of the other state for at least five of the seven years immediately preceding the application. N.Y. COMP. CODES R. & REGS. tit. 22 § 520.9(2)(i) (1987).

<sup>21</sup> 470 U.S. 274 (1985).

<sup>22</sup> *Id.* at 275-76. Kathryn Piper lived about 400 yards from the New Hampshire border. *Id.* at 275. Piper was told by the Board of Bar Examiners prior to applying for admission that she would have to reside within the state to be admitted to practice. *Id.* at 275-76. Piper was found to possess good moral character and satisfied all other requirements of the Board. *Id.*

<sup>23</sup> *Id.* Upon denial, Piper filed an action in the United States District Court for the District of New Hampshire where she was granted a motion for summary judgment. *Id.* at 276-77. On appeal, the United States Court of Appeals for the First Circuit affirmed the district court decision *en banc* in *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110,118 (1st Cir. 1983).

<sup>24</sup> *Piper*, 470 U.S. at 283. The Court held that the "right to practice law is protected by the Privileges and Immunities Clause." *Id.*

<sup>25</sup> *Id.* at 285. The State of New Hampshire raised some common justifications for the residency rule such as familiarity with local rules and customs, ethical behavior, availability for court proceedings, and availability for *pro bono* work. *Id.* The United States Supreme Court held that the state's justifications were not "substantial" enough to allow such discrimination inasmuch as a lawyer's professional duty to act ethically in the service of his clients would already require both resident and nonresident attorneys alike to familiarize themselves with the rules of the state. *Id.* at 285-86.

<sup>26</sup> *Id.* at 288. The Court invalidated Rule 42 of the New Hampshire Supreme Court which required an applicant for admission to be a "bona fide resident of the State at the

In its last Term, the United States Supreme Court in *Supreme Court of Virginia v. Friedman* was faced with the issue of whether the *Piper* decision should be extended to residency requirements for reciprocal admission on motion.<sup>27</sup> Friedman had been a resident of Virginia, a member of the Illinois and District of Columbia bars and was employed in Washington D.C.<sup>28</sup> Shortly after taking a position with a Virginia corporation, the plaintiff married and moved to her husband's home just inside the Maryland border.<sup>29</sup> Her application for admission to the Virginia bar on motion was denied because she was not currently a Virginia resident.<sup>30</sup> Friedman challenged the residency requirement and the United States Court of Appeals for the Fourth Circuit held the Virginia rule unconstitutional.<sup>31</sup> The Fourth Circuit, relying on *Piper*, found that the effect of the state's residency rule to deter competition from nonresident attorneys, a form of economic protectionism, was not a valid justification for discrimination against nonresidents and violated the privileges and immunities clause.<sup>32</sup>

On appeal, the United States Supreme Court affirmed the Fourth Circuit's decision finding Virginia's residency requirements for admission on motion violative of the privileges and immunities clause.<sup>33</sup> The Court reasoned that the state's full-time practice requirement was an alternative means for promoting Virginia's interests without implicating the constitutional concerns that residency requirements create.<sup>34</sup>

#### CONCLUSION

Before *Friedman*, only nineteen states required all applicants to

time that the oath of office . . . is administered." *Id.* at 277 n.1 (quoting affidavit of John W. King, App. 32).

<sup>27</sup> 108 S. Ct. 2260 (1988).

<sup>28</sup> *Id.* at 2262.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 822 F.2d 423 (4th Cir. 1987), *aff'd*, 108 S. Ct. 2260 (1988).

<sup>32</sup> *Id.* at 428-29.

<sup>33</sup> *Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260 (1988).

<sup>34</sup> *Id.* at 2267. The Court also stated that the State of Virginia could achieve its objective by requiring the mandatory attendance at periodic continuing legal education courses, or requiring that attorneys admitted on motion represent indigents and perform legal aid work. *Id.*

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take the regular bar exam,<sup>35</sup> while five others required either a modified or special attorney's exam for out-of-state lawyers.<sup>36</sup> Twenty-five states allowed an out-of-state lawyer admission without taking any exam by admission on motion, provided the attorney had been admitted elsewhere for a specific period of time.<sup>37</sup> Despite the move toward a national practice of law, six states - Illinois, Indiana, Iowa, Ohio, Virginia and Wyoming - attempted to bypass the *Piper* decision by still requiring some form of residence for admission on motion.<sup>38</sup> However, the United States Supreme Court's *Friedman* decision which struck down Virginia's

<sup>35</sup> See ALA. BAR ADM. R. 1-8; ARIZ. SUP. CT. R. 34(c); ARK. SUP. CT. BAR ADM. R. XII; DEL. SUP. CT. R. 52; FLA. SUP. CT. BAR ADM. R. ART. 1 § 1; GA. SUP. CT. R. 2-101 (1987); HAW. SUP. CT. R. 1-3 (1987); IDAHO BAR COMM'N R. 101 *et. seq.*; KAN. SUP. CT. R. 704; LA. SUP. CT. R. 17; NEV. SUP. CT. R. 51; N.H. SUP. CT. R. 42; N.J. SUP. CT. R. 1:27-1; N.M. SUP. CT. R. 15-103; OR. SUP. CT. R. 5; S.C. SUP. CT. BAR ADM. R. 5A; S.D. CODIFIED LAWS ANN. § 16-16-6 (1987); UTAH CODE ANN. §78-51-10 (1987); WASH. ADM. PRAC. R. 1.

<sup>36</sup> See CAL. BUS. & PROF. CODE ANN. § 6062 (Deering 1988) (attorneys who have practiced four of six years preceding filing must take modified bar exam); ME. SUP. CT. BAR ADM. R. 10 (attorneys who have practiced at least three of five preceding years must take modified examination); MD. APP. CT. BAR ADM. R. 14 (attorneys who have practiced five of seven years immediately preceding application must take special essay exam limited to Maryland Practice and Procedure); MASS. S. CT. R. 3:01 (all attorney applicants who have practiced five years must pass limited written examination on Massachusetts Practice and Procedure); MONT. SUP. CT. R. 8.08 (all attorney applicants must take modified exam).

<sup>37</sup> See ALASKA BAR R. 2 § 2(c); COLO. R. CIV. PRO. 202 (1988); CONN. SUP. CT. R. § 51.80; D.C. R. 104 (1987); ILL. ANN. STAT. ch. 110A § 705 (Smith-Hurd 1988) (only from reciprocal state); IND. A.D. R. 6; IOWA SUP. CT. BAR ADM. R. 114; KY. SUP. CT. R. 2.110; MICH. STAT. ANN. § 27A.946 (Callaghan 1986); MINN. SUP. CT. R. VIII; MISS. CODE ANN. § 73-3-25 (West Supp. 1988); MO. SUP. CT. R. 8.10 (only from reciprocal state); NEB. REV. STAT. § 7-109 (1987); N.Y. COMP. CODES R. & REGS. tit. 22 § 520.7 (1988); N.C. BAR ADM. R. .0502 (1988) (only from reciprocal state); N.D. ADM. PRAC. R. 4; OHIO SUP. CT. BAR ADM. R. I §9; OKLA. SUP. CT. BAR R. 17 (only from reciprocal state); PA. CODE vol. 204 § 204 (only from reciprocal state); R.I. SUP. CT. R. 34; TENN. SUP. CT. R. 6; TEX. GOV'T CODE ANN § 82.036 (Vernon Supp.1986); VT. SUP. CT. R. T.12 App. I, Pt. II, R.5; VA. SUP. CT. R. 1A:1; W. VA. ADM. PRAC. R. § 3.0 (only from reciprocal state); WIS. SUP. CT. R. 40.05.

<sup>38</sup> See ILL. SUP. CT. R. 705. Illinois requires attorneys to have resided and actively practiced law in the foreign state for at least five of seven years prior to application. *Id.*; IND. A.D. R. 6. Indiana requires attorneys to be bona fide residents of the state and to have practiced five of seven years prior to application. *Id.*; IOWA SUP. CT. BAR ADM. R. 114. Iowa requires attorneys to be inhabitants of Iowa, or to demonstrate a bona fide intention to open a law office in Iowa, and to have practiced five of seven years immediately preceding the application. *Id.*; OHIO SUP. CT. BAR ADM. R. I § 9. Ohio requires attorneys to have practiced for at least five years and be residents or intend to come into the state for the purpose of making it their permanent residence. *Id.*; VA. SUP. CT. R. 1A:1(c). Virginia required attorneys to be state residents at the time of application and show an intent to maintain an office and practice in the state. *Id.*; WYO. SUP. CT. R. 5. Wyoming requires attorneys to be residents at least six months prior to admission and to have practiced five of the eight years preceding application. *Id.*



residency requirement for admission on motion as violative of the privileges and immunities clause leaves the residency rules in the five states that continue to enforce them in jeopardy.<sup>39</sup>

The practice of law is expanding into multistate specialties.<sup>40</sup> It is submitted that once an attorney has passed the multistate bar examination and has practiced for the requisite period of time, he should be admitted to practice in any state without having to reside in that state or take its bar exam. In *Friedman*, the United States Supreme Court, in an effort to further this trend, has struck down residency requirements to practice on motion in what may signal the death knell for all residency requirements associated with bar admission.

*Robert Cote*

#### ETHICS OF CONDUCTING *Ex Parte* INTERVIEWS

A lawyer who communicates informally with an adverse party without first obtaining opposing counsel's consent runs the risk of violating the norms of professional ethics.<sup>1</sup> The determination of whether such a violation has occurred is particularly difficult when the adverse party is a corporation.<sup>2</sup> The Supreme Court has held,

<sup>39</sup> See *supra* notes 33 and 38 and accompanying text.

<sup>40</sup> See Brakel & Loh, *supra* note 1, at 699-702.

<sup>1</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). The text of the rule states:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.* The language of Rule 4.2 resembles that of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY which states:

During the course of his representation of a client the lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980). See generally Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 138 (1977) (reason for rule is "imbalance in knowledge and skill between the lawyer and the adverse party, who is generally a layman.").

<sup>2</sup> See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (since corpo-