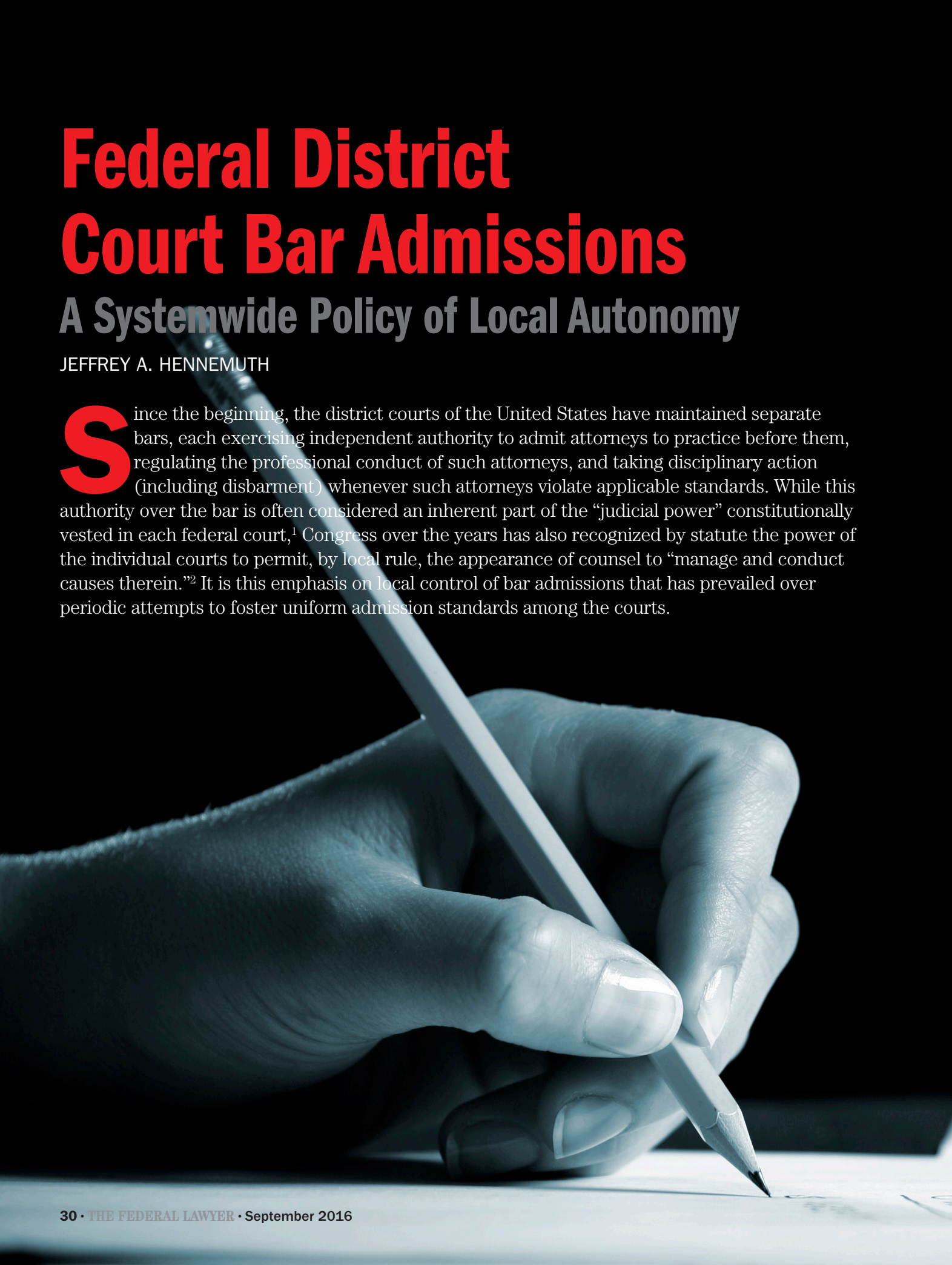
Federal District Court Bar Admissions

A Systemwide Policy of Local Autonomy

JEFFREY A. HENNEMUTH

Since the beginning, the district courts of the United States have maintained separate bars, each exercising independent authority to admit attorneys to practice before them, regulating the professional conduct of such attorneys, and taking disciplinary action (including disbarment) whenever such attorneys violate applicable standards. While this authority over the bar is often considered an inherent part of the "judicial power" constitutionally vested in each federal court,[1] Congress over the years has also recognized by statute the power of the individual courts to permit, by local rule, the appearance of counsel to "manage and conduct causes therein."[2] It is this emphasis on local control of bar admissions that has prevailed over periodic attempts to foster uniform admission standards among the courts.



The existence of a distinct bar for each district is but one example of the "independence, decentralization, and individualism" that have always characterized the federal courts as an institution.[3] Indeed, during the first 125 years of the judiciary's history, every court operated with near-complete administrative autonomy—both as to other courts in the system and vis-a-vis the other two branches of the federal government.[4] Though Congress has retained authority to legislate on judicial structure and process,[5] and the executive branch (principally the Department of Justice) initially handled various key administrative functions (e.g., budgeting and accounting, contracting, payroll, and statistics) for the judiciary,[6] federal judicial administration was not effectively integrated until early in the 20th century. Starting in 1922, Congress responded to calls for modernization of court administration at the national level by establishing a Judicial Conference of the United States as the systemwide policy-maker[7] with an executive arm, the Administrative Office of the United States Courts, serving as the system's administrative hub.[8] And it delegated authority to the Supreme Court to adopt rules of practice and procedure applicable in all the courts.[9]

As a result of those changes, the judiciary began to look at ways in which administrative policies and practices in the courts could be made uniform or at least more consistent across the circuits and districts. Soon after the first Federal Rules of Civil Procedure were approved, the Judicial Conference established a special committee in 1938 to review local rules of the district courts and make recommendations "so that the greatest practicable degree of uniformity throughout the country may be secured."[10] While the committee proposed to the Conference a set of uniform local rules that the individual courts could adopt, the committee found "complete uniformity … [to be] neither feasible nor desirable … illustrated by the requirements in the various districts for the admission of attorneys to practice."[11] In that context, the committee explained, "considerations of local policy and conditions play a controlling part."[12] When the Conference soon after revisited the possibility of greater uniformity in attorney admission requirements,[13] a three-year study completed in 1947 merely noted a "wide disparity among the rules dealing with this subject"[14] and, with the Conference's concurrence, concluded that consideration of national rules on the subject was at that time "inadvisable."[15] That conclusion was reaffirmed nine years later, in 1956, when the Conference expressed its disapproval of pending legislation that would make all members in good standing of the Bar of the United States Supreme Court automatically eligible to practice in any federal court.[16]

In the ensuing decades, the Judicial Conference was occasionally asked to reconsider making district court bar admission requirements consistent, or at least subject to certain national standards, but no change occurred.[17] A survey of district judges in 1972 showed a high degree of receptivity to changes in bar admission and disciplinary rules,[18] and in the same year, an American Bar Association resolution urged the federal courts to establish uniform bar admission and attorney discipline processes.[19] Responding to these developments, the Conference's Committee on Court Administration recommended that legislation be sought to regularize the courts' attorney discipline procedures through standard methods for investigating alleged misconduct.[20] But at the same time, the committee found neither "great disparity" in district court bar admission rules nor "general dissatisfaction with present practices and procedures" for either permanent or *pro hac vice* admissions and, thus, did not ask the Conference to seek greater standardization of bar admission requirements.[21]

Later in the same decade, the Conference responded to concerns (raised by then-Chief Justice Warren Burger and others) about the declining quality of trial advocacy in the federal courts by establishing a special committee. The Conference subsequently approved the committee's recommendation to use pilot programs in several districts to test stricter attorney admission standards including examinations, experience requirements, and peer-review procedures.[22] A multiyear study ensued and the Conference, in 1985, approved a recommendation that all courts consider adopting similar measures.[23] The committee that conducted the study, however, expressly declined to propose a uniform bar admission rule, citing (1) doubts as to the legal authority for imposing such a rule[24] and (2) concern that a uniform rule could, by its nature, prevent individual courts from further improving advocacy by imposing requirements beyond the minimum national standards.[25] Some 13 years later, another Conference committee cited those caveats in recommending that the Conference oppose a proposal of the National Bankruptcy Review Commission that any attorney admitted to practice and in good standing in one federal bankruptcy court be automatically entitled to practice in any other bankruptcy court.[26]

During the past 18 years, the Judicial Conference has not entertained any new proposals to adopt uniform district court bar admission requirements. The federal judiciary's decentralized nature, however, has remained unchanged, and so any renewed effort to impose a national standard on the district courts—through the federal rulemaking process, by Judicial Conference policy resolution, or through legislation—would again be likely to face substantial resistance.[27] ⊙

Jeffrey A. Hennemuth is a member of the District of Columbia Bar who retired from the federal government in 2015 after more than 30 years of service to the federal judiciary and at the United States Department of Labor. During 24 years as an attorney and senior executive at the Administrative Office of the United States Courts, he provided staff support for numerous committees of the Judicial Conference of the United States, including the successful effort in the 1990s to adopt the first long-range plan for the federal courts. Beginning in 2005, he served as a staff member for the Executive Committee of the Judicial Conference and the Conference itself, and ultimately was appointed the chief officer of the Judicial Conference Secretariat in 2013.

Endnotes

[1]*See, e.g., Chambers v. NASCO Inc.*, 501 U.S. 32, 43-46 (1991); *In re Snyder,* 472 U.S. 634, 643 (1985); *Theard v. United States*, 354 U.S. 278, 281-82 (1957); *Selling v. Radford*, 243 U.S. 46, 49-50 (1917); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530-31 (1824).

[2]*See* Act of Sept. 24, 1789 (hereinafter the "Judiciary Act of 1789"), ch. 20, § 35, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1654). *See also* 30 Moore's Federal Practice §§ 801.01, 801.20 (3d ed. 2010). Throughout their history, individual federal courts have possessed authority to prescribe rules for the conduct of their own business to the extent such rules are consistent with Acts of Congress and, since 1934, national rules of practice and procedure (*see* note 9 *infra* and accompanying text). *See* Judiciary Act of 1789, *supra*, at § 17, 1 Stat. at 83 (codified as amended at 28 U.S.C. § 2071(a)).

[3]Peter Graham Fish, The Politics of Federal Judicial Administration 3, 7 (1973).

[4]*Id.* at 7.

[5]*See* U.S. Const. art. III, § 1.
[6]*See* Fish, *supra* note 3, at 91-98.
[7]Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838-39 (codified as amended at 28 U.S.C. § 331).
[8]Act of Aug. 7, 1939, ch. 501, §1, 53 Stat. 1223.
[9]Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 331, 2071-2077). The Supreme Court's systemwide rulemaking authority was originally limited to civil actions, but a few years later Congress authorized the Court to promulgate rules for criminal proceedings as well. Act of June 29, 1940, ch. 445, 54 Stat. 688. Though the Judicial Conference did not formally participate in the rulemaking process at the outset, legislation in the late 1950s transferred to the Conference principal responsibility for identifying and recommending new and amended federal rules. *See* Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356.
[10]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 10-11 (Sept. 1938).
[11]*Report of the Judicial Conference Committee on Local District Court Rules* 7-8 (Oct. 1940).
[12]*Id.* Among other things, the committee noted a perceived need of "[c]ourts in urban communities and … close to the boundaries of larger cities … [to] protect themselves from inexperienced, incompetent and unfit practitioners" whereas "in rural districts … judges are personally acquainted with or have easily accessible sources of personal knowledge of most attorneys" and thus find it unnecessary to impose stricter admission requirements. *Id.*
[13]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 24 (Sept. 1944) (special committee formed to consider the advisability of uniform bar admission rules for the federal courts).
[14]*Report to the Judicial Conference of the Committee to Consider the Advisability of Regulating Admission to the Bar of the Federal Courts by Uniform Rules* 3 (Sept. 1947).
[15]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 26 (Sept. 1947).
[16]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 42-43 (Sept. 1956). In recommending that the Conference oppose the legislation, the reviewing committee stated that "conditions in the various federal judicial districts throughout the states of the union are sufficiently diverse as to make [uniform bar admission standards] inadvisable." *Report to the Judicial Conference of the Committee on Revision of Laws* 4-5 (Sept. 1956). It also opined that the proposed change "would not be conducive to the proper administration of justice" because it appeared to deprive individual courts of any control over admission to their bars of lawyers already admitted to practice before the Supreme Court. *Id.* at 5.
[17]By contrast, when the Federal Rules of Appellate Procedure were first developed and adopted in the 1960s, the Conference (and ultimately the Supreme Court) apparently saw no difficulty in using the federal rulemaking process to establish a national eligibility standard for admission to the respective bars of the United States Courts of Appeals. *See* Fed. R. App. P. 46(a).
[18]This survey was conducted as a part of an internal judiciary study of the need for uniformity of attorney admission and disciplinary rules, which was discussed at length in Burton C. Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 Hofstra L. Rev. 249 (1975).
[19]American Bar Association, *Summary of Action, House of Delegates, Midyear Meeting* 26 (1972).
[20]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 43 (Sept. 1973).
[21]*Id.*; *see also Report to the Judicial Conference of the Committee on Court Administration* 1-2 (Sept. 1973).
[22]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 103-05 (Sept. 1979).
[23]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 84-85 (Sept. 1985).
[24]Though the Conference's committee did not fully explain why it questioned the legal authority for a national bar admission rule, its assessment was not made in the context of a proposed federal rule of practice and procedure, and thus may have focused solely on whether uniform admission requirements could be imposed by Conference policy resolution rather than adoption of a formal rule under the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Indeed, any concerns about the validity of a formal rule would have been inconsistent with the Conference's decision, 20 years earlier, to recommend adoption of a national bar admission rule for the federal appellate courts (see *supra* note 17).
[25]*Report of the Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice* 24 (Sept. 1985).
[26]Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference* 55-56 (Sept. 1998); *Report of the Judicial Conference Committee on Court Administration and Case Management* 9-11 (Sept. 1998). Mirroring the concerns expressed about a similar proposal decades earlier (*see supra* note 16 and accompanying text), the reviewers in this instance were apprehensive about the possible impact of the National Bankruptcy Review Commission (NBRC) proposal on local court autonomy, noting that "[c]ourts have a strong interest in retaining control over who is admitted to practice before them so that they may set particular standards for their local bars and effectively discipline the bar for infractions of local rules." Though the proponents of a national bankruptcy bar admission standard "contemplate[d] that attorneys … [would] be required to read the appropriate local rules and submit to the disciplinary authority of the local court," the reviewing committee did not consider that "an adequate substitute for a court's autonomy in this regard." *Id. See also* Moore's Federal Practice, *supra* note 2, at § 801.20[7] (discussing the NBRC proposal).
[27]More recent experience involving the related field of attorney conduct rules is also instructive. Faced with congressional concerns about federal government attorney conduct, as well as a proliferation of inconsistent local rules governing such conduct, the Conference's Committee on Rules of Practice and Procedure conducted, from the mid-1990s to the early 2000s, a project to develop a set of uniform federal rules of attorney conduct. Despite its efforts to accommodate local interests by incorporating as much as possible the applicable state standards, the committee ultimately recognized that a national consensus was not attainable and, ultimately, the project was abandoned. *See* Judith A. McMorrow, *The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. Rev. 3, 17-19 (2005).