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AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED: That the American Bar Association amends the *ABA Model Rule for Admission by*
2 *Motion*, dated August 2012, as follows (additions underlined, deletions ~~struck through~~):

3
4 ABA Model Rule on Admission by Motion

- 5
6 1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion,
7 be admitted to the practice of law in this jurisdiction. The applicant shall:
8
9 (a) have been admitted to practice law in another state, territory, or the District of
10 Columbia;
11 (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section
12 of Legal Education and Admissions to the Bar of the American Bar Association at the
13 time the applicant matriculated or graduated;
14 (c) have been primarily engaged in the active practice of law in one or more states,
15 territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years
16 immediately preceding the date upon which the application is filed;
17 (d) establish that the applicant is currently a member in good standing in all jurisdictions
18 where admitted;
19 (e) establish that the applicant is not currently subject to lawyer discipline or the subject
20 of a pending disciplinary matter in any jurisdiction;
21 (f) establish that the applicant possesses the character and fitness to practice law in this
22 jurisdiction; and
23 (g) designate the Clerk of the jurisdiction's highest court for service of process.
24
25 2. For purposes of this ~~R~~Rule, the "active practice of law" shall include the following activities,
26 if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or
27 if performed in a jurisdiction that affirmatively permits such activity by a lawyer not
28 admitted in that jurisdiction; however, in no event shall any activities that were performed
29 pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in
30 some state, territory, or the District of Columbia be accepted toward the durational
31 requirement:
32
33 (a) Representation of one or more clients in the private practice of law;

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- 34 (b) Service as a lawyer with a local, state, territorial or federal agency, including military
- 35 service;
- 36 (c) Teaching law at a law school approved by the Council of the Section of Legal
- 37 Education and Admissions to the Bar of the American Bar Association;
- 38 (d) Service as a judge in a federal, state, territorial or local court of record;
- 39 (e) Service as a judicial law clerk; or
- 40 (f) Service as in-house counsel provided to the lawyer's employer or its organizational
- 41 affiliates.

42

43 3. For purposes of this ~~¶~~Rule, the active practice of law shall not include work that, as

44 undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was

45 performed or in the jurisdiction in which the clients receiving the unauthorized services were

46 located.

47

48 4. An applicant who has failed a bar examination administered in this jurisdiction within five

49 years of the date of filing an application under this ~~¶~~Rule shall not be eligible for admission

50 on motion.

51

52 FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not

53 adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have

54 adopted admission by motion procedures to eliminate any restrictions that do not appear in the

55 Model Rule on Admission by Motion.

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REPORT

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports.¹

The Resolution accompanying this Report proposes an amendment to the ABA Model Rule on Admission by Motion that, if adopted, would allow lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows (i.e., after three, instead of five, years of practice). The Commission is also asking that the ABA adopt a resolution urging jurisdictions that have not adopted the Model Rule to do so and encouraging jurisdictions that already have admission by motion procedures to eliminate additional restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

The Commission's work in this area was informed by the efforts of the ABA Commission on Multijurisdictional Practice ("MJP Commission"), which completed its work a decade ago. In August 2002, the ABA House of Delegates adopted as Association policy all nine of the MJP Commission's recommendations,² which reflect a more permissive regulatory framework. This framework allows lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they are not otherwise authorized to practice law.³ The framework also permits lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they are not otherwise authorized and without the necessity of sitting for a written bar examination.⁴

The Commission found that this framework has been widely adopted⁵ and produced many benefits for clients and their lawyers. It has enabled lawyers to represent their clients more

¹ In one Resolution, the Commission is recommending the creation of a Model Rule on Practice Pending Admission that would allow lawyers to establish a systematic and continuous presence in another jurisdiction while diligently pursuing admission in that jurisdiction. The Commission is also recommending changes to Model Rule 1.6 that would identify the information that lawyers can disclose in order to detect possible conflicts of interest that might arise when lawyers change firms or when two or more firms associate with each other or merge.

² See *Client Representation in the 21st Century*, Report of the Commission on Multijurisdictional Practice (2002), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html.

³ See, e.g., ABA MODEL RULES OF PROF'L CONDUCT R. [hereinafter MODEL RULE] 5.5(c); ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

⁴ See, e.g., MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

⁵ Since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, *State Implementation of ABA Model Rule 5.5* (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf. Every jurisdiction now has a rule allowing for pro hac vice admission. Chart, *Comparison of ABA Model Rule For Pro Hac Vice Admission With State Versions and Amendments Since August 2002* (2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf. Seven jurisdictions have adopted a version of the ABA Model Rule for Temporary Practice by Foreign Lawyers. *Summary of State Action on ABA MJP Recommendations 8 & 9* (2010),

effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

The Commission concluded that, in light of these successes and the still growing need to engage in cross-border practice, the ABA should once again consider carefully crafted changes to the framework governing multijurisdictional practice. The Resolutions accompanying this Report address the ABA Model Rule on Admission by Motion.

I. History of the ABA Model Rule on Admission by Motion

In August 2002, the ABA House of Delegates adopted the Model Rule on Admission by Motion. The Model Rule permits a lawyer admitted in one U.S. jurisdiction to gain full admission in another U.S. jurisdiction without having to pass that jurisdiction's bar examination. The lawyer, however, must satisfy several requirements, one of which is to have engaged in the active practice of law for five of the last seven years.⁶

Admission by motion procedures now exist in forty jurisdictions. The Commission's research revealed that more than 65,000 lawyers have used the procedure in the last ten years.⁷ Approximately half of these lawyers were admitted in the District of Columbia. The Commission found that there is no evidence that lawyers admitted by motion – either in the District of Columbia or elsewhere – are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted through more traditional procedures. The Commission sought information in this regard from lawyer disciplinary counsel, and responses revealed that the admission by motion process has produced no discernible risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers.

II. Proposal to Amend the Model Rule on Admission by Motion

In light of the Commission's findings and changes in the practice of law during the last decade, the Commission proposes to reduce the time-in-practice requirement in the Model Rule for Admission by Motion. The current Model Rule requires an applicant for admission by

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf. Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2011),

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf.

Finally, thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, *Foreign Legal Consultant Rules* (2010),

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf.

⁶ The Model Rule has remained unchanged except for one amendment in 2011. In February 2011, the Section of Legal Education and Admissions to the Bar filed a Resolution with the House of Delegates recommending that the Model Rule be amended to eliminate a provision that prohibited a lawyer's work as in-house counsel or as a judicial law clerk from being counted as part of the necessary practice experience to qualify for admission by motion. The House agreed that the Model Rule had created "an unfair and unnecessary distinction" between in-house counsel and judicial clerks, on the one hand, and the other categories of lawyers listed in paragraph 2 of the Model Rule on the other, and thus adopted the proposed amendment.

⁷ National Conference of Bar Examiners, *Bar Examination and Admission Statistics, 2011 Statistics*, at 28 (2011),

http://www.ncbex.org/assets/media_files/Statistics/2010Stats110111.pdf & *2005 Statistics*, at 35 (2005)

http://www.ncbex.org/assets/media_files/Statistics/2005_Statistics.pdf.

motion to have actively practiced in another jurisdiction for five out of the past seven years, and the Commission is proposing to allow lawyers to qualify for admission by motion after practicing in another jurisdiction for three out of the past five years.

The Commission believes this change responds to client needs and market demands in an increasingly borderless world, where lawyers frequently need to gain admission in other U.S. jurisdictions. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating or who regularly do business in the jurisdiction in which motion admission is sought. The Commission's proposal would address this need, thus benefitting both lawyers and their clients.

The proposal also recognizes that lawyers often need to move to new jurisdictions for a wide range of personal reasons, including the need to find employment. The Commission determined that a reduction of the active practice requirement from five to three years would have particularly salutary effects for less senior lawyers, who are most likely to need to move from one jurisdiction to another. The challenging legal employment marketplace only increases the likelihood that relatively junior lawyers will need to move to a new jurisdiction in search of employment.

The Commission seriously considered several possible arguments against reducing the time-in-practice requirement of the Model Rule. First, the Commission considered the concern that a lawyer who has practiced for only three years may not be sufficiently competent to practice law in a new jurisdiction. The Commission, however, found no reason to believe that lawyers who have been engaged in the active practice of law for three of the last five years will be any less able to practice law in a new jurisdiction than a law school graduate who recently passed the bar examination in that jurisdiction. In fact, five jurisdictions already have a reduced duration-of-practice requirement of three years,⁸ and none of those jurisdictions have reported any resulting problems.

The Commission also found unpersuasive the concern that passage of the bar examination is necessary to demonstrate knowledge of the law of the jurisdiction in which the lawyer is seeking admission. As explained above, more than 65,000 lawyers have obtained admission by motion in the last ten years, and there is no evidence from disciplinary counsel or any other source that these lawyers have been unable to practice competently in the new jurisdiction or have been unable to identify and understand aspects of the new jurisdiction's law that differ from the law of the jurisdiction where those lawyers were originally admitted.

The Commission also concluded that the "local law" concern rests on the incorrect assumption that passage of the bar examination demonstrates competence in local law. In fact, an increasing number of jurisdictions use the Uniform Bar Examination,⁹ which typically does not require any knowledge of local law. And in jurisdictions that do test local law, the local law

⁸ Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp_authcheckdam.pdf.

⁹ Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n Section of Legal Education & Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2012*, at 23 (2012) (available at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf).

portion of the test is usually sufficiently small that bar passage does not turn on it. Thus, a significant percentage of bar examinations require either limited knowledge of local law or none at all, suggesting that passage of the bar examination does not offer better evidence of a lawyer's understanding of local law than three years of practice in another jurisdiction. To the contrary, the Commission concluded that three years of practice in another jurisdiction may actually enable a lawyer to identify and understand variations in the law more easily than a recent law school graduate who has never practiced at all but has passed the jurisdiction's bar examination.

Another possible concern that the Commission considered is that lawyers might take and pass the bar examination in a jurisdiction with a relatively high passage rate and then seek admission by motion in a jurisdiction that has more demanding examination requirements. The Commission concluded, however, that the three year waiting period is sufficiently long that lawyers would not have an incentive to circumvent the bar examination requirements of a jurisdiction with a relatively low bar pass rate.

Additionally, the Commission considered whether to retain the existing seven year period within which a lawyer must fulfill the new three year practice requirement. One argument for doing so is that the career tracks of modern lawyers are not always linear and that lawyers, both male and female, frequently need to take time away from the practice of law due to changes in personal circumstances, including changes in substantive employment, military service, returning to school for another degree or, an issue that continues to disproportionately affect women, family care. At the same time, however, the Commission heard concerns that a four year gap in practice would be too substantial to offer adequate assurance to bar admission authorities that a lawyer has the requisite competence to practice law in the new jurisdiction. To reconcile these competing interests, the Commission determined that a lawyer seeking admission by motion should have to satisfy the three year practice requirement within a five year time period. This approach permits lawyers to take two years off from the active practice of law, while recognizing the concerns that bar admissions authorities would have about an extended period of time away from practice.

Finally, the Commission concluded that Section 2 of the Model Rule on Admission by Motion should state that the time spent practicing pursuant to the proposed new Model Rule on Practice Pending Admission should not count toward the period of time necessary to qualify for admission by motion. (The proposed new Model Rule on Practice Pending Admission would allow lawyers to establish a law practice in another jurisdiction while diligently pursuing admission in that jurisdiction through one of the recognized forms of admission, such as through admission by motion.) The Commission determined that this restriction in Section 2 is a necessary additional client protection as it will prevent lawyers from establishing a practice in a new jurisdiction in fewer than three years and prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

In sum, the Commission determined that, in most jurisdictions, a lengthy practice requirement unnecessarily hinders the lawyer mobility that clients and legal employers increasingly demand. Although the Commission recognizes that some jurisdictions may have

particular needs that warrant a longer or shorter durational requirement, the Commission concluded that the vast majority of jurisdictions would benefit from the proposed approach.

III. Implementation of ABA Model Rule on Admission by Motion Rule

The Commission concluded that the widespread adoption of admission by motion procedures is a positive development, but also found that a number of jurisdictions have not yet adopted an admission by motion process or have adopted a process that imposes unnecessary restrictions and requirements. Thus, in addition to proposing the amendments described above, the Commission also urges the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate any restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

With regard to the eleven jurisdictions that have not adopted any admission by motion procedure, those jurisdictions require lawyers to take at least some portion of the jurisdiction's bar examination (or a special lawyers' examination) in order to gain admission. The Commission concluded that such a requirement is unnecessary for lawyers who have three years of experience and that these jurisdictions should adopt an admission by motion procedure.

With regard to the forty jurisdictions that have adopted an admission by motion procedure, ten have an admission by motion procedure that is nearly identical to the Model Rule.¹⁰ The other thirty jurisdictions, however, have procedures that impose restrictions beyond those contained in the Model Rule. More than half of these jurisdictions have some type of reciprocity requirement, which makes admission by motion possible only for lawyers from states that also offer admission by motion on a reciprocal basis.¹¹ Moreover, some jurisdictions define law practice in a manner that is narrower than the Model Rule definition.¹² Other jurisdictions require lawyers to certify that they intend to practice actively and maintain an office in the state where admission by motion is being sought.¹³

The Commission found no evidence that these more restrictive approaches are related in any way to the competence of the applicants or the protection of the public. Indeed, jurisdictions that have adopted the Model Rule without any additional restrictions have reported no problems. The Commission believes that such varied additional restrictions only serve to sustain outdated and parochial purposes at a time when the relevance of borders to the competent practice of law has and will continue to erode. The Commission believes that the Model Rule on Admission by Motion ensures competent representation and amply protects the integrity of the bar.

Conclusion

Continually evolving technology, client demands and a national (as well as global) legal services marketplace have fueled an increase in cross-border practice as well as a related need for lawyers to relocate to new jurisdictions. The Resolutions accompanying this Report are intended to permit lawyers to respond to these developments to the benefit of their clients, while

¹⁰ See Comparison Chart, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

providing adequate regulatory safeguards. Accordingly, the Commission respectfully requests that the House of Delegates adopt those Resolutions.