

2010-2011

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**To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Disciplinary Agencies, Individuals, and Entities**

**From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest<sup>1</sup>**

**Re: For Comment: Issues Paper Concerning the ABA Model Rule on Admission by Motion**

**Date: December 2, 2010**

**Introduction**

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. It is clear that these developments are driving continued growth of cross-border practice both within the United States and between the United States and other nations.<sup>2</sup> One of the Commission's objectives is to examine existing domestic and international regulations governing cross-border practice to determine whether to propose amendments to existing ABA policies and rules in this area. One such rule is the ABA Model Rule on Admission by Motion, which addresses one of the methods by which a lawyer licensed in one American state or jurisdiction can gain admission to practice law in another state or jurisdiction. The goal of this paper is to invite comments on whether the Model Rule should be amended to better accommodate the increase in cross-border practice.

In seeking these comments, the Commission is not suggesting that the current Model Rule should be less or more restrictive or that the Commission has any agenda for such changes. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate discussion and the development of any reports and proposals. The Commission is particularly interested in comments from state bar associations, disciplinary agencies, and others about the potential impact that changes to admission by motion procedures would have in their jurisdictions.

<sup>1</sup> Members of the Working Group are: Stephen Gillers (Chair and Commission Member), Hon. Elizabeth B. Lacy (Commission Member), Theodore Schneyer (Commission Member), Doug Ende (National Organization of Bar Counsel), Donald B. Hilliker (ABA Center for Professional Responsibility), Janet Green Marbley (ABA Client Protection Committee), Jim McCauley (ABA Ethics Committee), and John P. Sahl (ABA Standing Committee on Professional Discipline). Andrew M. Perlman serves as Reporter, and Dennis A. Rendleman and John A. Holtaway provide counsel.

<sup>2</sup> The Commission is separately considering issues concerning inbound foreign lawyers. See <http://www.abanet.org/ethics2020/templates.pdf>

## **I. ABA Model Rule on Admission by Motion**

The ABA Commission on Multijurisdictional Practice (“MJP Commission”) submitted numerous proposals to the ABA House of Delegates in August 2002, including a Model Rule on Admission by Motion (“Model Rule”). The House of Delegates adopted the Model Rule at that meeting, and it has remained unchanged since that time.<sup>3</sup> The Model Rule provides as follows:

- 1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:**
  - (a) have been admitted to practice law in another state, territory, or the District of Columbia;**
  - (b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated;**
  - (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;**
  - (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;**
  - (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;**
  - (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and**
  - (g) designate the Clerk of the jurisdiction’s highest court for service of process.**
  
- 2. For the purposes of this rule, the “active practice of law” shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2) (e) and (f) that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement:**
  - (a) Representation of one or more clients in the practice of law;**

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<sup>3</sup> The ABA Section on Legal Education and Admissions to the Bar has proposed several modest amendments to the Model Rule, described in more detail in the attached report from that Section, and which will be presented to the ABA House of Delegates in February 2011.

- (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;**
  - (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;**
  - (d) Service as a judge in a federal, state, territorial or local court of record;**
  - (e) Service as a judicial law clerk; or**
  - (f) Service as corporate counsel.**
- 3. For the purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.**
- 4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.**

The MJP Commission drafted the Model Rule because many states had erected excessive barriers to admission for out-of-state lawyers, often requiring those lawyers to take the state's bar examination. The MJP Commission concluded that such requirements had become problematic in light of lawyers' increasing mobility and the increasingly interstate character of law practice. The MJP Commission's report to the House of Delegates highlighted these trends:

At one time, lawyers tended to maintain their law offices in a single jurisdiction over the course of their entire legal careers because of the local nature of law practice. Today, in contrast, geographic mobility is unexceptional. Lawyers move from one state to another in order to continue to serve clients who are relocating or to better serve clients that function outside the state, for personal reasons, for career advancement, or for a host of other reasons. Lawyers change law firms or employers, or simply reestablish their individual practices in different jurisdictions. Lawyers in large law firms move from one office of their firm to another. Lawyers employed by corporations move from one corporate office to another.

Jurisdictional restrictions impede national mobility, because in many cases the process for admitting lawyers to practice law in a new jurisdiction is lengthy, expensive, and burdensome. Some states subject a lawyer who is already licensed and experienced in legal practice to the process designed for admitting new law school graduates. The practicing lawyer is required to take the state bar examination and, upon receiving a passing grade, to undergo character and fitness review.

Report 201G, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, at 1.

## **II. Adoptions of the Model Rule**

Current approaches to admission by motion fall into three categories. First, approximately ten jurisdictions have an admission by motion procedure that is nearly identical to the Model Rule.<sup>4</sup>

A second group of approximately thirty jurisdictions have an admission by motion procedure that imposes restrictions beyond those contained in the Model Rule. For example, more than half of these states 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. Moreover, some states have a definition of the types of practice experiences that qualify a lawyer for admission by motion that is narrower than the Model Rule definition. Some states also require that lawyers certify that they intend to practice actively in the state where admission by motion is being sought.

Finally, approximately eleven states still have not adopted any admission by motion procedure and instead require lawyers to take at least some part of the state's bar exam (or a special lawyers' examination) in order to gain admission.

## **III. Issues and Questions Relating to the Model Rule on Admission by Motion**

Lawyers are engaged in more cross-border practice now than when the Model Rule was first adopted nearly ten years ago. This continued growth in cross-border practice suggests that the Commission might reexamine the Model Rule, determine whether it has had its intended effect, and determine if any new efforts might be advisable in this area. Indeed, in its final report, the MJP Commission concluded that precisely such work would have to be undertaken. It advised that the ABA would have to "evaluate the implementation and impact of its policies relating to multijurisdictional practice, coordinate the continued study of multijurisdictional practice and monitor developments in the United States and in international practice, and make such additional recommendations as appropriate to govern the multijurisdictional practice of law that serve the public interest." Introduction and Overview, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, at 15. To gather information for possible Commission actions regarding the ABA Model Rule and to implement the MJP Commission's recommendation to engage in further information gathering in this area, the Commission seeks information regarding the following:

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<sup>4</sup> A comparison chart is available here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_comp.pdf](https://www.abanet.org/cpr/mjp/admission_motion_comp.pdf)

A. Options for Possible Commission Action:

1. Should the Commission recommend that the ABA actively encourage states that make no provision for admission by motion, or have stricter eligibility requirements for admission by motion, to adopt the Model Rule?
2. Should restrictions contained in the Model Rule be eased further to facilitate admission by motion? If so, which current requirements should be amended?
  - a. Section 1(c) of the Model Rule requires a lawyer to have been “engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed.”
    - i. Does this requirement make relocation more difficult for women, who are more likely to have taken time away from practice to raise children, or for members of military families, who may find their practice interrupted because of an assignment or relocation?
    - ii. What adverse effects (if any) would result from liberalizing this requirement to permit admission by motion at an earlier point in time or by eliminating the time requirement entirely? In other words, what is the basis for the “five of past seven years” requirement? Could it safely be liberalized or eliminated?
  - b. To the extent that states move towards a Uniform Bar Exam<sup>5</sup> or continue to rely primarily on testing materials created by the National Conference of Bar Examiners (such as the Multistate Bar Exam, Multistate Essay Exam, and the Multistate Performance Test), should a state rely on a recently licensed lawyer’s test results as an alternative to section 1(c)’s practice requirements?
  - c. Should there be a category of admission by motion short of full membership? For example, some states currently have a special registration procedure for in-house counsel. Would it be advisable to adopt other special registration categories that would permit a lawyer to perform certain types of work in a state, such as legal services related to international law or federal law?

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<sup>5</sup> See <http://www.ncbex.org/multistate-tests/ube/>.

- d. Should Model Rule 5.5(d) be amended to permit a lawyer to practice within a state when that lawyer is pursuing admission by motion expeditiously but has not yet gained formal admission? *See, e.g., D.C. App. R. 49(c)(8)*. Should such a safe harbor provision also be available when the lawyer seeks admission by examination if the lawyer does not qualify for motion admission or if the jurisdiction does not recognize motion admission? If such a safe harbor includes both motion admission and admission by examination, should the period of the safe harbor differ depending on the form of admission the lawyer is seeking?

#### B. The Experience of States that Permit Admission by Motion

1. Are lawyers who are admitted by motion more likely to be the subject of discipline, disciplinary complaints, or legal malpractice actions than lawyers who have been admitted through traditional means (i.e., by taking the state's bar examination)?
2. How does the Model Rule advance (or hinder) the state-based system of lawyer regulation?
  - a. For example, does the adoption of the Model Rule enhance a state's control over law practice by ensuring that lawyers who practice in the state are formally licensed to practice law there?
  - b. Similarly, might the increase in the number of lawyers who are licensed in multiple jurisdictions enhance the resources available to bar associations and disciplinary counsel, such as through increased bar dues and greater participation in lawyer protection funds? Or do the additional lawyers admitted on motion pose a greater burden to the disciplinary system?
  - c. Does a state have a legitimate concern that motion admission could attract a substantial number of out-of-state lawyers to seek admission to the state's bar although they have no intention of relocating to the state, thereby making it harder for the state's courts to regulate these lawyers? A state may conclude that by requiring passage of its bar examination as a condition of admission, it weeds out those whose interest in the state is casual or peripheral and who have no commitment to the state's administration of justice. Does this concern have empirical support? If so, is there a way short of denying motion admission to address such a concern?

3. How does the Model Rule advance (or adversely affect) the profession's core values, including confidentiality, loyalty, avoidance of forbidden conflicts, diligence, and protection of the public?
4. What are the constitutional implications of existing variations on the Model Rule?
  - a. For example, do reciprocity requirements raise dormant commerce clause or other constitutional problems?
  - b. What issues have arisen in cases that challenge these procedures?

C. The Concerns of States that Do Not Permit Admission by Motion

1. In states that do not permit admission by motion, why have they decided not to do so? Do these states have concerns that are related to the profession's core values? If so, what is the nature of these concerns?
2. To the extent a state is concerned about out-of-state lawyers' knowledge of local law, does the bar examination in that state test local law?
  - a. If so, how much local law is on the state's bar examination?
  - b. To what extent does the state rely on multistate tests created by the National Conference of Bar Examiners?
  - c. How would the widespread adoption of the Uniform Bar Examination affect these concerns?
3. Are there any relevant demographic considerations that should affect a state's approach to admission by motion?
  - a. For example, in states that attract retirees, are those states more likely to receive applications for admission by motion from retiring or semi-retired lawyers?
  - b. If retiring or semi-retired lawyers become admitted by motion, are they any more likely than other attorneys to be subject to legal malpractice actions, disciplinary complaints, or discipline? Are there other concerns that relate to the profession's core values that would justify treating these lawyers differently?

**IV. Conclusion**

The practice of law has become increasingly national and transnational in the years since the American Bar Association adopted the Model Rule for Admission by

Motion. In light of these trends, the Commission seeks input into whether amendments to the Model Rule or other action would be advisable and specifically requests responses to the questions posed in this paper. Any responses or any comments on related issues should be directed by **February 15, 2011**, to:

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Comments received may be posted to the Commission's website.

## Selected Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

The MJP Commission's report on the Model Rule on Admission by Motion can be found here: <https://www.abanet.org/cpr/mjp/report-201g.pdf>

A fifty state survey of the existing admission procedures for out-of-state lawyers is here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_rules.pdf](https://www.abanet.org/cpr/mjp/admission_motion_rules.pdf)

A comparison of state procedures for the admission of lawyers relative to the Model Rule is here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_comp.pdf](https://www.abanet.org/cpr/mjp/admission_motion_comp.pdf)

Statistics regarding admission by motion nationwide can be found here: [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2009\\_Stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2009_Stats.pdf) (see pages 26-28)

A description of Canada's approach to this issue is here: <http://www.flsc.ca/en/committees/mobility.asp>

Essays related to the Uniform Bar Examination can be found here: [http://www.ncbex.org/uploads/user\\_docrepos/780109\\_UBEEEssays\\_01.pdf](http://www.ncbex.org/uploads/user_docrepos/780109_UBEEEssays_01.pdf)

**AMERICAN BAR ASSOCIATION  
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
STANDING COMMITTEE ON CLIENT PROTECTION  
REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, that the American Bar Association House of Delegates adopts the proposed  
2 amendments to the Model Rule for Admission by Motion, dated February 2011.

**ABA Model Rule on Admission by Motion**

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4  
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 ~~first professional degree in law (J.D. or LL.B.)~~ degree from a law school  
12 approved by the Council of the Section of Legal Education and Admissions to the Bar  
13 of the American Bar Association at the time the ~~graduate applicant~~ applicant matriculated or  
14 graduated;
  - 15 (c) have been primarily engaged in the active practice of law in one or more states,  
16 territories or the District of Columbia for five of the seven years immediately  
17 preceding the date upon which the application is filed;
  - 18 (d) establish that the applicant is currently a member in good standing in all jurisdictions  
19 where admitted;
  - 20 (e) establish that the applicant is not currently subject to lawyer discipline or the subject  
21 of a pending disciplinary matter in any ~~other~~ jurisdiction;
  - 22 (f) establish that the applicant possesses the character and fitness to practice law in this  
23 jurisdiction; and
  - 24 (g) designate the Clerk of the jurisdiction's highest court for service of process.
- 25
- 26 2. For purposes of this rule, the "active practice of law" shall include the following activities, if  
27 performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if  
28 performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted  
29 in that jurisdiction; however, in no event shall any activities ~~listed under (2)(e) and (f)~~ that  
30 were performed in advance of bar admission in some ~~the~~ state, territory, or the District of

31 Columbia jurisdiction to which application is being made be accepted toward the durational  
32 requirement:  
33

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

- 43
- 44 3. For purposes of this rule, the active practice of law shall not include work that, as  
45 undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was  
46 performed or in the jurisdiction in which the clients receiving the unauthorized services were  
47 located.
- 48
- 49 4. An applicant who has failed a bar examination administered in this jurisdiction within five  
50 years of the date of filing an application under this rule shall not be eligible for admission on  
51 motion.

## REPORT

The Section of Legal Education and Admissions to the Bar recommends that the House of Delegates amend the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought. That provision currently states: “however, in no event shall activities listed in (2)(e) [in-house counsel] and (f) [judicial law clerk] that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement.”

The Standing Committee on Client Protection raised the concern that this language creates “an unfair and unnecessary distinction” between in-house counsel and judicial clerks, and the other categories of lawyers listed in paragraph 2. The Section agrees. For example, Attorney 1 licensed in State A who practices with a federal agency in State B for five years would qualify for admission on motion in State B, while Attorney 2 licensed in State A who practices as in-house counsel in State B for five years would not.

Other provisions of the Rule, which are retained, make clear that the practice has to occur in a jurisdiction “that affirmatively permits such activity by a lawyer not admitted” and “shall not include work that, as undertaken, constituted the unauthorized practice of law.” These provisions prevent an attorney from qualifying if he has skirted any admission or registration requirements a jurisdiction imposes. Thus, in the above example, if State B had not adopted Model Rule 5.5(d)(1) providing “safe harbor” to in-house counsel, Attorney 2 must have complied with any registration or admission requirements in State B in order for the practice to count.

In addition to the elimination of this provision of paragraph 2, other amendments to the Rule are proposed. The other amendments relate to all categories of practice, not just practice as in-house counsel or a judicial clerk.

Paragraph 2 is amended to make clear that any activities undertaken before the applicant was admitted to the bar in some jurisdiction will not count toward the durational requirement under any circumstances. When seeking admission on motion, applicants often expect to count their employment during the period between graduating from law school and passing the bar examination as qualifying practice. This arises most often in the context of service as a judicial clerk, but the Section suggests this bright-line rule should apply to all categories.

In paragraph 2, a new provision is added clarifying that the activities must be performed where the applicant is “authorized to practice” in order to count as the active practice of law under the Rule. This new provision is intended to address situations where an applicant is admitted in a jurisdiction but not authorized to practice because of inactive status. Some jurisdictions classify lawyers as in “good standing” even if the lawyer is inactive, so the provision of paragraph 1(d) [“the applicant is currently a member in good standing in all jurisdictions where admitted”] is inadequate to address this.

It is recommended that paragraph 1(b) be revised to include a degree from a law school that was ABA approved at the time the lawyer matriculated or graduated. This is common under the admission on motion rules already adopted in many jurisdictions. It also is consistent with Interpretation 102-10 of the Standards.

Finally, paragraph 2(f) is revised from “service as corporate counsel” to “service as in-house counsel provided to the lawyer’s employer or its organizational affiliates.” This is more consistent with the wording used in Model Rule 5.5 and the Model Rule for Registration of In-House Counsel.

Respectfully submitted,

Hon. Christine M. Durham, Chair  
ABA Section of Legal Education  
and Admissions to the Bar

February 2011

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association  
Section of Legal Education and Admissions to the Bar

Submitted By: Hon. Christine M. Durham, Chair  
Section of Legal Education and Admissions to the Bar

1. Summary of Recommendation(s).

The Section of Legal Education and Admissions to the Bar recommends that the House of Delegates adopts the proposed amendments to the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

2. Approval by Submitting Entity.

The Council of the Section of Legal Education and Admissions to the Bar approved the amendments at its meeting on June 11 - 12, 2010.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The proposed changes modify the existing ABA Model Rule on Admission by Motion.

5. What urgency exists which requires action at this meeting of the House?

The proponents believe that the Model Rule should be amended as quickly as possible to correct the discrepancy that exists.

6. Status of Legislation. (If applicable.)

n/a

7. Cost to the Association. (Both direct and indirect costs.)

n/a

8. Disclosure of Interest. (If applicable.)

n/a

9. Referrals.

Prior to the submission of this report to the House of Delegates, it was circulated to all ABA entities and other interested parties for comment. All comments received have been considered and incorporated into the report as appropriate.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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## **EXECUTIVE SUMMARY**

### **A. Summary of Recommendation**

The Section of Legal Education and Admissions to the Bar recommend that the House of Delegates adopts the proposed amendments to the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

### **B. Issue Recommendation Addresses**

The recommendation addresses the concern that the current Model Rule creates “an unfair and unnecessary distinction” between in-house counsel and judicial clerks, and the other categories of lawyers listed in paragraph 2 of the rule.

### **C. How Proposed Policy Will Address the Issue**

The recommendation eliminates the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

### **D. Minority Views or Opposition**

None