No. ________

In The

Supreme Court of the United States

LAWYERS UNITED INC., EVELYN AIMEE DeJESÚS, AND ALLAN WAINWRIGHT,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If all men and women are created equal, all lawyers are created equal. This 21st Century case implicates this Supreme Court's *supervisory* responsibility over the balkanized and disparate attorney licensing Local Rules in the ninety-four United States District Courts that some commentators have concluded are without rhyme or reason. Congress concluded that there is no meaningful opportunity to challenge United States District Court *Local Rules* because the judges who make the rules decide whether they are lawful. It thus enacted 28 U.S.C. § 332(d)(4) and placed on each United States Circuit Judicial Council a statutory duty to periodically review District Court *Local Rules* for consistency with 28 U.S.C. §§ 2071-72. (App. 141-143) Congress declared 28 U.S.C. § 2071(a) incorporates the standard of review set forth in 28 U.S.C. § 2072(b), which provides: "Such rules shall not abridge, enlarge, of modify any substantive rights."

1. The first question presented is whether Local Rules that on their face create classes of citizens and lawyers exceed the rule-making authority of the United States District Courts?

2. The second question presented is whether Local Rules that on their face create classes of citizens and lawyers and compel the petitioners, and all similarly situated *licensed* attorneys, to subsidize, join and associate with a second, third, and fourth mandatory state bar association as a condition precedent to obtain *general* admission *licensing* privileges in the United States District Courthouse are constitutional?

LIST OF PARTIES

Petitioners are LAWYERS UNITED INC., a corporation dedicated to protecting and enforcing the constitutional rights of licensed attorneys in good standing and its members EVELYN AIMEE DeJESÚS, Esq., and ALLAN WAINWRIGHT, Esq.

Respondents are the UNITED STATES OF AMERICA, and the individually named judges serving on the District of Columbia Circuit Judicial Council, Eleventh Circuit Judicial Council, and Ninth Circuit Judicial Council, and the active District Judges serving on the United States District Courts in the District of Columbia, Florida, and California. The respondents are sued in their official capacity solely for injunctive and declaratory relief.

The name of each individual respondent is as follows: SRI SRINIVASAN, Chief Judge District of Columbia Judicial Council, and his Honorable Judicial Council colleagues PATRICIA A. MILLETT, ROBERT L. WILKINS, GREGORY G. KATSAS;

ED CARNES, Chief Judge of the ELEVENTH CIRCUIT JUDICIAL COUNCIL, his Hon. Judicial Council colleagues: CHARLES R. WILSON, WILLIAM H. PRYOR Jr., BEVERLY B. MARTIN, ADELBERTO JORDAN, ROBIN S. ROSENBAUM, JILL PRYOR, KEVIN C. NEWSON, and BRITT C. GRANT;

SYDNEY R. THOMAS, CHIEF JUDGE of the NINTH CIRCUIT JUDICIAL COUNCIL, and his Hon. Judicial Council colleagues, RANDY SMITH,

LIST OF PARTIES—Continued

MARY H. MURGUIA, MILAN D. SMITH, JR., MORGAN CHRISTEN, JAY S. BYBEE, BARRY MOSKOWITZ, VIRGINIA A. PHILLIPS, J. MICHAEL SEABRIGHT, OKI MOLLWAY, RICHARD S. MARTINEZ;

BERYL A. HOWELL, CHIEF JUDGE FOR THE DISTRICT OF COLUMBIA, and his Hon. District Judge colleagues EMMET G. SULLIVAN, COLLEEN KOLLAR-KOTELLY, JAMES E. BOASBERG, AMY B. JACKSON, RUDOLPH CONTRERAS, KETANJI B. JACKSON, CHRISTOPHER R. COOPER, TANYA S. CHUTKAN, RANDOLPH D. MOSS, AMIT P. MEHTA, TIMOTHY J. KELLY, TREVOR N. McFADDEN, DABNEY L. FRIEDRICH, and CARL J. NICHOLS;

PHYLLIS J. HAMILTON, Chief Judge of the Northern District of California, and her Hon. District Judge colleagues YVONNE GONZALEZ ROGERS, JON S. TIGAR, JEFFREY S. WHITE, WILLIAM ALSUP, EDWARD CHEN, VINCE CHHABRIA, JAMES DONATO, WILLIAM ORRICK, RICHARD SEEBORG, EDWARD J. DAVILA, BETH LABSON FREEMAN, LUCY H. KOH;

VIRGINA A. PHILLIPS, CHIEF JUDGE OF THE CENTRAL DISTRICT OF CALIFORNIA, and her Hon. District Judge colleagues;

LAWRENCE J. O'NEILL, Chief Judge of the Eastern District of California, and his Hon. District Judge colleagues DALE A. DROZD, MORRISON C.

LIST OF PARTIES—Continued

ENGLAND, JR., JOHN A. MENDEZ, KIMBERLY J. MUELLER, TROY L. NUNLEY;

LARRY ALAN BURNS, CHIEF JUDGE OF THE SOUTHERN DISTRICT OF CALIFORNIA, and his Hon. District Judge colleagues MICHAEL M. ANELLO, CYNTHIA A. BASHANT, ANTHONY J. BATTAGLIA, ROGER T. BENITEZ, GONZALO P. CURIEL, WILLIAM B. ENRIGHT, WILLIAM Q. HAYES, JOHN A. HOUSTON, MARILYN L. HUFF, M. JAMES LORENZ, M. MARGARENT McKEOWN, JEFFREY T. MILLER, BARRY TED MOSKOWITZ, DANA M. SABRAW, JANIS L. SAMMARTINO, THOMAS J. WHELAN;

MARK WALKER, Hon. Chief Judge of the Northern District of Florida and his active District Judge colleagues;

STEVEN MERRYDAY, Chief Judge of the Middle District of Florida and his active District Court colleagues;

K. MICHAEL MOORE, Chief Judge of the Southern District of Florida and his active District Judge colleagues.

CORPORATE DISCLOSURE STATEMENT RULE 29.6

LAWYERS UNITED INC. is a corporation organized under California law. It is not publicly traded. It has no parent, subsidiaries or affiliates.

RELATED CASES

Lawyers United Inc. et al. v. United States et al., Docket 1:19-cv-03222, U.S. District Court for the District of Columbia, Judgment entered June 29, 2020, petition for rehearing denied August 21, 2020.

Lawyers United Inc. et al. v. United States et al., Docket 20-5269, U.S. Court of Appeals for the District of Columbia Circuit, Judgment entered March 15, 2021, petition for rehearing denied May 5, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The U.S. Court of Appeals for the District of Columbia Circuit Opinion affirming dismissal is set forth at App. 1-2. It is one paragraph and not published. The Order denying rehearing and rehearing *en banc* is set forth at App. 25. The District Court's Order dismissing the out-of-state parties under FRCP 12(b)(2) and dismissing the amended complaint under FRCP 12(b)(6) and denying Petitioners' Motion for Preliminary Injunction is set forth at App. 6-24. It is not published. The District Court's order denying rehearing is set forth at App. 3-5.

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on March 15, 2021. (App. 1) The timely filed petition for rehearing and rehearing *en banc* was denied on May 5, 2021. (App. 25) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and substantive provisions involved are set forth in the Petition. The challenged Local Rules for the District of Columbia, Central District of California, and Middle District of Florida are set forth in the Appendix. (App. 26-44) The Local Rules for the other District Courts in California and Florida adhere to the same pattern set forth in the Central District of California and Middle District of Florida.

STATEMENT OF CASE

A. THE RULES ENABLING ACT

Congress has carefully circumscribed "Local Rulemaking" discretion. It legislated an expanded supervisory role for the Judicial Councils in the District Court local rule-making process. (App. 141-143) 28 U.S. Code § 332(d)(4) provides:

> Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

A key part of the legislation was to subject all rulemaking of the district courts to review by the Circuit Judicial Councils. (App. 141) According to the Congressional Reporter, the "amendment § 332 to add a new

paragraph (d)(4) was a consequence of widespread discontent," communicated to Congress, about "a proliferation of local rules." (App. 141) Congress found that the rule-making procedures "lacked sufficient openness" and that local rules often "conflict with national rules of general applicability." (App. 141) Congress also placed on the judicial councils a mandatory periodic duty of review because it concluded "effective appellate review of such a [local] rule [is] impossible sometimes, impractical most times, and impolitic always" (App. 142) because the judges who enact the Local Rules decide whether they are lawful. The Circuit Judicial Councils are empowered to "modify or abrogate" any rule found inconsistent with Sections 2071-72. "There is no such thing as a rule's becoming sacrosanct merely for having passed judicial scrutiny the first time. It is subject to ongoing scrutiny." (App. 149)

The decisions below skip over and do not address the principle that all men are created equal, the text of § 332(d)(4), or the reasons and objectives sought by Congress in enacting this statute imposing mandatory judicial review. No lower court, many of whom have upheld attorney licensing Local Rules as rational, has addressed § 332(d)(4) and its ramifications.

Congress has also legislated an interlocking standard of review for District Court Local Rules that is stricter than strict security. Section 2071(a) provides:

> The Supreme Court and all courts established by Act of Congress may from time to time

> prescribe rules for the conduct of their business. *Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.* (Emphasis added)
>
> 28 U.S. Code § 2072(b) provides:
>
> *Such rules shall not abridge, enlarge or modify any substantive rights*. (Emphasis added)

Thus, the standard of review set forth in § 2071(a) for Local Rules is incorporated by reference into the standard of review for nationally promulgated rules set forth in § 2072(b).

The District of Columbia Circuit in *National Ass'n of Multijurisdiction Practice v. Howell*, 851 F.3d 12 (D.C. Cir. 2017) held only the Supreme Court has *supervisory* review over Local Rules. *Howell* holds: "A single district court judge or an appellate panel may not usurp that body's [Supreme Court] authority." *Id*. at 18. *Howell* and other Circuits have carved out an exception to 28 U.S.C. §§ 2071-72 by holding Local Rules need only pass a rational basis standard of review, based on any conceivable evidence in the record or not, in light of the "*professional speech*" doctrine. *Id*. at 19. The District of Columbia Circuit one paragraph decision below cites *Howell* as binding precedent.

However, after *Howell* was decided, this Supreme Court invalidated the so-called "*professional speech*" doctrine in *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018). This Supreme Court also rejected rational basis review as foreign to First Amendment jurisprudence in *Janus*

v. AFSCME, 138 S.Ct. 2448 (2018). *Howell* relies on both the professional speech doctrine and rational basis review. The decisions below rely on *Howell* and pay no attention to *Becerra* and *Janus*.

B. THE RIGHT TO COUNSEL AND THE FULL FAITH AND CREDIT STATUTE IN THE ARTICLE III COURTS

Petitioners aver that if all men and women are created equal then all lawyers are created equal. This case arises out of a common nucleus of operative facts and law. It presents a pure question of law only this Court can decide. The government has admitted petitioners have standing and there is no material fact dispute. The government concedes petitioners have taken an attorney's oath to uphold the law and comply with the Rules of Professional Conduct.

The federal right to counsel is inextricably intertwined with the Bill of Rights' protected freedoms to speech, counsel, assembly, and to petition the government for the redress of grievances. Citizens also have a substantive right to counsel and to petition the government with counsel. *General* admission licensing privileges provide a public office that has particular value to the petitioners as an association of licensed lawyers, individual lawyers, clients, and to 350 million citizens who may want to choose counsel from a nationwide market of legal know-how. 28 U.S.C. § 1654 *Appearance personally or by counsel* provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 1738 *State and Territorial statutes and judicial proceedings; full faith and credit*:

> "The records of any Court or State are admissible in evidence, and such records shall have the same full faith and credit in every court within the United States as they have by law or usage in the Courts of any such State from which they are taken."

Every lawyer is admitted to the bar by a judgment of professional proficiency by an act and record of a state supreme court. Section 1738 states supreme courts acts and records are entitled to full faith and credit in every United States District Court. "Regarding judgments, . . . the full faith and credit obligation is exacting." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998). There is "no roving 'public policy exception' to the full faith and credit due *judgments*." *Ibid.* (emphasis in original).

Supreme Court Rule 5 and Federal Rule of Appellate Practice 46 take for granted all attorneys are created equal and provide full faith and credit to all state supreme court records. These national rules promulgated under 28 U.S.C. § 2072 are approved by Congress. Congress also presumes all citizens and attorneys are created equal and does not discriminate for or against any class in admission to practice before

administrative agencies, 5 U.S.C. § 500(b), or in hiring attorneys, 28 U.S.C. § 517. Approximately one-third of the 94 Federal District Courts also assume all lawyers are created equal, provide full faith and credit, and do not discriminate in favor or against any class of lawyers or citizens in *general* bar admission licenses.[1]

In *United States v. Windsor*, 133 S.Ct. 2675 (2103), this Court held the federal government is required to accord same sex citizens equal rights and their marriage licenses full faith and credit in the federal context. The rights to counsel, association, and petition are textually embedded in the Constitution. They predate the fundamental right to marriage equality by over two hundred years.

The Courts below have refused to provide full faith and credit to the state judgments and oath of office of petitioners and other attorneys in good standing licensed in 49 states. The Courts below have refused to follow the dictates of 28 U.S.C. § 1738, the standard of review for Local Rules set forth by Congress, this Court's precedent in *Becerra* overturning the professional speech doctrine, and this Court's decision in *Janus* holding rational basis review is foreign to First Amendment jurisprudence. All of this has occurred under the excuse that only the Supreme Court has supervisory review over licensing rules. *See Howell*, 851 F.3d at 18 ("A single district court judge or an appellate

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[1] United States District Court for the District of Maryland Survey of the Admission Rules in the Federal District Court (Jan. 2015), http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf Page 1.

panel may not usurp that body's [Supreme Court] authority.").

C. THE CHALLENGED FEDERAL DISTRICT COURT ATTORNEY LICENSING RULES ARE NOT NEUTRAL AND THEY ARE NOT GENERALLY APPLICABLE

Petitioners challenge the District of Columbia attorney licensing Local Rules that on their face are not neutral and generally applicable. These licensing rules discriminate among and target at least eight classes of citizens and afford these classes of attorneys and their clients unequal substantive and constitutional rights. LCvR 83.2(e) *Attorneys Employed by the United States* provides that any attorney employed by the United States may appear, file papers, and practice on behalf of their client regardless of state of licensure or office location. (App. 27) LCvR 83.2(f) *Attorneys Employed by a State* also provides any attorney who is admitted in any state may appear and represent the state. (App. 27-28) LCvR 83.2(g) *Attorneys Representing Indigents* provides any attorney representing an indigent may be admitted in any state, may appear, file papers, and represent their indigent client in any case handled without a fee. (App. 28) Thus, the federal government, states, and indigents are the special favorites. These superior citizens and body politics can hire any attorney they want regardless of the attorney's state of admission or principal office location. The District of Columbia Bar Association is a mandatory trade union

that engages in political advocacy on matters of public concern.

Similarly, LCvR 83.8 further discriminates among several classes of citizens and affords these classes of attorneys and their clients second-class substantive and constitutional rights. LCvR 83.8(a)(1) provides *general* admission privileges to any District of Columbia attorney regardless of *office location*. (App. 28) LCvR 83.8(a)(2) provides *general* admission privileges to any attorney admitted in a state where they have their principal office. (App. 28) LCvR 83.8(a)(3) provides *general* admission privileges to any admitted in-house corporate attorney. (App. 28)

DC LCvR 57.21 similarly establishes categories of citizens, special friends and foes. (App. 33) Those charged with crimes have more constitutional and substantive rights than citizens seeking to enforce civil rights. Once again, some citizens can sit at the front of the bar in the United States courtroom, but other citizens are second-class, not unlike the citizens who were denied a seat on a bus or railroad car, or denied the right to vote, or denied the right to serve as counsel based on gender. Citizens have a fundamental right to choose their spouses, but not their lawyers under licensing rules in our nation's capital.

Petitioners challenge the Local Rules of the three United States District Courts in Florida. These Local Rules categorically deny *general* bar admission privileges to all lawyers not licensed by the Florida Supreme Court. (App. 41) They further deny some

petitioners *pro hac vice* admission on the basis of residence. (App. 43) They have extra-territorial impact outside the state boundary line. They compel all citizens and corporations to choose a Florida licensed attorney in order to exercise their constitutional rights in the district courts. The Florida Supreme Court compels all of its lawyers join and pay dues to its mandatory Florida Bar Association. The Florida Bar Association routinely utilizes its members' dues to engage in partisan political lobbying. Thus, in order to obtain *general* admission privileges in the United States courts all attorneys are compelled to associate with and pay dues to a mandatory trade union. Sometimes, they are compelled to pay union dues to a second, third, and fourth mandatory bar association.

Petitioners challenge the *general* bar admission licensing rules of the four United States District Courts in California that categorically deny them *general* bar admission privileges because they are not licensed by the California Supreme Court. (App. 36) These Local Rules further categorically and wholly deny some petitioners *pro hac vice* admission privileges because they reside or have offices in California. (App. 38) These Local Rules have extra-territorial impact. They compel all American citizens and corporations to choose a California licensed attorney in order to exercise their constitutional rights in a United States Courthouse. The California State Bar association has been sued numerous times for partisan political lobbying and is historically a mandatory trade union. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 9-17 (1990).

The Florida and California Local Rules are mirror opposites. If a citizen from California sues a citizen from Florida on a federal claim in federal court, the Florida citizen or corporation is also a party. If the first to file or venue is in California, it is arbitrary and irrational to compel the Florida citizen to hire a California lawyer. Likewise, if venue is in Florida, it is equally arbitrary to compel the California citizen to hire a Florida lawyer on the identical federal claims. The same holds true on jurisdiction based on diversity. Diversity claims are also governed by the *Federal Rules of Civil Procedure*. The purpose of diversity jurisdiction is to provide a neutral forum. That purpose is defeated by the Local Rule reliance on forum state law on both federal and diversity claims in two-thirds of the district courts.

The decisions below zoom over the fact the challenged Local Rules are not neutral and they are not generally applicable. They are not neutral because they pre-select favored and disfavored speakers. They do not serve any legitimate government interest because the same citizen can invidiously have unequal privileges and immunities for the same federal claims depending solely on local procedure. They are not generally applicable when the government can choose any lawyer regardless of forum state law or office location and American citizens who have constitutional rights cannot.

Every year, year in and year out, over 16,000 lawyers are provided equal and reciprocal licensing privileges and immunities and dignity in a second state

that are denied to petitioners, and thousands of other citizens, by monopoly protecting licensing Local Rules often fixed and funded by disparate political trade unions. Every single one of these 16,000 lawyers are categorically disqualified for *general* admission licensing privileges in the Florida and California District Courts. Many are categorically disqualified in the District of Columbia. The decisions below dodge these undisputed material facts.

D. PROCEDURAL HISTORY

This Court has never addressed the licensing discrimination question presented in this case on the merits. However, this Court has denied review in prior decisions upholding this licensing discrimination, including the District of Columbia's Circuit's 2017 decision in *Howell*.

1. This Court's Decision in *Becerra* and *Janus*

Recently, this Court held the government cannot "reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, ___ (2018) (slip op., at 14). In *Becerra*, this Court cited with disapproval several U.S. Court of Appeals cases upholding licensing discrimination as rational based on the so-called "professional speech doctrine." In *Becerra*, this Court held there is no such thing as a professional speech doctrine. Several decisions upholding

Local Rules as rational including *Howell* squarely rely on the professional speech doctrine. Additionally, in *Janus v. AFSCME*, 138 S.Ct. 2448, 2465 (2018), this Court held minimal scrutiny rational basis review is foreign to its First Amendment speech jurisprudence and it rejected rational basis review in a licensing case.

In light of *Becerra* and *Janus* and other recent 21st Century Supreme Court precedent and pending litigation, changes in technology and cultural mores, including the coronavirus, petitioners expanded the spotlight because of the interstate relationship of the Local Rules. This licensing discrimination cannot be fairly viewed in insolation; as if our Union only consisted of one state; or only one mandatory bar association; or only one United States District Courtroom, where some citizens are special and others second-class.

Petitioners filed an eighty-page chapter and verse complaint. They attached to the complaint Exhibit A (App. 45-82) which proves the 100% subjective California bar exam that experienced out-of-state attorneys are required to pass in order to obtain *general* admission privileges in the District Courts in California is not a valid and reliable test, and that year in and year out, this 100% subjective licensing test has a *standard error of measurement* shoddier than .48. This speech-content entry level exam is employed by the content-police to routinely fail two out of three already licensed attorneys on the July bar exam. Flipping a coin would be more reliable measure. *See* Amended Complaint ¶ 67 ("The test results for this licensing

exam do not comply with professional *Standards* and are inadmissible as evidence under the *Federal Rules of Evidence* 701 series and the *Daubert* standards because the test results are neither *valid* nor *reliable*, and they contradict the ABA legal industry licensing standard of reciprocity.").

Every experienced out-of-state attorney seeking *general* admission licensing privileges in the Federal District Courts in California must pass this Berlin Wall guarded by the content-police. Moreover, not unlike the 17th Century government practice of licensing printing presses, and not unlike the literacy tests that were used to deprive black citizens of the right to vote, some petitioners are denied *general* admission licensing privileges based on this prior restraint not only in California, but also under the D.C. Local Rules that vicariously adopt this California entry-level rite of passage.

Petitioners further attached to the complaint Exhibit B—a petition filed with the Chair of the Ninth Circuit Judicial Council by legal scholars requesting it to abrogate this licensing discrimination. Exhibit B traces the history of the promulgation of the Local Rules back to the adoption of the *Federal Rules of Civil Procedure* in 1934. Exhibit B demonstrates that this licensing discrimination is not reasonably related to any legitimate government interest in this 21st Century. (App. 83-140) Exhibit B includes notice that the petition was denied. (App. 86-88)

2. Petitioners' Motion for a Preliminary Injunction

The parties below stipulated to a briefing continuance in light of the then pending petition for certiorari *in Jarchow v. State Bar of Wisconsin*, 130 S.Ct. 1720 (2020). Petitioner LAWYERS UNITED INC. filed an amicus petition in *Jarchow*. In light of *Janus*, *Jarchow* and *amici* asked this Court to hold that it was unconstitutional to compel attorneys to join and subsidize mandatory state bar unions that engaged in non-germane political advocacy. Justices THOMAS and GORSUCH filed a dissent from cert denial.

After certiorari was denied in *Jarchow*, petitioners amended their complaint and concurrently filed a Motion for Preliminary Injunction. Petitioners' amended complaint allegations track their Motion for Preliminary Injunction. It includes Exhibits A and B; multiple attorney Declarations under oath establishing injury and standing;[2] the American Bar Association 20-20 Commission (2012) (App. 164-191) judgment that all states adopt admission on motion for ABA graduates with three years of experience; and ABA Recommendation 8A (1995) finding that Local Rules that deny

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[2] Declaration of Thomas Easton, Esq. on behalf of LAWYERS UNITED INC. alleging direct injury and association standing ECF 44-2; Declaration and Supplemental Declaration of EVELYN AIMEE DeJESÚS, Esq. ECF 44.1 and ECF 44.3; Declaration of ALLAN WAINWRIGHT and Order revoking his pro hac vice admission in Middle District of Florida ECF 44.2; Declaration of JENNIFER LOW, Esq. ECF 44; Declaration of PHILLIP DOWNEY, Esq. ECF 44.5; Declaration of CHAD MARZEN, Esq. ECF 44.6.

general admission privileges to out-of-state attorneys are outdated, anti-competitive, and unnecessarily interfere with the attorney-client relationship. (App. 159-163)

Petitioners showed the purpose of a bar exam is to ascertain "entry level" minimum competence in order to protect the public. The ABA holds there is no reason to conclude an experienced attorney is less competent than a brand-new lawyer. According to the ABA, bar exams for previously licensed attorneys serve no useful purpose—women and minorities are disproportionately injured. Several converging lines of Judicial Conference studies[3] and multidisciplinary research reinforce this ABA judgment. Initially, psychometricians have concluded that it is almost impossible to get graders to agree on subjective scores.[4] Exhibit A and the

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[3] "(N)o one has yet devised an examination which will test one's ability to be a courtroom advocate." Report and Tentative Recommendations of the Committee to Practice in the Federal Courts in the Judicial Conference of the United States, 79 F.R.D. 187, 196. "Lawyers with previous trial experience are much more likely to turn in very good performances, and it permits the inference that experience improves the quality of trial performance." *Id.* at 196. There is a correlation between the quality of trial performance and the prior experience of the attorneys evaluated. 83 F.R.D. at 222. (Amended Complaint ¶ 48)

[4] Dr. Geoff Norman is a nationally recognized testing expert with over 30 years of experience. Dr. Norman is one of the experts writing a chapter in the Cambridge Handbook of Expertise and Expert Performance. Dr. Norman writes:

> "Study after study has shown that it is almost impossible to get judges to agree on scores for essay answers."

RAND Corporation studies (App. 46-60) prove it is almost impossible to get essay graders to agree on scores.[5] Exhibit A also contains testing expert evidence from Dr. Susan M. Case and Dr. Robert Kane from the *National Conference of Bar Examiners*, and Dr. Gary McClelland (App. 67-69) from the University of Colorado at Boulder, and Dr. Phillip L. Ackerman, a fellow at the testing associations responsible for promulgating testing *Standards* and professor at Georgia Tech. (App. 61-66) These experts conclude that California's 100% subjective test that experienced attorneys are required to pass is neither a valid nor reliable licensing test. Multiple *Standards* are breached. (App. 62-66)

Neuroscientists have also found that practical experience in a subject rewires the brain and makes it more efficient: "Neurons that fire together wire together." Studies show practice is indispensable for expertise and expert performance. Everyone knows practice makes perfect. Petitioners further submitted

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See "So What Does Guessing the Right Answer Out of Four Have to Do With Competence Anyway?" The Bar Examiner, p. 21 (Nov. 2008). (Amended Complaint ¶ 47)

[5] Grader correlation .41 Feb. 2001 (App. 46)

Grader correlation .48 July 2001 (App. 49)

Grader correlation .38 Feb. 2002 (App. 50)

Grader correlation .40 July 2002 (App. 52)

Grader correlation .48 Feb. 2002 (App. 54)

Grader correlation .39 Feb. 2004 (App. 56)

Grader correlation .41 July 2004 (App. 58)

The industry standard for a test to be valid is .8 to .9 (App. 66). Expert psychometric opinions by Dr. Ackerman, Dr. McClelland, and Dr. Kane included in Exhibit A.

ABA Journal new stories reporting that the *licensing rite of passage* for entry level bar exams was not necessary, being reexamined in light of COVID-19, and requested judicial notice of changed circumstances.[6]

3. The Decisions Below

The Senior District Judge allotted was previously the Chief Judge on the Court whose rules he was judging. His Honor also previously served on the Judicial Council. His Honor was deciding his own case. The court denied oral argument and ignored virtually everything petitioners submitted. He entered a Rule 12(b)(2) dismissal of the out-of-state defendants claiming he did not have *personal* jurisdiction over federal officials under the 14th Amendment (sic). He dismissed the United States as a party and petitioners' claims under Rule 12(b)(6) and denied petitioners' Motion for Preliminary Injunction. He chose to ignore the Judicial Council respondents' status as parties and their duties under 28 U.S.C. § 332(d)(4) to periodically review District Court Local Rules for consistency with 28 U.S.C. §§ 2071-72. The court held his hands were tied by *Howell* and that only the District of Columbia Circuit or the Supreme Court could grant relief.

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[6] ECF 67-1 Ward, ABA Journal, 4-21-20 "Bar exam does little to ensure attorney competence"; ECF 66-1 Ward, ABA Journal, 4-10-20 "Test-takers express safety concerns, fears from in-person bar exam—including lack of masks, unclean bathrooms."

The court further disparaged petitioners' counsel for "highly offensive analogies" (App. 22-24) for comparing the disparate Local Rules as a vestige from separate but equal era: for comparing a seat at the bar in the United States Courtroom with a seat on a public railroad car or public bus; for comparing the right to vote based on a literacy test with the right to petition based on a 100% subjective test that has a standard error of measurement shoddier than 48; for comparing the rights to counsel and to petition with the right to marriage.

On appeal: petitioners' motion to name ALLAN WAINWRIGHT as an additional party was DENIED. He filed a Declaration under oath along with an Order revoking his *pro hac vice* status in the Middle District of Florida because he had an office and residence in Florida that was attached to petitioners' Motion for Preliminary Injunction. The hearing panel members previously served on the Judicial Council. Petitioners' motion to recuse the hearing panel because of conflicts of interests and request that the Court request Chief Justice ROBERTS to assign the panel was DENIED. Petitioners' motion for oral argument was DENIED. The panel affirmed in a one-paragraph decision citing *Howell*. (App. 1-2)

The decisions below refuse to address *Janus*, *Becerra*, and petitioners' claims the challenged Local Rules that often require them to join and subsidize a second, third, and fourth mandatory state bar association to petition United States District Courts trespass

their First Amendment freedoms to not associate and not subsidize political speech they disagree with.

4. The District Court Has Personal Jurisdiction Over All of the Out-Of-State Officials and the United States is the Real Party In Interest

Federal judges are not immune from suit for declaratory and injunctive relief. *See Frazier v. Heebe, Chief Judge of the District of Louisiana*, 482 U.S. 641, 645 (1987) ("We hold that the District Court was not empowered to adopt its Local Rules."). This Court is requested to note an important distinction the court below overlooked. The named judicial officers are not being sued for their adjudicatory role to decide cases and controversies. They are parties because of restrictions and omissions in administratively enacted Local Rules, not unlike President Obama's administratively enacted immigration rules invalidated in *Texas v. United States*, 809 F.3d. 134 (5th Cir. 2015) *affirmed* 136 S.Ct. 2271 (2016), or the federal statute in *Windsor* that constructed classes among married citizens that was invalidated.

The District Court's conclusion it did not have *personal* jurisdiction is a pretextual ploy. "Congress' typical mode of providing for the exercise of *personal* jurisdiction has been to authorize service of process." *See BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1555 (2017). "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the

subject matter of the suit asserts jurisdiction over the *person* of the party served." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). *Omni* further holds "federal courts cannot add to the scope of service of summons Congress has authorized." *Id*. at 109.

The District Court's circular reasoning that it did not have *personal jurisdiction* over the judicial officers in California and Florida and the United States is not a real party in interest may sound plausible at first glance. However, a careful analysis reveals both of these conclusions false. The District Court has jurisdiction over the out-of-state defendants and the United States based on 28 U.S.C. § 1391(e)(1) and (2) and this Court's precedent interpreting these provisions. 28 U.S.C. § 1391(e) provides:

> (e) Actions Where Defendant Is Officer or Employee of the United States.—
>
> (1) In general.—
>
> A civil action in which **a** *defendant is an officer or employee of the United States* or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, *or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred*. (Emphasis added)

> (2) Service.—
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified *mail beyond the territorial limits of the district in which the action is brought*. (Emphasis added)

The administratively enacted rules are the events and omissions that give rise to petitioners' claims. These rules have extra-territorial impact. Under the District Court's reasoning, every citizen in 49 states would be required to travel to Florida or California to bring a challenge to Local Rules that implicate the rights of Americans in all 50 states. This result is the opposite of what Congress intended.

More particularly, this Court has held "[S]ection 2 of the Act, 28 U.S.C. § 1391(e), provides a similarly expanded choice of venue *and authorizes service by certified mail on federal officers or agencies located outside the district in which such a suit is filed*." (Emphasis added) *Stafford, U.S. Attorney v. Briggs*, 444 U.S. 527, 534 (1980). "The purpose of this bill [Section 1391(e) amendment] is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, *which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia.*" *Id.* at 539-40. (Emphasis in original). The "general rule" is that "all

persons materially interested . . . in the subject-matter of a suit, are to be made parties to it . . . , however numerous they may be, so that there may be a complete decree, which shall bind them all." *Trump v. Hawaii*, 138 S.Ct. 2392, 2427 (2018). One of the recognized bases for an exercise of equitable power was the avoidance of multiplicity of suits. *Ibid*.

The District Court further holds the United States is not a proper party or the real party in interest. But the text of Section 1391(e) by its terms authorized suits against the United States. "Frequently, the administrative determinations involved are made not in Washington but in the field. In either event, these are actions *which are in essence against the United States.*" (Emphasis in original) *Stafford*, 444 U.S. at 542. Hence, defendant United States is the real party in interest. The United States has been a real party in many civil lawsuits. *See United States v. Windsor*. *See Texas v. United States*, where 26 states filed a lawsuit in the Western District of Texas naming multiple federal officials with offices in the District of Columbia. Contrary to the District Court's conclusion, there is nothing in the current statutory language or current text of § 1391(e)(1) that shows that Congress was only thinking about executive officers in providing a remedy or providing for nationwide service of process under § 1391(e)(2).

The District Court further devotes several pages of his Opinion to dismissing the out-of-state defendants for lack of *personal* jurisdiction under the 14th Amendment (sic) and the District of Columbia long-arm

statute (sic). A first-year law student would know that the 14th Amendment has nothing whatsoever to do with a lawsuit in federal court challenging federal licensing discrimination. Similarly, petitioners repeatedly affirmed they were not relying on the District of Columbia long-arm statute. Petitioners rely on 28 U.S.C. § 1391(e)(2) which provides for nationwide service of process. The District of Columbia long-arm statute is not remotely relevant. False in one, false in all.

ARGUMENT

I. THIS COURT'S *SUPERVISORY* RESPONSIBILITY OVER FEDERAL LICENSING DISCRIMINATION AND ITS *SUPERVISORY* RESPONSIBILITY OVER THE ARTICLE III COURTS WARRANTS GRANTING REVIEW

The Congressional conclusion that there is no meaningful opportunity to challenge Local Rules because the judges who make the rules decide whether they are valid is front and center. The Founding principle all men and women are created equal is turned upside down. The due process principle that no person should decide their own case is turned upside down. *Howell* holds only this Supreme Court has supervisory review. *See* 851 F.3d at 18 ("A single district court judge or an appellate panel may not usurp that body's [Supreme Court] authority."). If this Court does not grant review, there is no judicial review.

Initially, the legal system is broken. In large part, this fractured system under this Court's supervisory watch is the product of monopoly protecting mandatory bar association conduct. According to respondents, all men are presumed equal and innocent, except members of the bar licensed in 49 states. Law forms the basic operating system, the transactional platform of all economic and social activity. Clifford Winston, et al., *Trouble at the Bar*, p. 2 (Brookings Institution Press, Kindle Edition 2020). The legal profession has been able to create a powerful self-aggrandizing position in the United States. *Ibid*. It has been estimated the law profession's legal monopoly fails to serve 80 percent of the known market and it continues to build barriers for people to access legal services. *Ibid*. Twenty-seven percent of all civil cases filed in the United States District Court had at least one *pro se* party.[7] The following chart depicts the numbers of total appeals and the shocking percentage of pro se appeals in all U.S. Circuit Courts of Appeals.[8]

Fiscal year	**Total Appeals**	**Pro se appeals**	**Percentage pro se**
2020	48,190	23,546	48.9%
2019	48,486	23,728	48.9%
2018	49,276	24,680	50.1%
2017	50,506	25,366	50.2%
2016	60,357	31,609	52.4%

[7] Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019 | United States Courts (uscourts.gov)

[8] https://www.uscourts.gov/sites/default/files/data_tables/jff_2.4_0930.2020.pdf

2015	52,698	26,883	51.0%
2010	55,991	27,208	48.6%
2005	68,469	28,555	41.7%
2000	54,694	24,935	45.6%
1995	50,072	19,973	39.8%

This Court should exercise its supervisory review responsibility because the courts below have neglected to conform to the public trust essential for our Union of checks and balances. Justice Brandeis believed that he could not properly comprehend the legal aspects of a controversy unless he fully understood the facts. "[T]he judgment should be based upon a consideration of relevant facts, actual or possible—Ex facto jus oritur [Law must arise from facts]. That ancient rule must prevail in order that we may have a system of living law." Melvin Urofsky, *Louis D. Brandeis* (Doubleday Publishing Kindle Edition) at 10207-10209. Brandeis held: "Knowledge is essential for understanding and understanding should precede judging." *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924).

The following undisputed material facts warrant careful consideration and review and were suppressed by the courts below, including:

- Exhibit A—demonstrating the 100% subjective California experienced attorney bar exam is not a valid or reliable licensing test according to numerous testing experts.

- Exhibit B—demonstrating legal scholars have presented a petition to the Ninth Circuit showing the balkanized licensing rules do not serve any legitimate government interest that was summarily denied.
- ABA Recommendations 8A (1995) holding the Local Rules are anti-competitive and interfere with the right to counsel and should be abrogated.
- ABA 20-20 Commission (2012) report concluding that all states should adopt admission on motion for attorneys with three years of experience as there is no reason to conclude an experienced attorney is less qualified than a law school graduate.
- Statistics showing that every year 16,000 lawyers are admitted to the bar of a second state on motion under the Uniform Bar Exam rubric adopted in 36 states and on reciprocity rules adopted in 43 states that are categorically denied to petitioners by the Local Rules in Florida and California, and sometimes denied by District of Columbia Local Rules.

The courts below also systematically ignore and disregard this Court's out-of-state attorney licensing precedent that overturned state and federally imposed burdens on a licensed attorney's opportunity to practice law under a strict scrutiny or heightened scrutiny standard of review.

First, in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), this Court overruled the 19th Century holding that an attorney's opportunity to practice law is not a fundamental right and is not a constitutionally protected privilege and immunity. The Court held:

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.[fn11] Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. *Id*. at 281-82.

Second, in *Frazier v. Heebe, Chief Judge for the District of Louisiana*, 482 U.S. 641 (1987): "The question for decision is whether a United States District Court may require that applicants for general admission to its bar either reside or maintain an office in the State where that court sits." *Id*. at 642-43. This Court said No. *Frazier* holds, "[s]imilarly, we find the in-state office requirement *unnecessary* and *irrational*. First, the requirement is not imposed on in-state attorneys." *Id*. at 649. The *Frazier* Court applied its supervisory power over Local Rules and a heightened scrutiny rational and necessary standard. *Id*. at 645. *Frazier* further states: "No empirical evidence was introduced at

trial to demonstrate why this class of attorneys . . . should be excluded from the Eastern District's Bar." *Id*. at 646-47. Obviously, rational basis review does not require the introduction of empirical evidence. *Frazier* also holds *pro hac vice* admission is not an equivalent substitute for *general* admission privileges.

Third, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) squarely holds that *bar admission on motion* (without taking another bar exam) for out-of-state licensed attorneys is a constitutionally protected Privilege and Immunity. In *Piper* and *Friedman*, this Court applied strict scrutiny. These licensing cases uniformly reject the hypothesis that licensed lawyers will not conform with their professional responsibilities as members of the bar.

This Court has not addressed attorney licensing preferential treatment in over thirty years. Looking back thirty years, information was not at a lawyer's finger-tip with smartphones, internet, email, Google, PACER. Today, computers are driving cars, children have access to information technology previously unimaginable. These Supreme Court licensing cases were also decided before Congress enacted 28 U.S.C. § 332(d)(4) and amended 28 U.S.C. §§ 2071-2072(b) tightening the District Court Local Rule standard to "Such rules shall not abridge, enlarge or modify any substantive right." Clear and specific congressional legislation has rejected Local Rule inequality. Yet, this federal licensing inequality that makes a mockery out of our Constitution exists and it will continue unless

review is granted because the Courts below hold only this Court has supervisory review.

It is difficult to imagine a more egregious example of speech-licensing discrimination than in this petition. Every citizen in the United States is compelled to choose as their primary counsel in two-thirds of the 94 United States District Courthouses a local attorney preselected and approved by a mandatory trade union that engages in partisan politics.

II. UNLESS THIS COURT GRANTS REVIEW, THE DECISIONS BELOW UNDERMINE PUBLIC CONFIDENCE IN THE INTEGRITY OF THE ARTICLE III COURTS BECAUSE NO PERSON SHOULD BE A JUDGE AND PARTY IN THEIR OWN CASE

This Court has been scrupulous in maintaining the separation of powers structure that has an essential connection to the non-delegation doctrine. In *Nguyen v. United States*, 539 U.S. 69 (2003), the Court considered the question whether a panel consisting of two Article III judges and one Article IV judge had jurisdiction. The Article IV judge did not have life tenure and Article III Court protections. The DOJ argued this structural error had been waived by failure to object and it was harmless error. This Court reversed and remanded for a new hearing by Article III judges. The Courts below, and every other court upholding Local Rules as rational, have not addressed

petitioners' separation of powers arguments that were presented below.

Petitioners' argument that the Local Rule delegation of federal power to forum state licensing officials who have not subscribed to a federal oath of office violates the separation of powers doctrine and *Janus* is clear and unambiguous.

First, states are prohibited from exercising federal legislative power. Article I § 1 of the Constitution provides, "All legislative Powers herein granted *shall* be vested in a Congress of the United States, which *shall* consist of a Senate and House of Representatives." States do not have a shred of jurisdiction over many of the enumerated powers including patents, copyrights, bankruptcy, admiralty, federal taxation, federal criminal law, or to prescribe rules necessary and proper for the adjudication of federal claims in the federal courts. No state bar exam tests the exclusively federal subjects of patents, trademarks, copyrights, bankruptcy, admiralty, or federal taxation.

Second, states are prohibited from exercising Article III Court judicial duties. Federal district courts are national courts and have jurisdiction over cases arising under the Constitution. District Judges are nominated by the President and confirmed by the Senate. They take an oath of office. Article III Court jurisdiction and power is necessary, according to the Great Chief Justice John Marshall because "the mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent

courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *Cohens v. Virginia*, 19 U.S. 264, 415-416 (1821). "[L]ocal Courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor." *Id*. at 420.

Third, states have no power to govern bar admission in other states or in the federal courts. The right to practice law before federal courts is not governed by State court rules. *Theard v. United States*, 354 U.S. 278, 280 (1956); *Winterrowd v. American Gen. Annuity Ins. Co*., 556 F.3d 815, 820 (9th Cir. 2009). *Birbrower, Montalbano, Condon & Frank v. Superior Ct*., 17 Cal. 4th 119, 130 (1998).

Furthermore, "when a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101, 1114 (2015). State agencies controlled by active market participants pose the exact risk of self-dealing. *Ibid*. These active market participants are not angels. Even assuming the irrational proposition that federal district judges can delegate their Article III Court judicial duties solely to one state's licensing officials, this delegation is annexed without a shred of supervision and without any "intelligible standard."

These Local Rules have no consistent standard, let alone an *intelligible standard*.

This delegation of federal judicial duty to state-sponsored public trade unions further encroach upon *Janus* and the *Code of Conduct for United States Judges*. Canon 2 provides:

> "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities"
>
> "(B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge."

These uneven speech-licensing rules on their face stem from a social, political, and financial relationship with forum state public trade unions that regularly engage in lobbying and litigation on political matters of public concern. The *Code of Conduct for United States Judges* prohibits this incestuous relationship with a political trade union.

This Article III Court nepotism further nullifies *Federalist Paper 10*, which holds a core benefit of our Union is to dissolve local faction. It provides:

> AMONG the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its

> tendency to break and control the violence of faction.
>
> . . . .
>
> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

The District of Columbia Circuit's one-paragraph ruling overlooks separation of powers, non-delegation, and our government's requirement of checks and balances. This one-paragraph ruling is a pretextual ploy that does not warrant the presumption of regularity. It is arbitrary and irrational to conclude the right to marriage is constitutionally protected, but the rights to speech, association, counsel, and to petition the United States are not constitutionally protected, as *Howell* and the decisions below hold.

III. THIS COURT SHOULD SUMMARILY ABROGATE THIS FACIAL LICENSING DISCRIMINATION THAT RENDERS THE FIRST AMENDMENT A DEAD LETTER OR GRANT CERTIORARI

If Congress shall make no law abridging the freedoms to speech, association, and petition, neither can judges abridge these freedoms under the guise of Local Rules. In addition to *Janus* and *Becerra*, the

one-paragraph ruling turns a blind eye to First Amendment scripture. In *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943), Justice Robert Jackson famously summarized First Amendment gospel:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Equally important:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 642.

Barnette means District Judges cannot utilize Local Rules to prescribe First Amendment orthodoxy for any class of citizens.

There is no reason to conclude that "religious freedom" is more important than "*petition freedom*." The Local Rules constitute a prior restraint on the right to petition. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, *Inc*., 508 U.S. 49 (1993), the Court, in construing the right to *petition*,

held that "litigation could only be enjoined when it is a sham. To be a sham, first, it must be objectively baseless in the sense that no reasonable litigant could expect success on the merits; second, the litigant's subjective motive must conceal an attempt to interfere with the business relationship of a competitor . . . through the use of government process—as opposed to the outcome of that process—as an anti-competitive weapon." *Id*. at 60-61. Petitioners submit the Local Rules on their face violate the Petition Clause because they presume that the petitioners and all licensed lawyers from 49 states will file sham petitions for an anti-competitive purpose, and only file sham petitions.

The Local Rules on their face also constitute viewpoint discrimination. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017). "A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988). The government, by enforcing disparate Local Rules, suppresses the viewpoints of a disfavored class of licensed lawyers, citizens, and corporations.

These licensing rules also constitute *speaker discrimination.* In *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010):

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each. *Citizens United*, 130 S.Ct. at 890
>
> . . .
>
> Any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. *Id*. at 890 (Emphasis added)

These licensing rules on their face further constitute content discrimination. This Court in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) redefined "content

discrimination." The subject and content of this federal discrimination is federal law and procedure.

Similarly, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), at issue was the constitutionality of restrictions on attorney speech enacted by Congress. This Court held the Congressionally imposed restriction on attorney speech was *facially unconstitutional*. *Id*. at 549. (Emphasis added)

CONCLUSION

As famously stated by Justice Anthony Kennedy, the nature of injustice is that we may not always see it at first blush. The generations that wrote and ratified the Bill of Rights did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. According to the Congressional Reporter, "there is no such thing as a rule's becoming sacrosanct merely for having passed judicial scrutiny the first time. It is subject to ongoing scrutiny." (App. 149) It is hornbook law that no man shall be a judge in his or her own case. This maxim has been turned on its head by the decisions below where lower courts are judge, jury, and defense counsel. The courts below hold only this

Court has supervisory responsibility over federal licensing discrimination.

Yet, if all men and women are created equal, lawyers are created equal. This Court has held an attorney's opportunity to practice law is a fundamental right. This Court has squarely held that it will not presume that out-of-state lawyers will trespass the Rules of Professional Conduct. The decisions below do not adhere to this Court's precedent, the will of Congress, and the Bill of Rights.

Are this Court's precedent, Congress, and the text of the Constitution to be disregarded with impunity? Are the RAND Corporation Reports and testing experts Dr. Norman, Dr. Ackerman, Dr. McClelland, Dr. Case, and Dr. Kane to be ignored? (App. 45-82) Sixteen thousand lawyers, year in and year out, are afforded reciprocal licensing in other states that are denied to them under Local Rules.

In *Boudreaux v. Louisiana State Bar Association*, No. 20-30086, the Fifth Circuit in the first paragraph of its published decision acknowledges the 21st Century national importance of this licensing issue:

> [T]he COVID–19 pandemic threw the rite-of-passage bar exam into turmoil, states adopted a hodgepodge of responses that teed up larger questions, like "Is the bar exam the best way to measure competency?" and "[A]re there ways to fundamentally change how lawyers are trained, licensed, and regulated?" The exam is being reexamined. But for most

> lawyers, the bar examination is just step one of a career-long relationship with the bar association. Even if the legal licensing regime is lastingly upended, thirty or so states still mandate joining and funding the state bar as a precondition to practicing law.

In view of the foregoing, it is plain and unambiguous that this federal uneven playing field constitutes structural error that only this Court can remedy. This Court is thus requested to summarily abrogate this facial licensing discrimination or issue a writ of certiorari to review it.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5269 **September Term, 2020**
FILED ON: MARCH 15, 2021

LAWYERS UNITED INC. AND EVELYN AIMEE DEJESUS,
APPELLANTS

V.

UNITED STATES, ET AL,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-03222)

Before: TATEL and PILLARD, *Circuit Judges*,
and SENTELLE, *Senior Circuit Judge.*

JUDGMENT

This appeal from the United States District Court for the District of Columbia was considered on the record and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be **AFFIRMED**.

Substantially for the reasons contained in our court's decision in *National Ass'n for Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12 (D.C. Cir. 2017), the district court properly granted appellees' motion to dismiss and denied their motion for reconsideration, and appellants have not shown any other reversible error.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWYERS UNITED, INC., *et al.*,	)	
Plaintiffs,	)	Case No.
v.	)	1:19-cv-3222-RCL
UNITED STATES, *et al.*,	)	
Defendants.	)	

MEMORANDUM ORDER

(Filed Aug. 21, 2020)

On June 29, 2020, this Court denied plaintiffs' request for a preliminary injunction and dismissed the case with prejudice. The Court assumes familiarity with that Memorandum Opinion (ECF No. 60) and the accompanying Order (ECF No. 61). On July 16, 2020, plaintiffs filed a motion for reconsideration (ECF No. 62). Upon consideration of that motion, defendants' opposition (ECF No. 65), and plaintiffs' reply[1] (ECF Nos. 66 & 67), the Court **DENIES** the motion.

Plaintiffs seek reconsideration under Federal Rules of Civil Procedure ("Rules") 59 and 60. Under

[1] Defendants filed their opposition on August 7, 2020, meaning that plaintiffs' reply was due on August 14, 2020; however, plaintiffs did not file their reply until August 18, 2020. They did not ask the Court for an extension of time, and their reply is thus untimely. Nevertheless, the Court considered the reply as supplemented before issuing this ruling.

Rule 59(e), the Court may grant reconsideration if the movant shows an intervening change of controlling law, the availability of new evidence that could not have been raised prior to the Court's order, or the need to correct a clear error or prevent manifest injustice. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Under Rule 60(b), the Court may grant reconsideration due to "mistake, inadvertence, surprise, or excusable neglect" as well as for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1); Fed. R. Civ. P. 60(b)(6). Under either rule, "it is well-established that 'motions for reconsideration . . . cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Lemper v. Power*, 45 F. Supp. 3d 79, 85-86 (D.D.C. 2001).

Neither Rule 59 nor Rule 60 supports plaintiffs' motion, which primarily rehashes the litany of rambling arguments that they already presented in their original filings. There has been no change of controlling law since the Court issued its ruling on June 29, 2020, nor is there any new evidence to consider. There is no clear error or manifest injustice to prevent, nor can the Court find any other reason to grant relief. Quite simply, plaintiffs' motion is not a proper motion. to reconsider under the Federal Rules of Civil Procedure, as there is no basis for reconsideration. Perhaps the most bewildering part of plaintiffs' motion is the final section, which asks the Court to "enter judgment for plaintiffs." ECF No. 62 at 23. To the extent that this

represents a request for the Court to enter summary judgment in plaintiffs' favor, this case had not even reached the summary judgment stage before it was dismissed—the Court cannot grant summary judgment when plaintiffs never asked for it in the first place. As already explained in the previous Memorandum Opinion, plaintiffs' Amended Complaint failed to state any viable claims, and plaintiffs' claims are no more viable today than they were on June 29, 2020. The motion for reconsideration is therefore **DENIED**.

It is **SO ORDERED**.

Date: August 21, 2020 /s/ Royce C. Lamberth

Royce C. Lamberth
United States
District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWYERS UNITED, INC., *et al.*, *Plaintiffs*, v. UNITED STATES, *et al.*, *Defendants*.	)	Case No. 1:19-cv-3222-RCL

MEMORANDUM OPINION

(Filed Jun. 29, 2020)

In October of 2019, plaintiffs Lawyers United Inc. and Evelyn Aimee de Jesus filed this lawsuit against defendants the United States, Attorney General William P. Barr, and federal judges on the D.C. Circuit Court of Appeals, the U.S. District Court for the District of Columbia, the Ninth Circuit Court of Appeals, the Northern, Eastern, Central, and Southern Districts of California, the Eleventh Circuit Court of Appeals, and the Northern, Middle, and Southern Districts of Florida.[1] Plaintiffs have brought seven counts challenging the Local Rules that govern general admission privileges in federal courts in California, Florida, and the District of Columbia. Plaintiffs requested

[1] The United States, the Attorney General, the Eleventh Circuit judges, and the District Court judges in Florida were added as defendants for the first time in the Amended Complaint. The original Complaint also named all nine Supreme Court Justices, but they have since been terminated as defendants.

a preliminary injunction (ECF No. 43), and defendants responded with a motion to dismiss the case in its entirety (ECF No. 52). Upon consideration of all motions, oppositions, and replies, the Court will **GRANT** defendants' motion to dismiss and **DENY** plaintiffs' motion for a preliminary injunction. There is no need to have a hearing on these issues, so plaintiffs' supplemental motion for a hearing (ECF No. 59) will be **DENIED** as moot. It will be **ORDERED** that this case is **DISMISSED** with prejudice.

BACKGROUND

Plaintiffs' Amended Complaint challenges Local Rule 83.8 of the U.S. District Court for the District of Columbia, which governs eligibility for general admission privileges in this Court. Plaintiffs specifically challenge the provision allowing attorneys who are active members in good standing of the Bar of any State in which they maintain their principal law office to obtain general admission ("Primary Office Provision"). The Amended Complaint also challenges the general bar membership rules for the U.S. District Courts for the Northern, Eastern, Central, and Southern Districts of California as well as for the Northern; Middle, and Southern Districts of Florida. The U.S. District Courts in California require attorneys to be members of the California State Bar before they can obtain general admission privileges, and the U.S. District Courts in Florida require attorneys to be members of the Florida State Bar before they can obtain general admission privileges.

Plaintiffs' Amended Complaint lists seven causes of action. Attempting to parse through some of these allegations was exceedingly difficult, as plaintiffs did not clearly or succinctly explain all of their claims. After sorting through the obfuscating metaphors and extraneous information in the Amended Complaint, it appears that plaintiffs believe defendants have violated the separation of powers doctrine, various federal statutes, the Federal Rules of Civil Procedure, the Supremacy Clause, the First Amendment, and the Fifth Amendment. Plaintiffs seek a preliminary injunction invalidating the challenged local rules. Defendants ask that this case be dismissed for lack of personal jurisdiction and failure to state a claim.

LEGAL STANDARDS

I. MOTION TO DISMISS

A. Personal Jurisdiction

Federal Rule of Civil Procedure ("FRCP") 12(b)(2) requires courts to have personal jurisdiction over the parties. Although 28 U.S.C. § 1391(e) arguably provides for personal jurisdiction over the United States in many instances, it does not provide for personal jurisdiction over the U.S. Courts, as U.S. Courts are not "agencies." *See*, *e.g.*, *King v. Russell*, 963 F.2d 1301, 1303-04 (9th Cir. 1992); *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970). D.C. Code § 13-422 permits this Court to exercise general personal jurisdiction over a person who is "domiciled in, organized under the laws of, or maintaining [a]

principal place of business in, the District of Columbia as to any claim for relief." For parties over whom the Court does not have general personal jurisdiction, (i.e., defendants who are not "at home" in the District of Columbia), the Court will need specific personal jurisdiction.

The first requirement of specific personal jurisdiction is that the defendant must fall within the forum's long-arm statute. The District of Columbia's long-arm statute requires plaintiffs to show that defendants: (1) transacted business in the District; (2) contracted to supply services in the District; (3) caused tortious injury in the District by an act or omission in the District; (4) caused tortious injury in the District by an act or omission outside the District if they regularly do or solicit business, engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed, or services rendered, in the District; (5) had an interest in, are using, or possess real property in the District; (6) contracted to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District at the time of contracting; or (7) in certain circumstances, have a marital or parent and child relationship in the District. D.C. Code § 13-423(a).

If the non-resident defendant does fall within the long-arm statute, exercising specific personal jurisdiction must still be consistent with the Due Process Clause of the Fourteenth Amendment. This means that the defendant must have "minimum contacts"

with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945). "Minimum contacts" are established if the defendant creates a "substantial connection" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The minimum contacts "must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 109 (1987). The Court must dismiss any defendants over whom it lacks personal jurisdiction. Fed. R. Civ. P. 12(b)(2).

B. Failure to State a Claim

FRCP 12(b)(6) requires courts to dismiss any case wherein the plaintiff has failed to state a legal claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a motion to dismiss under FRCP 12(b)(6), courts must construe the pleadings broadly and assume that the facts are as the plaintiff alleges; however, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Additionally, courts are not obligated to "accept as true a legal

conclusion couched as a factual allegation." *Papsan v. Allain*, 478 U.S. 265, 286 (1986).

II. PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy." *Winter v. Natural. Res. Del Council, Inc., 555 U.S.* 7, 22 (2008). The movant must make a "clear showing that four factors, taken together, warrant relief." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (quoting *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016)). The four factors are: (1) a substantial likelihood of success on the merits, (2) that [the movant] would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Plaintiffs must clearly demonstrate that all four factors weigh in their favor before they can obtain a preliminary injunction. *See Winter*, 555 U.S. at 22.

ANALYSIS

I. PERSONAL JURISDICTION

Defendants argue that the Court lacks personal jurisdiction over the Circuit and District judges in California and Florida who are named as defendants in this lawsuit. The Court agrees and will thus dismiss them from the case. As a preliminary matter, although 28 U.S.C. § 1391(e) generally allows for lawsuits

against the United States, it does not provide for personal jurisdiction over federal judges sued in their official capacities. Section 1391(e) states:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

Courts are divided about whether Section 1391(e) confers personal jurisdiction or is merely a venue statute. *See Duplantier v. United States*, 606 F.2d 654, 663 (5th Cir. 1979) (explaining that although the Second Circuit found that Section 1391(e) is both a personal jurisdiction statute and a venue statute, other courts have found that it is purely a venue statute). The Court need not resolve this dispute here. Even when assuming that Section 1391(e) is also a personal jurisdiction statute, it still does not cover federal judges in

California or Florida, as the provision only applies to the executive branch. *See*, *e.g.*, *King*, 963 F.2d at 1303-04 (finding that Section 1391(e) "only applies to suits against officers of the executive branch"); *Liberation News Serv.*, 426 F.2d at 1384 (explaining that the Court did not have personal jurisdiction over members of the legislative branch under Section 1391(e) because when Congress enacted that provision, it "was thinking solely in terms of the executive branch").

Of course, Section 1391(e) is not the only means through which courts may obtain personal jurisdiction. As previously explained, either general personal jurisdiction or specific personal jurisdiction will suffice. In this case, however, plaintiffs have failed to establish that either form of personal jurisdiction covers the California or Florida defendants. The Court clearly lacks general personal jurisdiction over the California and Florida defendants, as they are not "at home" in the District of Columbia. The fact that a federal judge could be assigned anywhere in the country by designation is insufficient to establish general personal jurisdiction. *Mason v. Cassady*, U.S. Dist. LEXIS 91614, at *11 (S.D. Miss. Sep. 1, 2010).

Plaintiffs have also failed to allege facts sufficient to show that the Court has specific personal jurisdiction over these defendants. There is nothing to suggest that any one of the seven provisions of D.C.'s long-arm statute applies to these defendants. Because they do not fall within the District of Columbia's long-arm statute, the Court lacks specific personal jurisdiction. Additionally, plaintiffs have not alleged that these

defendants have any minimum contacts with the forum state that are based in purposeful availment of the privilege of conducting activities within the forum state, meaning that exercising specific personal jurisdiction over these defendants would violate the Fourteenth Amendment's Due Process Clause. *Id.* (finding that the District of Mississippi has no specific personal jurisdiction over a Magistrate Judge assigned to the Southern District of Alabama). For these reasons, the Court lacks personal jurisdiction over all of the judges who do not sit in the District of Columbia, and FRCP 12(b)(2) requires that they be dismissed from this lawsuit.[2]

Plaintiffs make a convoluted argument that because the defendant-judges are being sued in their official capacities, the United States is the real party in interest. This argument suggests that plaintiffs believe it is completely unnecessary to name any individual judges as defendants if they have also named the United States, thus leading the Court to question why plaintiffs would name individual judges in the first place. Plaintiffs also appear to argue that because the

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[2] Plaintiffs claim that any arguments regarding personal jurisdiction, minimum contacts, or long-arm statutes are "red herrings" that are "not relevant" to this case. ECF No. 54 at 27. Plaintiffs may not like that many of the defendants they have named in this lawsuit are outside of the Court's jurisdiction, but that does not make FRCP 12(b)(2) a red herring. FRCP 12(b)(2) is clear that if the Court does not have personal jurisdiction over a defendant, it must dismiss all claims against that defendant. The Court is therefore obligated to analyze the personal jurisdiction question presented in this case.

United States is the real party in interest and because there is personal jurisdiction over the United States, there must also be personal jurisdiction over the judges. This reasoning is misguided. Although the United States is the real party in interest in *many* official capacity suits, that does not automatically make the United States the real party in interest in *every* official capacity suit. The Supreme Court has been clear that official capacity suits "represent only another way of pleading an action against an entity of which an officer is an agent." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). Here, the California and Florida federal judges were acting in their official capacity as members of the Judicial Councils on which they sit. Although they are federal employees, the United States as a whole did not enact the challenged Local Rules—the Judicial Councils on which these defendants sit enacted those rules. Therefore, the real parties in interest are the Judicial Councils on which the defendant-judges sit, not the United States, and this Court does not have jurisdiction over the defendant-judges simply because they are federal employees.[3] Just as this Court lacks jurisdiction over the defendant-judges in California and Florida, it similarly lacks jurisdiction over the Judicial Councils on which they sit.

This is confirmed by persuasive authority like *Duplantier v. United States*, wherein the Fifth Circuit found that despite the District Court's ability to

[3] Even if the United States were the real party in interest, plaintiffs have also sued the United States, meaning that naming individual judges would be redundant and unnecessary.

exercise personal jurisdiction over the United States, it lacked personal jurisdiction over the Judicial Ethics Committee, which was undisputedly a part of the federal judiciary. 606 F.2d at 664. The Fifth Circuit similarly determined that the District Court lacked personal jurisdiction over the Chairman of the Judicial Ethics Committee, D.C. Circuit Judge Edward Allen Tamm, who was sued in his official capacity. *See id.* If being sued in one's official capacity as a member of the federal judiciary was synonymous with suing the United States and thus automatically conferred personal jurisdiction over that member of the federal judiciary, the Fifth Circuit in *Duplantier* would have found that it had personal jurisdiction over the Judicial Ethics Committee and Judge Tamm. Instead, the Fifth Circuit made a crucial distinction between the judiciary and other branches of government, meaning that personal jurisdiction is not automatic when federal judges are sued in their official capacities. Even in cases where the Court has personal jurisdiction over the United States, it does not necessarily have personal jurisdiction over federal judges outside of the forum who are sued in their official capacities. Essentially, if a federal judge is sued in his or her official capacity outside of the District or Circuit on which he or she sits, the Court will usually lack personal jurisdiction over that federal judge. Therefore, even when taking into consideration the real parties in interest, FRCP 12(b)(2) still requires dismissing all defendant judges from courts other than the District of Columbia.

II. FAILURE TO STATE A CLAIM

Although the Court may assert personal jurisdiction over the Attorney General, the United States, and the judges sitting in the District of Columbia, plaintiffs have failed to state any legally cognizable claims with respect to these defendants. Therefore, all claims against these defendants must be dismissed under FRCP 12(b)(6).

A. The United States & Attorney General William P. Barr

Plaintiffs have included in their long list of defendants both the United States and Attorney General William P. Barr. The Amended Complaint, however, fails to allege any actual wrongdoing on the Attorney General's part. It does not claim that the Attorney General committed any acts or omissions related to the challenged Local Rules, nor does it explain what relief the Attorney General could provide. The Attorney General "plays no role in promulgating or enforcing the local rules of federal courts." *Nat'l Ass'n for the Advancement of Multijurisdictional Practice v. Roberts*, 180 F. Supp. 3d 46, 55 (D.D.C. 2015) (dismissing the Attorney General from a lawsuit challenging the Local Rules). The D.C. Circuit similarly held in *Nat'l Ass'n for the Advancement of Multijurisdictional Practice v. Howell*—a nearly identical lawsuit—that the Attorney General could not be sued for Local Rules which allegedly violate the Constitution or federal statutes. 851 F.3d 12,

16-17 (D.C. Cir. 2017). Therefore, Attorney General Barr must be dismissed from this lawsuit.

Plaintiffs have also named as a co-defendant the United States. Although oftentimes the United States is a proper party when government employees are sued in their official capacities, that is not always the case. The Amended Complaint does not specify any wrongdoing on the part of the United States, nor does it specify what remedy the United States could provide. Although the judges sued in their individual capacities are technically federal employees, as explained above, that does not automatically make the United States the real party in interest, nor does it automatically make the United States a proper defendant. For example, the Fifth Circuit only found that the United States was a proper defendant in *Duplantier* because the statute in question specifically assigned responsibilities to the United States. 606 F.2d at 665. The Local Rules at issue in this case do no such thing. Because the United States is not a proper party, it must be dismissed from this lawsuit.[4]

B. D.C. District and Circuit Judges

Plaintiffs' claims against the remaining defendants must also fail under FRCP 12(b)(6). The D.C. Circuit ruled in *Howell* that Local Rule 83.8 violates

[4] Even if the United States and/or the Attorney General were proper parties, the claims against them would still be dismissed for the reasons set forth in the next Section of this Memorandum Opinion.

neither the Constitution nor any federal statute. The D.C. Circuit noted that the National Association for the Advancement of Multijurisdictional Practice has spent over thirty years attempting "to overturn local rules of practice limiting those who may appear before a particular state or federal court." 851 F.3d at 16. The D.C. Circuit expressly "join[ed] the chorus of judicial opinions rejecting these futile challenges," finding that the constitutional and statutory claims were without merit. *Id.* The claims in that case were nearly identical to the claims in this case. Quite simply, the Court must follow controlling precedent until that precedent is directly overturned. *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

The D.C. Circuit in *Howell* specifically upheld Local Rule 83.8's Primary Office Provision, finding that: (1) there was no violation of the Rules Enabling Act; (2) there was no violation of the Supreme Court's decision in *Frazier v. Heebe*; (3) rational basis review is the proper standard; (4) there was no violation of 28 U.S.C. § 1783; (5) there was no violation of the admission requirements of other federal courts; and (6) there was no First Amendment Violation. The D.C. Circuit specifically clarified that Local Rule 83.8 "is not an unconstitutional content-based restriction on speech" and noted that other circuits have come to the same conclusion. *Howell*, 851 F.3d at 19-20. The D.C. Circuit also specified that the Primary Office Provision "does not contravene any Act of Congress" whatsoever. *Id.* at 17. In light of these express findings, it appears that

plaintiffs have failed to state any legally cognizable claims in this case.

Interestingly, plaintiffs do not deny that the claims at issue in *Howell* are the same claims at issue in this lawsuit. Instead, they attempt to argue that although *Howell* has not been overturned, it is undermined by subsequent case law. The Court declines plaintiffs' invitation to ignore binding precedent. Indeed, *Howell* is not just binding precedent—it is nearly identical to this case. If plaintiffs want to challenge *Howell*, they must do so in the D.C. Circuit or the U.S. Supreme Court, as this District Court plainly lacks authority to overturn binding precedent, especially when that precedent is nearly indistinguishable from the current case. Moreover, even if this Court did have authority to ignore *Howell*, it would not do so, as this Court agrees with the reasoning set forth in that opinion and does not believe that subsequent case law would require the D.C. Circuit to decide *Howell* differently today.

Plaintiffs also accuse the D.C Circuit of engaging in a "conspiracy" to "cover[] up" the illegality of the Local Rules. ECF No. 54 at 33. These accusations are completely unfounded. Furthermore, even if the Court did believe that the D.C. Circuit was biased when it made its decision in *Howell*, that would not be a valid basis for ignoring precedent. This argument is clearly a desperate attempt to convince this Court to ignore a binding decision legitimately issued by the D.C. Circuit.

In addition to the fact that precedent clearly requires. this Court to dismiss all seven counts set forth in the Amended Complaint, the first claim would need to be dismissed simply because it is unintelligible. The first cause of action—titled "Separation of Powers"—rambles on for fourteen pages, and it is unclear how exactly plaintiffs believe that defendants have violated the separation of powers doctrine. FRCP 8(a)(2) specifically requires plaintiffs to provide "a short and plain statement of the claim showing that [they are] entitled to relief." Plaintiffs failed to do so with respect to the first claim.

Furthermore, even if defendants had not filed a motion to dismiss, the Court would still deny the motion for a preliminary injunction. Plaintiffs have failed to meet the four factors required to obtain this "extraordinary remedy." *Winter*, 555 U.S. at 22. Beginning with the first factor, plaintiffs do not have a substantial likelihood of success on the merits. As already explained in this Memorandum Opinion, plaintiffs' claims cannot succeed as a matter of law. That fact alone is enough to deny the preliminary injunction. The second factor, however, also turns in defendants' favor, as a preliminary injunction is not necessary to stop irreparable harm. Plaintiffs have asked for multiple stays throughout the course of this litigation, suggesting that the alleged "harm" they are suffering is not irreparable. Additionally, although plaintiffs cannot obtain general admission privileges, they can still file for *pro hac vice* admission while this case is pending, meaning that they are not entirely precluded from

appearing in federal court. The third and fourth factors also turn in defendants' favor, as the requested injunction would alter rather than preserve the status quo, forcing courts to alter their rules. Although plaintiffs argue that such a change benefits the public by expanding admission privileges and thereby increasing access to counsel, the public is not benefitted by an unnecessary injunction that does not stop irreparable harm. Therefore, plaintiffs have not met their burden to prove that such an "extraordinary remedy" is warranted. *Winter*, 555 U.S. at 22.

Finally, the Court feels compelled to highlight some of the offensive analogies that plaintiffs attempted to draw throughout this case. Although these inappropriate analogies were not the basis for dismissing plaintiffs' suit, the Court would be remiss if it did not take a moment to address them. First, plaintiffs suggest that being denied general admission privileges in federal court is akin to "deny[ing] American women the right to vote." ECF No. 54 at 45-47. Plaintiffs may not like the Local Rules at issue, but the Court can guarantee that they would like being denied the right to vote even less. Frankly, this comparison is an insult to the brave women who fought tirelessly for the fundamental right to participate in their democracy. Second, plaintiffs argue that being admitted *pro hac vice* rather than being given general admission privileges is akin to being told that you may "sit in the front of the bus for this one time." ECF No. 35 at 11. Again, while plaintiffs certainly do not like the Local Rules, any alleged injury caused by these Local Rules

certainly pales in comparison to the injuries caused by segregation. Third, in arguing that this Court should ignore binding precedent, plaintiffs assert that the D.C. Circuit abused its authority in *Howell* in the same way that the "Minneapolis police officers" abused their authority over "George Floyd while they were kneeling on his head while ignoring his complaints that he could not breathe." ECF No. 54 at 32. It would be improper for the Court to comment on the circumstances surrounding George Floyd's death due to the ongoing criminal proceedings, but for reasons that hopefully are obvious, this analogy is both appalling and severely flawed.

Perhaps most shocking was plaintiffs' argument that the Local Rules treat them "as 3/5 of a citizen." ECF No. 35 at 13. This is an obvious reference to the Three-Fifths Compromise, which counted slaves as three-fifths of a person when determining a state's total population for legislative representation. The history of slavery in this country is shameful and reprehensible. The Court will not allow plaintiffs' counsel to trivialize that painful history by arguing that an attorney who is unable to appear in federal court has been subjected to the same evils as a human being who was purchased and treated as property. Plaintiffs made many other comparisons that the Court found extremely distasteful, but the ones highlighted here were the most egregious. This Court strongly recommends that plaintiffs' attorneys, Joseph Robert Giannini and W. Peyton George, refrain from

ever again making such highly offensive and utterly unfounded comparisons.

CONCLUSION

Based on the foregoing, the Court will **GRANT** defendants' motion to dismiss (ECF No. 52) and **DENY** plaintiffs' motion for a preliminary injunction (ECF No. 43). The Court will also **DENY** plaintiffs' request for a hearing (ECF No. 59) as moot.

It will be **ORDERED** that this case is **DISMISSED** with prejudice.

A separate Order accompanies this Memorandum Opinion.

Date: June 29, 2020 /s/ Royce C. Lamberth

Royce C. Lamberth
United States
District Court Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5269 **September Term, 2020**

1:19-cv-03222-RCL

Filed On: May 5, 2021

Lawyers United Inc. and
Evelyn Aimee DeJesus,

Appellants

v.

United States, et al.,

Appellees

BEFORE: Tatel and Pillard, Circuit Judges,
and Sentelle, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for panel rehearing filed on April 26, 2021, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

DISTRICT OF COLUMBIA

LCvR 83.2 PRACTICE BY ATTORNEYS

(c) PRACTICE BY NON-MEMBERS OF THE BAR OF THIS COURT. (1) An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State, but who is not a member of the Bar of this Court, may file papers in this Court only if such attorney joins of record a member in good standing of the Bar of this Court. All papers submitted by nonmembers of the Bar of this Court must be signed by such counsel and by a member of the Bar of this Court joined in compliance with this Rule. (2) Paragraph (1) above is not applicable to an attorney who engages in the practice of law from an office located in the District of Columbia. An attorney who engages in the practice of law from an office located in the District of Columbia must be a member of the District of Columbia Bar and the Bar of this Court to file papers in this Court.

(d) PARTICIPATION BY NON-MEMBERS OF THIS COURT'S BAR IN COURT PROCEEDINGS. An attorney who is not a member of the Bar of this Court may be heard in open court only by permission of the judge to whom the case is assigned, unless otherwise provided by the Federal Rules of Civil Procedure. Any attorney seeking to appear pro hac vice must file a motion signed by a sponsoring member of the Bar of this Court, accompanied by a declaration by the nonmember that sets forth: (1) the full name of the attorney; (2) the attorney's office address and telephone number; (3) a list of all bars to which the attorney has

been admitted; (4) a certification that the attorney either has or has not been disciplined by any bar, and if the attorney has been disciplined by any bar, the circumstances and details of the discipline; (5) the number of times the attorney has been admitted pro hac vice in this Court within the last two years; and (6) whether the attorney, if the attorney engages in the practice of law from an office located in the District of Columbia, is a member of the District of Columbia Bar or has an application for membership pending. Each motion must be accompanied by a payment of $100. Such sums will be deposited in the fund described in LCvR 83.8(f)

(e) ATTORNEYS EMPLOYED BY THE UNITED STATES An attorney who is employed or retained by the United States or one of its agencies may appear, file papers and practice in this Court on behalf of the United States or that agency, irrespective of (c) and (d) above. A government attorney must register and certify personal familiarity with the Local Rules of this Court and, as appropriate, other materials set forth in LCvR 83.8(b) and 83.9(a), prior to the initial appearance by the attorney pursuant to this subsection. A government attorney must submit an updated registration and certification every three years, as requested by the Clerk's Office.

(f) ATTORNEYS EMPLOYED BY A STATE. A State Attorney General or that official's designee, who is a member in good standing of the bar of the highest court in any State or of any United States Court, may appear and represent the State or any agency thereof, irrespective of (c) and (d) above. A state attorney must

register and certify personal familiarity with the Local Rules of this Court and, as appropriate, other materials set forth in LCvR 83.8(b) and 83.9(a), prior to the initial appearance by the attorney pursuant to this subsection. A state attorney must submit an updated registration and certification every three years, as requested by the Clerk's Office. (g) ATTORNEYS REPRESENTING INDIGENTS. Notwithstanding (c) and (d) above, an attorney who is a member in good standing of the District of Columbia Bar or who is a member in good standing of the bar of any United States Court or of the highest court of any State may appear, file papers and practice in any case handled without a fee on behalf of indigents upon certifying that the attorney is providing representation without compensation and is personally familiar with the Local Rules of this Court and, as appropriate, the other materials set forth in LCvR 83.8(b) and LCvR 83.9(a).

LCvR 83.8 ADMISSION TO THE BAR (a) WHO MAY BE ADMITTED. Admission to and continuing membership in the Bar of this Court are limited to: (1) attorneys who are active members in good standing in the District of Columbia Bar; or (2) attorneys who are active members in good standing of the Bar of any state in which they maintain their principal law office; or (3) in-house attorneys who are active members in good standing of the Bar of any state and who are authorized to provide legal advice in the state in which they are employed by their organization client. COMMENT TO LCvR 83.8(a): The new subsection (3) addresses situations in which an in-house counsel,

although licensed to practice in one state, is employed by her organization client elsewhere. For example, if an attorney is licensed in Illinois, but works as an internal or corporate counsel in the District of Columbia, D.C. Court of Appeals Rule 49(c)(6) permits her to provide certain legal advice here. Article 10-206(d) of the Maryland Code is similar as applied to in-house counsel in Maryland. Such lawyers would now be eligible for admission to this Court's Bar.

(e) OATH. The oath which each applicant for admission to the Bar of this Court shall take shall be as follows: I do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will respect courts of justice and judicial officers; that I will well and faithfully discharge my duties as an attorney and as an officer of the court; and in the performance 84 of those duties I will conduct myself with dignity and according to both the law and the recognized standards of ethics of our profession. (f) ADMISSION FEE. Each petition shall be accompanied by payment in such amount and form as determined by the Court, which the Clerk shall deposit to the credit of a fund to be used for such purposes as inure to the benefit of the members of the bench and the Bar in the administration of justice which are determined to be appropriate by the Court from time to time. This fee shall be in addition to the statutory fee for administering the oath of office and issuing the certificate of admission.

(f) ADMISSION FEE. Each petition shall be accompanied by payment in such amount and form as determined by the Court, which the Clerk shall deposit to

the credit of a fund to be used for such purposes as inure to the benefit of the members of the bench and the Bar in the administration of justice which are determined to be appropriate by the Court from time to time. This fee shall be in addition to the statutory fee for administering the oath of office and issuing the certificate of admission.

(g) CLERK AS AGENT FOR SERVICE. By being admitted to the Bar of this Court or by being permitted to practice in this Court under LCvR 83.2 and 83.12 or in fact practicing in this Court, the attorney shall be deemed to have designated the Clerk of the Court as agent for service of process in any disciplinary proceeding before this Court. COMMENT TO LCvR 83.8: This Rule clarifies the intention that continuing membership in the bar is premised on a continuing duty to meet the requirements of this Rule. Section (a) parallels revised LCvR 83.2 regarding practice by attorneys. COMMENT TO LCvR 83.8(b)(6)(ii): Section (v) was added to LCvR 83.8(b)(6) to stress the importance that the Court places on the need for civility among lawyers who practice in the Court.

LCvR 83.9 RENEWAL OF MEMBERSHIP (a) RENEWAL OF MEMBERSHIP EVERY THREE YEARS. Each member of the Bar of this Court shall renew his or her membership every three years by filing with the Clerk of the Court, on or before July 1st of every third year, a certificate in a form prescribed by the Clerk that the member is familiar with the then current version of the Federal Rules of Civil Procedure, Federal Rules of Evidence, the Local Rules of this Court, Rules of

Professional Conduct and the D.C. Bar Voluntary Standards for Civility in Professional Conduct. If the attorney appears in criminal cases, he or she must also certify familiarity with the then-current version of the Federal Rules of Criminal Procedure and the Sentencing Guidelines. (See LCrR 44.5(b)). Members of the Bar of this Court on the effective date of this Rule shall file certificates by March 1, 1990, and by July 1 of every third calendar year thereafter. Subsequently admitted members shall file certificates by July 1st of every third calendar year after the year in which they were admitted. The Clerk shall notify members of this certification requirement at least 60 days before the date for filing such certificates and renewals.

(b) RENEWAL FEE. Each certificate required by (a) above shall be accompanied by a payment of $25 in a form determined by the Clerk. The fee shall be $10 for the initial certificate filed by any person admitted to the Bar of this Court after July 1, 1986. The Clerk shall deposit the fees received to the credit of the fund described in LCvR 83.8(f) to be used for the purposes specified in that Rule, including the defraying of expenses of maintaining a current register of members in good standing and to administer the counseling program outlined in LCvR 83.21.

(c) FAILURE TO RENEW. An attorney who fails to file the required certifications and pay the renewal fee shall be provisionally removed from the list of members in good standing and pursuant to LCrR44.1(a) shall not be permitted to practice before this Court until restored as a member in good standing. The name

of the attorney shall be restored to the list of members in good standing upon filing of the required certificates and payment of the delinquent fee within five years after the due date. At the end of five years from the due date, the name will be permanently removed from the roll, without prejudice to an application for admission as a new member.

COMMENT TO LCvR 83.9(a): This amendment brings the rule in compliance with LCvR 83.8(b)(6)(v).

LCvR 83.15 OBLIGATIONS OF ATTORNEYS (a) RULES OF PROFESSIONAL CONDUCT. Violations of the Rules of Professional Conduct (as adopted by the District of Columbia Court of Appeals except as otherwise provided by specific Rule of this Court) by attorneys subject to these Rules shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

(b) DUTY TO NOTIFY THE COURT. It shall be the duty of each attorney subject to these Rules to notify promptly the Clerk of this Court of: (1) conviction of any crime other than minor traffic offenses, giving the name of the court in which the attorney was convicted, the date of conviction, docket number, the offense for which the attorney was convicted and the sentence; (2) any disbarment, suspension or other public discipline imposed by any federal, state or local court, giving the name of the court, the date of such disbarment, suspension or other public discipline, the docket number, and a description of the discipline imposed and the offense committed in connection therewith; or any

disbarment by consent or resignation while an investigation into allegations of misconduct is pending; (3) whether the attorney has ever been held in contempt of court and, if so, the nature of the contempt and the final disposition thereof; and (4) any change in the attorney's office address or telephone number as provided for in (c) below. Failure to provide the notice required by this paragraph may constitute a separate ground for discipline.

(c) CHANGES IN ADDRESS Notice to the Clerk of any change in the attorney's address or telephone number (see (b)(4) above) shall be filed in writing within 14 days of the change. The attorney shall also within 14 days file a praecipe reflecting such change in each case which the attorney has pending before this Court, serving a copy upon each of the attorneys in these cases.

LCrR 57.21 ADMISSION TO THE BAR (a) WHO MAY BE ADMITTED. Admission to and continuing membership in the Bar of this Court are limited to: (1) attorneys who are active members in good standing in the District of Columbia Bar; or (2) active members in good standing of the Bar of any state in which they maintain their principal law office; or (3) in-house attorneys who are active members in good standing of the Bar of any state and who are authorized to provide legal advice in the state in which they are employed by their organization client.

COMMENT TO LCrR 57.21: The new subsection (3) addresses situations in which an in-house counsel,

although licensed to practice in one state, is employed by her organization client elsewhere. For example, if an attorney is licensed in Illinois, but work as an internal or corporate counsel in the District of Columbia, D.C. Court of Appeals Rule 49(c)(6) permits her to provide certain legal advice here. Article 10-206(d) of the Maryland Code is similar as applied to in-house counsel in Maryland. Such lawyers would now be eligible for admission to this Court's Bar.

LCrR 57.21.1 RENEWAL OF MEMBERSHIP (a) RENEWAL OF MEMBERSHIP EVERY THREE YEARS. Each member of the Bar of this Court shall renew his or her membership every three years by filing with the Clerk of the Court, on or before July 1st of every third year, a certificate in a form prescribed by the Clerk that the member is familiar with the then current version of the Federal Rules of Civil Procedure, Federal Rules of Evidence, the Local Rules of this Court, Rules of Professional Conduct and the D.C. Bar Voluntary Standards for Civility in Professional Conduct. If the attorney appears in criminal cases, he or she must also certify familiarity with the then-current version of the Federal Rules of Criminal Procedure and the Sentencing Guidelines. (See LCrR 44.5(b)). Members of the Bar of this Court on the effective date of this Rule shall file certificates by March 1, 1990, and by July 1 of every third calendar year thereafter. Subsequently admitted members shall file certificates by July 1st of every third calendar year after the year in which they were admitted. The Clerk shall notify members of this

certification requirement at least 60 days before the date for filing such certificates and renewals.

(b) RENEWAL FEE. Each certificate required by (a) above shall be accompanied by a payment of $25 in a form determined by the Clerk. The fee shall be $10 for the initial certificate filed by any person admitted to the Bar of this Court after July 1, 1986. The Clerk shall deposit the fees received to the credit of the fund described in LCvR 83.8(f) to be used for the purposes specified in that Rule, including the defraying of expenses of maintaining a current register of members in good standing and to administer the counseling program outlined in LCrR 57.31.173 (c)

LOCAL RULES –
CENTRAL DISTRICT OF CALIFORNIA

L.R. 83-2.1 Attorneys L.R. 83-2.1.1 Appearance Before the Court L.R. 83-2.1.1.1 Who May Appear. Except as provided in L.R. 83-2.1.3, 83-2.1.4, 83-2.1.5, 83-4.5, and F.R.Civ.P. 45(f), an appearance before the Court on behalf of another person, an organization, or a class may be made only by members of the Bar of this Court, as defined in L.R. 83-2.1.2.

L.R. 83-2.1.1.2 Effect of Appearance. Any attorney who appears for any purpose submits to the discipline of this Court in all respects pertaining to the conduct of the litigation.

L.R. 83-2.1.1.3 Form of Appearance – Professional Corporations and Unincorporated Law Firms. No appearance may be made and no pleadings or other documents may be signed in the name of any professional law corporation or unincorporated law firm (both hereinafter referred to as "law firm") except by an attorney admitted to the Bar of or permitted to practice before this Court. A law firm may appear in the following form of designation or its equivalent: John Smith A Member of Smith and Jones, P.C. Attorneys for Plaintiff

.R. 83-2.1.2 The Bar of this Court L.R. 83-2.1.2.1 In General. Admission to and continuing membership in the Bar of this Court are limited to persons of good moral character who are active members in good standing of the State Bar of California. If an attorney admitted to the Bar of this Court ceases to meet these

criteria, the attorney will be subject to the disciplinary rules of the Court, infra.

L.R. 83-2.1.2.2 Admission to the Bar of this Court. Each applicant for admission to the Bar of this Court must complete an Application for Admission to the Bar of the Central District of California (Form G-60) and submit it to the Court electronically through the Court's website, together with the admission fee prescribed by the Judicial Conference of the United States and such other fees as may from time to time be required by General Order of this Court. The completed Application for Admission to the Bar of the Central District of California must include certification that the applicant is familiar with the Court's Local Civil and Criminal Rules and with the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence.

L.R. 83-2.1.3 Pro Hac Vice Practice L.R. 83-2.1.3.1 Who May Apply for Permission to Practice Pro Hac Vice. An attorney who is not a member of the State Bar of California may apply for permission to appear pro hac vice in a particular case in this Court if the attorney:

(a) is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory, or Insular Possession of the United States;

(b) is of good moral character; (c) has been retained to appear before this Court; and (d) is not disqualified under L.R. 83-2.1.3.2.

L.R. 83-2.1.3.2 Disqualification from Pro Hac Vice Appearance. Unless authorized by the Constitution of the

United States or Acts of Congress, an applicant is not eligible for permission to practice pro hac vice if the applicant:

(a) resides in California;

(b) is regularly employed in California; or (

c) is regularly engaged in business, professional, or other similar activities in California.

L.R. 83-2.1.4 Attorneys for the United States, or Its Departments or Agencies L.R. 83-2.1.4.1 Attorney for the United States, or its Departments or Agencies. Any person who is not eligible for admission under L.R. 83-2.1.2 or 83-2.1.3, who is employed within this state and is a member in good standing of, and eligible to practice before, the bar of any United States Court, the District of Columbia Court of Appeals, or the highest court of any State, Territory or Insular Possession of the United States, and is of good moral character, may be granted leave of court to practice in this Court in any matter for which such person is employed or retained by the United States, or its departments or agencies. The application for such permission must include a certification filed with the Clerk showing that the applicant has applied to take the next succeeding Bar Examination for admission to the State Bar of California for which that applicant is eligible. No later than one year after submitting the foregoing application, the applicant must submit to this Court proof of admission to the State Bar of California. Failure to do so will result in revocation of permission to practice in this Court.

L.R. 83-2.1.4.2 Special Assistant United States Attorneys. Notwithstanding L.R. 83-2.1.4.1, any United States Armed Forces attorney who has been appointed a Special Assistant United States Attorney pursuant to 28 U.S.C. sections 515 and 543 may handle misdemeanor matters before this Court. Attorneys employed by the United States Department of Justice specially appointed by the United States Attorney General to conduct any kind of legal proceeding, civil or criminal, pursuant to 28 U.S.C. § 515(a), may appear without filing an Application of Non-Resident Attorney to Appear in a Specific Case.

L.R. 83-2.1.5 Registered Legal Services Attorney. A registered legal services attorney authorized to appear in the state courts of California under California Rules of Court, Rule 9.45, may apply for permission to appear in a case before this Court under the conditions set forth in that rule. Such an applicant must complete an Application of Registered Legal Services Attorney to Practice Before the Court (Form CV-99, available on the Court's website), which must include:

(a) certification that the applicant is a registered legal services attorney authorized to practice law in the state courts of California pursuant to California Rules of Court, Rule 9.45 (or a successor rule);

(b) certification that the applicant is familiar with the Court's Local Civil and Criminal Rules and with the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence; and

(c) identification of a supervising attorney who is a member in good standing of the Bar of this Court, and who must appear with the registered legal services attorney as one of the attorneys of record.

The completed Application of Registered Legal Services Attorney to Practice Before the Court must be electronically filed by the supervising attorney in each case in which the applicant seeks to appear, together with a separate proposed Order. Approval of the application will be at the discretion of the assigned judge in each case in which an application is submitted. By practicing in this Court, the registered legal services attorney submits to the disciplinary authority of the Central District of California.

L.R. 83-2.2 Parties Without Attorney

LOCAL RULES UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA

RULE 2.01 GENERAL ADMISSION TO PRACTICE

(a) No person shall be permitted to appear or be heard as counsel for another in any proceeding in this Court unless first admitted to practice in the Court pursuant to this rule (or heretofore admitted under prior rules of the Court).

(b) Only those persons who are members in good standing of The Florida Bar shall be eligible for general admission to the bar of the Court. If a person ceases to be a member in good standing of The Florida Bar, that person will be suspended from the bar of the Court until that person is reinstated to The Florida Bar. However, if the suspension from The Florida Bar is 90 days or less, the person will be automatically reinstated. If the suspension is 91 days or more, that person must apply with the Clerk of Court for reinstatement. Each applicant for general admission shall file with the Clerk a written petition setting forth his residence and office address, his general and legal education, and the Courts to which he has previously been admitted to practice. The petition shall be accompanied by the certificates of two members in good standing of the bar of the Court attesting that the applicant is of good moral character and is otherwise competent and eligible for general admission to practice in the Court (provided, however, members in good standing of the bars of the Northern or Southern Districts of Florida shall be admitted on petition without necessity of such certificates). In addition, each

applicant shall furnish a certificate certifying that the applicant has read and is familiar with each of the following: The Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the Middle District of Florida.

(c) Petitions for general admission to practice shall be called from time to time in open Court on notice to the applicants; except that, under special circumstances, any United States District Judge or United States Magistrate Judge of the Court may entertain a petition at any time. Upon taking the prescribed oath and payment of the prescribed enrollment fee, the applicant shall then be enrolled as a member of the bar of the Court and the Clerk shall issue a suitable certificate to that effect.

(d) To maintain good standing in the bar of this Court, each attorney admitted under this rule, beginning in the year following the year of the attorney's admission, must pay a periodic fee set by administrative order and, unless exempted by the Chief Judge for good cause, must register with the Clerk of Court and maintain an e-mail address for electronic service by the Clerk during the attorney's membership in the bar of this Court. An attorney who fails to pay timely the periodic fee or fails without exemption to maintain a registered e-mail address is subject to removal from membership in the bar of this Court.

RULE 2.02 SPECIAL ADMISSION TO PRACTICE

(a) Any attorney who is not a resident of Florida but who is a member in good standing of the bar of any District Court of the United States; outside Florida; may appear specially as counsel of record; without formal or general admission; provided, however, such privilege is not abused by appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law in Florida; and provided further that whenever appearing as counsel by filing any pleading or paper in any case pending in this Court, a non-resident attorney shall file within fourteen (14) days a written designation and consent-to-act on the part of some member of the bar of this Court, resident in Florida, upon whom all notices and papers may be served and who will be responsible for the progress of the case, including the trial in default of the non-resident attorney. In addition to filing the written designation, the non-resident attorney shall comply with both the fee and e-mail registration requirements of Rule 2.01(d), and the written designation shall certify the non-resident attorney's compliance.

(b) An attorney employed full-time by either the United States, an agency of the United States, or a public entity established under the laws of the United States may appear within the course and scope of the attorney's employment as counsel without general or other formal admission.

(c) Any attorney who appears specially in this Court pursuant to subsections (a) or (b) of this rule shall be

deemed to be familiar with, and shall be governed by, these rules in general, including Rule 2.04 hereof in particular; and shall also be deemed to be familiar with and governed by the Code of Professional Responsibility and other ethical limitations or requirements then governing the professional behavior of members of The Florida Bar.

(d) In an extraordinary circumstance (such as the hearing of an emergency matter) a lawyer who is not a member of the Middle District bar may move instanter for temporary admission provided the lawyer appears eligible for membership in the Middle District bar and simultaneously initiates proceedings for general or special admission to the Middle District bar. Temporary admission expires in thirty days or upon determination of the application for general or special admission, whichever is earlier.

EXHIBIT A

Proof 100% Subjective Cal Bar Exam for experienced attorneys is not a *valid* or *reliable* test covered-up by Federal Courts

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the February 2001 California Bar Examination

(February 2001 .41)

WRITTEN SECTION

There were 1050 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was about 5 points higher than it was on the second reading. The correlation between these scores was .41. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – SUMMARY STATISTICAL DATA ON THE WRITTEN SECTION AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Community Property	61.7	8.32
2	Corporations	63.3	7.32
3	Criminal Law	59.8	8.50
4	Remedies	64.3	7.03
5	Professional Responsibility	65.6	7.12
6	Contracts	61.3	6.39

PT-1	Draft pre-counseling letter	65.3	8.57
PT-2	Draft closing argument	66.8	7.86

SUMMARY STATISTICS

Table 3 presents summary statistical data on each section after all readings. There was a .58 correlation between MBE and Written scores. Law School Admission Test (LSAT) scores correlated .52, .43, and .52 with MBE, Written, and Total Scale scores, respectively. There were 3779 applicants with useable LSAT scores.

Table 3 – SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1405.3	640.2	1397.5
Standard Deviation	147.0	46.2	129.5
Reliability	.89	.72	.83

The MBE's reliability was computed by ACT using national data.

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the July 2001 California Bar Examination

(July 2001 .48)

Table 1 – NATIONAL AND CALIFORNIA MEAN MBE SCORES AND THE DIFFERENCE BETWEEN THESE MEANS

Test Score	Number of Items	National Mean	California Mean	Difference
Constitutional Law	33	22.9	22.5	-0.4
Contracts	34	21.8	22.3	0.5
Criminal Law	33	21.6	22.5	0.9
Evidence	33	21.4	23.5	2.1
Real Property	33	19.2	20.5	1.3
Torts	34	21.9	22.4	0.5
Total Raw	200	128.7	133.7	5.0
NCBE/ACT Scale	200	142.8	146.8	4.0

WRITTEN SECTION

There were 1598 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was 7 points higher than it was on the second reading. <u>The</u>

correlation between these scores was .48. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – SUMMARY STATISTICAL DATA ON THE WRITTEN SECTION AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Civil Procedure	61.7	9.19
2	Real Property	64.9	7.22
3	Evidence	64.1	9.45
4	Constitutional Law	61.4	7.92
5	Torts	61.3	8.91
6	Wills & Trusts	61.8	7.57
PT-1	Constitutional Law	66.1	6.61
PT-2	Criminal Law and Procedure	65.0	8.11

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the February 2002 California Bar Examination

(February 2002 .38)

Table 1 – NATIONAL AND CALIFORNIA MEAN MBE SCORES AND THE DIFFERENCE BETWEEN THESE MEANS

Test Score	Number of Items	National Mean	California Mean	Difference
Constitutional Law	33	20.71	18.03	-2.68
Contracts	34	22.83	18.72	-4.11
Criminal Law	33	17.08	23.84	6.76
Evidence	33	17.94	21.12	3.18
Real Property	33	19.65	20.43	0.78
Torts	34	21.93	22.95	1.02
Total Raw	200	120.15	125.09	4.94
NCBE/ACT Scale	200	135.28	139.60	4.32

WRITTEN SECTION

There were 990 applicants who had their answers read at least twice. On the average. an applicant's total written raw score on the first reading was 11 points higher than it was on the second reading. The correlation

between these scores was .38. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the July 2002 California Bar Examination

(July 2002 .40)

WRITTEN SECTION

There were 1588 applicants who had their answers read at least twice. On the average. an applicant's total written raw score on the first reading was 4 points higher man it was on the second reading. The correlation between these scores was .40 This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – SUMMARY STATISTICAL DATA ON THE WRITTEN SECTION AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Wills	63 3	10.2
2	Real Property	63 5	6 8
3	Professional Responsibility	65.3	9.2
4	Contracts	62.4	8.2
5	Torts	61.2	8.3

6	Community Property	63.2	7.7
PT-1	Memo regarding constitutionality and changes	60.8	8.8
PT-2	Analysis of criminal law statute and ethical issues	65.8	7.4

SUMMARY STATISTICS

Table 3 presents summary statistical data on each section after all readings. There was a .64 correlation between MBE and Written scores. Law School Admission Test (LSAT) scores correlated .61, .48, and .57 with MBE, Written, and Total Scale scales, respectively. There were 6764 applicants with useable LSAT scores.

Table 3 – SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1445.1	1438.3	1440.7
Standard Deviation	155.2	154.2	141 2
Reliability	0.89	0.72	0.84

The MBE's reliability was computed by ACT using national data.

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the February 2003 California Bar Examination

(February 2003 .48)

WRITTEN SECTION

There were 991 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was 10 points higher than it was on the second reading. The correlation between these scores was .48. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – SUMMARY STATISTICAL DATA ON THE WRITTEN SECTION AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Civil Procedure	55.56	8.11
2	Wills/Real Property	59.29	8.30
3	Criminal Law	61.10	6.93
4	Professional Responsibility	62.48	8.73
5	Constitutional Law	60.09	7.00

6	Community Property	59.20	7.97
PT-1	Torts	65.33	7.69
PT-2	Civil Procedure/Evidence	61.31	8.16

SUMMARY STATISTICS

Table 3 presents summary statistical data on each section after all readings. There was a .58 correlation between MBE and Written scores. Law School Admission Test (LSAT) scores correlated .48, .44, and .51 with MBE, Written, and Total Scale scores, respectively. There were 3523 applicants with useable LSAT scores.

Table 3 – SUMMARY TEST
STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1397.92	611.06	1397.15
Standard Deviation	146.39	45.21	131.60
Reliability	.87	.68	.81

The MBE's reliability was computed by ACT using national data.

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the February 2004 California Bar Examination

(February 2004 .39)

WRITTEN SECTION

There were 936 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was 9 points higher than it was on the second reading. The correlation between these scores was .39. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – SUMMARY STATISTICAL DATA ON THE WRITTEN SECTION AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Criminal Law and Procedures	62 90	8 05
2	Community Property	64.44	8.94
3	Professional Responsibility	64.38	7.64
4	Real Property	61 03	7 34

5	Constitutional Law	60 50	7 13
6	Civil Procedure	61 16	8 90
PT-1	Insurance Law and Contracts	61.70	7 80
PT-2	Contracts and Alternative Dispute Resolution	63 34	7 30

SUMMARY STATISTICS

Table 3 presents summary statistical data on each section after all readings. There was a :59 correlation between MBE and Written scores. Law School Admission Test (LSAT) scores correlated .52, .41, and .50 with MBE, Written, and Total Scale scores, respectively. There were 3699 applicants with useable LSAT scores

Table 3 – SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1392 30	624.54	1390 27
Standard Deviation	146 53	46.28	132.04
Reliability	.89	.72	.90

The MBE's reliability was computed by ACT using national data.

[SEAL] **Committee of Bar Examiners of The State Bar of California**

Report to the Supreme Court of California on the July 2004 California Bar Examination

(July 2004 .41)

MULTISTATE BAR EXAMINATION (MBE)

Table 1 shows California applicants scored higher than the national average on five of the six MBE subtests. California's mean total raw score (the average number of questions answered correctly) was 2.44 points higher than the national average (which included California scores).

Table 1 – NATIONAL AND CALIFORNIA MEAN MBE SCORES AND THE DIFFERENCE BETWEEN THESE MEANS

Test Score	Number of Items	National Mean	California Mean	Difference
Constitutional Law	33	23.51	21.63	-1.88
Contracts	34	21.63	21.97	0.34
Criminal Law	33	21.23	21.73	0.50
Evidence	33	21.65	23.96	2.31
Real Property	33	21.64	22.21	0.57

Torts	34	22.95	23.56	0.61
Total Raw	200	132.62	135.06	2.44
NCBE/ACT Scale	200	141.22	143.38	2.16

WRITTEN SECTION

There were 1658 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was 2.5 points higher than it was on the second reading. The correlation between these scores was .41. This value underestimates the true degree of agreement between readers because reread was limited to applicants near the pass/fail line. Table 2 shows the means and standard deviations on each question after all readings.

Table 2 – WRITTEN RAW
SCORES AFTER ALL READINGS

Question Number	Essay Content Area(s) and PT Tasks	Mean Score	Standard Deviation
1	Criminal Law	61.08	6.79
2	Constitutional Law	59.27	6.90
3	Wills/Trusts	60.92	9.05
4	Evidence	62.85	8.65
5	Professional Responsibility	64.37	9.65
6	Torts	61.03	8.16

PT-1	Consumer Protection/ Usury	60.86	7.72
PT-2	Torts/Premises Liability	64.84	8.35

DECLARATION OF PHILLIP L. ACKERMAN. Ph.D.

I PHILLIP L. ACKERMAN, Ph.D. am competent to testify and have personal knowledge, and based on that knowledge declare the following:

1. My curriculum vita is attached.

I am attaching a true and complete copy of my Evaluation of the Psychometric Adequacy of the California Attorney's Examination dated February 15, 2008, that is the test given by the State of California to attorneys in good standing already licensed in another state for four years to qualify for licensure in California. I am re-publishing that Evaluation, and including additional information that can be found in paragraphs 6-10 below, that reinforces the conclusions reached in my Evaluation of the Psychometric Adequacy of the California Attorney's Examination.

2. These are a few salient details about my background (also listed in the CV).

a. I am a Professor of Psychology at Georgia Institute of Technology, and the past Editor, *Journal of Experimental Psychology: Applied.*

b. I am a Fellow of the American Psychological Association, a Fellow of the American Educational Research Association, and a member of the National Council on Measurement in Education (these are the three organizations that generate the *Standards on Psychological and Educational Testing* in the United States.)

c. Over the past 17 years, I have published 12 reviews and I have two additional reviews "in press" in the *Mental Measurements Yearbook* (this is generally regarded as the 'bible' for critical reviews of commercial educational, psychological and organizational tests). In 2005, I was named a "Distinguished Reviewer" by the Buros Institute of Mental Measurements.

d. Over the past 27 years, I have consulted on educational and occupational testing for the following organizations: U.S. Air Force, U. S. Army, U. S. Navy Personnel Research and Development Center, U. S. Department of Education, Minnesota Air Traffic Control Training Center (FAA), The College Board, Educational Testing Service (ETS), and General Motors.

3. It is my professional opinion that the Attorney's Examination fails to meet the *Standards for Educational and Psychological Testing (1999)* published by the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education.

4. As stated in my Evaluation of the Psychometric Adequacy of the California Attorney's Examination dated February 15, 2008, the specific shortcomings for this test and thus its failure to meet the *Standards for Educational and Psychological Testing* are as follows:

a. The Attorney's Examination lacks content-related validity. According to Steven P. Klein (The Rand Corporation):

"State bar examinations have been criticized for measuring only a few of the important skills and abilities that are needed for the practice of law. For example, a typical essay question provides several facts that are material to a case and then asks the applicant to determine how the case should be resolved relative to the applicant's knowledge of general legal principles. The exam does not address interviewing, negotiating, or oral advocacy skills; the ability to draft or evaluate legal documents; or the ability to conduct legal research." (Klein, 1983a; *Measuring Legal Research Skills on a Bar Examination*, Rand Report P-6879). [emphasis added][1]

Similarly, Klein claimed "Some of the other skills that are important for legal practice that are not tested directly by the traditional bar exam include the ability to interview clients, examine a witness, conduct legal research, and negotiate a settlement." (Klein, 1983b, *Relationship of Bar Examinations to Performance Tests of Lawyering Skills*, Rand Report P-6895)

b. The Attorney's Examination has never been demonstrated to have criterion-related validation, in terms of evaluating the scores on the test and comparing them to performance

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[1] The incomplete coverage of the content of the job in this case might be compared to a driving license examination that only involves parking a car, and does not involve driving outside of a parking lot. Such an examination would fail to adequately sample the content of the overarching activities allowed by a driver's license.

of practicing attorneys. (per Dr. Susan M. Case, Director of Testing, National Conference on Bar Examiners, 1/18/08).

c. The scores on the Attorney's Examination are determined in a manner that is not consistent with professional standards. The reliability of the test scoring procedures fails to reach a level that would be acceptable for high-stakes testing. (Specifically, inter-rater agreement is quite low, a correlation of .48 between raters indicate only 23% shared variance among ratings; source: Klein & Bolus; Gansk & Associates 2003.) An acceptable level of reliability for such high-stakes testing would be shared variance in the neighborhood of 70% or higher (corresponding to reliability of about .84 or higher).

d. The passing cut-off score on the Attorney's Examination is determined without regard to the actual knowledge and skills of the individuals taking the examination, but is determined by the scores of other individuals taking the test.

The adjustment process that is used to transform the Attorney's Examination raw scores to a mean and standard deviation that matches the results of other examinee's MBE scores, is performed in a manner that is inconsistent with actually assessing the individual examinee's knowledge and skills. This process is " . . . arbitrary, because it ensures that some fixed proportion of applicants will fail even though all or most of the applicants may in

fact be qualified. The more able the group of applicants taking the test, the higher the passing scores will be." (Shimberg, 1981, p. 1141)

e. Because of the lower reliability of the Attorney's Examination, when compared to the MBE, and the non-compensatory scoring for the Attorney's Examination, the resulting regression-to-the-mean (a statistical phenomena that is exacerbated by lower reliability) will result in fewer qualified individuals taking the Attorney's Examination actually obtaining a passing score on the examination, in comparison to the California Bar Examination.

6. I have not testified as a witness at trial or deposition in the last four years.

7. I agree with Dr. Robert Kane's conclusions that bar exams are high-stakes licensing tests, and "a fairly high reliability (above 0.8; preferably above 0.9) is expected for testing programs that are used to make high-stakes decisions about individuals." See Kane, Reflections on Bar Examining, 6, The Bar Examiner, p.9 (Nov 2009). Dr. Kane's opinion is consistent with my opinion expressed in Paragraph 4C above: ("An acceptable level of reliability for such high-stakes testing would be shared variance in the neighborhood of 70% or higher (corresponding to reliability of about .84 or higher").

8. I also agree with Dr. Gary McClelland's conclusion concerning the California Attorney's Examination that: "The degree of inter-rater agreement is

dreadful. I do not believe any scientist would ever publish data based on such low inter-rater agreement." See McClelland Declaration ¶ 6, May 5, 2008.

9. When the goal of inter-rater reliability is preferably in the range of .8 to .9 as noted by Dr. Kane, and the inter-rater reliability of the California Attorney's Examination is consistently reported to be below .5, there can be little doubt that the reliability of the decisions made on the basis of the scores is extremely low, and not acceptable.

10. The facts and opinions submitted in this Declaration and in the attached Evaluation of the Psychometric Adequacy of the California Attorney's Examination are true and correct to the best of my knowledge. This Declaration is submitted under penalty of perjury under state and federal law.

Dated: July 30, 2010

/s/ Phillip L. Ackerman
PHILLIP L. ACKERMAN, Ph.D.

DECLARATION OF
GARY H. McCLELLAND, Ph.D.

I, GARY H. McCLELLAND, Ph.D. am competent to testify and have personal knowledge, and based on that knowledge declare the following:

1. I'm a psychology professor at the University of Colorado at Boulder. I am interested in the study of judgment and decision making, measurement and scaling, and statistics and data analysis. I do research in these areas and teach courses about statistics and measurement.

2. I have a Ph.D. (1974) from The University of Michigan, and I am also a Faculty Fellow, at the Institute of Cognitive Science.

3. A representative of my publications includes:

- *McClelland, G.H. (2000). Seeing Statistics. Duxbury Press.*
- *Judd, C.M., & McClelland (1998). Measurement. In D. Gilbert, S. Fiske, & G. Lindzey (Eds.), The handbook of social psychology (4e). Cambridge University Press.*
- *McClelland, G.H. (1997). Optimal design in psychological research. Psychological Methods, 2, 3-19.*
- *Judd, C.M., McClelland, G.H., & Smith, E.R. (1996). Testing treatment by covariate interactions when treatment varies within subjects. Psychological Methods, 1, 366-378.*

- *Judd, C.M., McClelland, G.H., & Culhane, S.E. (1995). Data analysis: Continuing issues in the everyday analysis of psychological data. Annual Review of Psychology, 46, 433-465.*
- *McClelland, G.H., & Judd, C.M. (1993). Statistical difficulties of detecting interactions and moderator effects. Psychological Bulletin, 114(2), 376-390.*
- *McClelland, G.H., Schulze, W.D., & Coursey, D.L. (1993). Insurance for low-probability hazards: a bimodal response to unlikely events. Journal of Risk and Uncertainty, 7(1), 95-116.*
- *Irwin, J.R., Slovic, P., Lichtenstein, S., & McClelland, G.H. (1993). Preference reversals and the measurement of environmental values. Journal of Risk and Uncertainty, 6, 5-18.*
- *Judd, C.M., & McClelland, G.H. (1989). Data analysis: A model comparison approach. New York: Harcourt Brace Jovanovich.*

4. I have previously studied the Colorado bar examination from 1972 to 1975, and based on that study wrote "Assessing Bias in Professional Licensing Examinations by Checking Internal Consistency," 9 Law and Human Behavior, No. 3, p. 305 (1985).

5. I have reviewed Dr. Phillip L. Ackerman's "Evaluation of the Psychometric Adequacy of the California Attorney's Examination" dated February 15, 2008, and generally agree with it. Dr. Ackerman is a credible psychometrician as well. In my opinion, the lack of an explicit equating procedure for the Essay

and Performance Test sections is a fatal flaw. The degree of inter-rater agreement is dreadful. I do not believe any scientist would ever publish data based on such low inter-rater agreement.

6. The facts and opinions submitted in this Declaration are true and correct to the best of my knowledge. This Declaration is submitted under penalty of perjury under state and federal law.

Date: 5 May 08 /s/ Gary H. McClelland, Ph.D.
GARY H. McCLELLAND, Ph.D.

Evaluation of the Psychometric Adequacy of the California Attorney's Examination

Prepared by Phillip L. Ackerman, Ph.D.
February 15, 2008

1. According to the State Bar of California Committee of Bar Examiners/Office of Admissions. Retrieved from the web 12/8/07

   "To be admitted to practice law in California, an attorney applicant must comply with the requirements outlined in the *Rules*, which include: 1) registration as an attorney applicant; 2) a positive moral character determination; 3) passage of the Multistate Professional Responsibility Examination (MPRE); and 4) passage of the California Bar Examination."

   "Attorney applicants admitted in other states or jurisdictions of the United States who have been admitted in active status in good standing four years immediately preceding the first day of the administration of the California Bar Examination, may elect to take the Attorney's Examination, which is of two days duration and consists of six essay questions and two performance test questions from the California Bar Examination."

2. After review of the available materials, it is concluded that the Attorney's Examination fails to meet the *Standards for Educational and Psychological Testing.* (1999), Published by the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education.

The specific shortcomings of the test are as follows:

a. The Attorney's Examination lacks content-related validity. According to Steven P. Klein (The Rand Corporation):

   "State bar examinations have been criticized for measuring only a few of the important skills and abilities that are needed for the practice of law. For example, a typical essay question provides several facts that are material to a case and then asks the applicant to determine how the case should be resolved relative to the applicant's knowledge of general legal principles. **The exam does not address interviewing, negotiating, or oral advocacy skills; the ability to draft or evaluate legal documents; or the ability to conduct legal research.**" (Klein, 1983a; *Measuring Legal Research Skills on a Bar Examination*, Rand Report P-6879). [emphasis added][1]

   Similarly, Klein claimed "Some of the other skills that are important for legal practice that are not tested directly by the traditional bar exam include the ability to interview clients, examine a witness, conduct legal research, and negotiate a settlement." (Klein,

[1] The incomplete coverage of the content of the job in this case might be compared to a driving license examination that only involves parking a car, and does not involve driving outside of a parking lot. Such an examination would fail to adequately sample the content of the overarching activities allowed by a driver's license.

1983b, *Relationship of Bar Examinations to Performance Tests of Lawyering Skills*, Rand Report P6895)

b. The Attorney's Examination has never been demonstrated to have criterion-related validation, in terms of evaluating the scores on the test and comparing them to performance of practicing attorneys. (per Dr. Susan M. Case, Director of Testing, National Conference on Bar Examiners, 1/18/08).

c. The scores on the Attorney's Examination are determined in a manner that is not consistent with professional standards. The reliability of the test scoring procedures fails to reach a level that would be acceptable for high-stakes testing. (Specifically, inter-rater agreement is quite low, a correlation of .48 between raters indicate only 23% shared variance among ratings; source: Klein & Bolus; Gansk & Associates 2003.) An acceptable level of reliability for such high-stakes testing would be shared variance in the neighborhood of 70% or higher (corresponding to reliability of about .84 or higher).

d. The passing cut-off score on the Attorney's Examination is determined without regard to the actual knowledge and skills of the individuals taking the examination, but is determined by the scores of other individuals taking the test.

The adjustment process that is used to transform the Attorney's Examination raw scores to a mean and standard deviation that

matches the results of **other** examinee's MBE scores, is performed in a manner that is inconsistent with actually assessing the individual examinee's knowledge and skills. This process is " . . . arbitrary, because it ensures that some fixed proportion of applicants will fail even though all or most of the applicants may in fact be qualified. The more able the group of applicants taking the test, the higher the passing scores will be." (Shimberg, 1981, p. 1141)

e. Because of the lower reliability of the Attorney's Examination, when compared to the MBE, and the non-compensatory scoring for the Attorney's Examination, the resulting regression-to-the-mean (a statistical phenomena that is exacerbated by lower reliability) will result in fewer qualified individuals taking the Attorney's Examination actually obtaining a passing score on the examination, in comparison to the California Bar Examination.

Specific Evidence/Data that
Form the Basis of the Evaluation

1. The described procedure (from the Gansk & Associates "Analysis of the February 2003 California Bar Examination" by S. P. Klein & R. Bolus; and repeated in subsequent reports)

    a. The procedure described for the "equating" of test scores from the MBE (using common questions across multiple administrations of the test) appears to be an appropriate use of

psychometric procedures to maintain approximately similar meanings of test scores from one administration to the next. However, neither the National Conference of Bar Examiners (phone contact with Dr. Susan Case, 1/18/08) nor ACT, Inc. (phone contact with Diane Johnson, 1/18/08) would make available any evidence regarding the adequacy of the procedures used for equating the test scores. A failure to release such information is inconsistent with standards for open professional evaluation of the psychometric adequacy of tests used for commercial purposes.

b. The reported reliability (form of reliability not specified in the report) of the Attorney's Examination ranges from .68 to .79 in available reports, but is always reported to be lower than the MBE (which ranges from .87 to .90) [Given that no discussion is presented about a sample of individuals who have taken the test twice for test-retest reliability purposes, I have surmised that the authors are referring to internal consistency reliability.] Because internal consistency reliability estimates (such as Cronbach's a) represent a confounding of test reliability and homogeneity (see Ackerman & Humphreys, 1991), the reported reliability information does not, in and of itself, provide sufficient evidence to determine if the test has adequate reliability. A sample of individuals who have taken the test twice, which would provide either test-retest same form or test-retest alternate form reliability is needed, in order to ascertain whether the reliability of the test and the stability of the knowledge and

skills assessed by the test are adequately measured. Test-retest alternate form reliability would be the most appropriate form of reliability for a certification test, and such data are not available.

c. No criterion-related validity data are reported for the MBE or the Attorney's Examination. According to the evidence available and statements from the National Conference of Bar Examiners (NCBE) Director of Testing, there has never been an attempt to establish whether the test has criterion-related validity.

2. There is no clear indication of how the examination questions for the Essay section and the Performance Test (PT) section were created.

3. There is no evidence of explicit equating procedure (as is performed with the MBE) which involves repeated use of a subsample of items from one administration to the next, in order to retain equivalent interpretations of test scores.

4. Instead, the raw scores for the written portion (Essay and PT) are converted to another scale, by means of multiplying the raw scores by a constant and subtracting the mean, in order to "have the same mean and standard deviation as the applicants' MBE scores" (Klein & Bolus, 2003, p. 5)

   "An applicant's Total scale score was a weighted combination of that applicant's MBE and Written scale scores. The formula for computing Total scale scores was:
   Total Scale Score = (.35)(MBE Scale) + (.65)(Written Scale)" (p.3)

The actual weighting and constant values applied to the raw scores on the Written portion changes from one administration to the next; essentially moving the goal posts, depending on the scores of other examinees who complete the MBE. For example, in July, 2002 the Written Scale score was "(3.0256 x Written Raw) – 473.9788" (p. 3). In February, 2003, the Written Scale score was "(3.2419 x Written Raw) – 584.0536"(p. 3)

5. As noted above, according to the State Bar of California "Attorney applicants who take the Attorney's Examination also have their scores on the written section placed on the same scale of measurement as general applicants, but as they are exempt from the MBE, their pass/fail status is based solely on the written section" (p. 3).

On the basis of professional standards:

Standards for educational and psychological testing. (1999). Published by the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education

1. Ideally, there would be criterion-related validity for each of the components of the Bar Examination (in particular, both the MBE and the Written sections).

   Comment: There do not appear to be any empirical data on criterion-related validity for either of these tests.

2. In the absence of criterion-related validity, there should be indicators of content-based validity.

   Comment: It is not possible, from the information made available, to ascertain the process by which items are created for the Written sections of the test.

3. Page 157. "Tests for credentialing need to be precise in the vicinity of the passing, or cut, score. They may not need to be precise for those who clearly pass or clearly fail."

   According to the Gansk & Associates 2003 report: "There were 991 applicants who had their answers read at least twice. On the average, an applicant's total written raw score on the first reading was 10 points higher than it was on the second reading. The correlation between these scores was .48. *This value underestimates the true degree of agreement between the readers because reread was limited to applicants near the pass/fail line.*" (p.5., italics added)

   In July 2002, "The correlation between these scores was .40"

   In the reports of the February, 2005 and July 2005 administrations, these statistics have been omitted.

   Comment: This level of inter-rater agreement is quite low, indicating only 16% to 23% shared variance among ratings. With such low reliability, there is a strong tendency for regression-to-the-mean when scores are averaged. If the pass/fail cutoff score is above the mean, the result will be lower passing rates than would be obtained if the

procedure were more reliable. (This results in a larger portion of truly qualified individuals taking the Attorney's Examination to fail the examination, in comparison to individuals taking the full California Bar Examination, ceteris paribus.)

4. Page 157 "Legislative bodies sometimes attempt to legislate a cut score, such as a score of 70%. Arbitrary numerical specifications of cut scores are unhelpful for two reasons. First, without detailed information about the test, job requirements, and their relationship, sound standard setting is impossible. Second, without detailed information about the format of the test and the difficulty of the items, such numerical specifications have little meaning."

   Page 158. "Some credentialing groups consider it necessary, as a practical matter, to adjust their criteria yearly in order to regulate the number of accredited candidates entering the profession. This questionable procedure raises serious problems for the technical quality of the test scores. Adjusting the cut score annually implies higher standards in some years than in others, which, although open and straightforward, is difficult to justify on the grounds of quality of performance. Adjusting the score scale so that a certain number or proportion reach the passing score, while less obvious, is technically inappropriate because it changes the meaning of the scores from year to year."

   Standard 14.13. "When decision makers integrate information from multiple tests or integrate test and nontest information, the role played by each test in the decision process should be clearly

explicated, and the use of each test or test composite should be supported by validity evidence. (p. 181).

Standard 14.17. "The level of performance required for passing a credentialing test should depend on the knowledge and skills necessary for acceptable performance in the occupation or profession and should not be adjusted to regulate the number of proportion of persons passing the test."

Comment: Given that there is no apparent matching between the content of the Written portion *scores* and the content of the knowledge and skills of the occupation **(especially given that the score 'meaning' is norm-centered, rather than content-centered, based on the transformations to the raw scores), it seems clear that these standards have not been met in any explicit fashion**.

5. On January 18, 2008, I spoke by telephone with Dr. Susan M. Case, Director of Testing, National Conference on Bar Examiners.

   Dr. Case confirmed that there have been no validation studies conducted on the Multistate Bar Examination (MBE) that involve practicing lawyers. That is, there are no predictive or concurrent validity data that would support the use of the MBE for determining the competency of individuals for admission to the Bar.

   Dr. Case also indicated that NCBE would not release any information about the psychometric adequacy of the MBE test (e.g., reliability and validity).

I also spoke with Diane Johnson of ACT on January 18, 2008. She noted that ACT develops and equates the test for NCBE, but she indicated that no information could be released about the psychometric properties (e.g., reliability, equating) could be released from her organization.

References

Klein, S. P., & Bolus, R. (2002). *Analysis of the July 2002 California Bar Examination.* This is an attachment to the Report to the Supreme Court of California.

Klein, S. P., & Bolus, R. (2003). *Analysis of the February 2003 California Bar Examination.* This is an attachment to the Report to the Supreme Court of California.

Klein, S. P., & Bolus, R. (2005a). *Analysis of the February 2005 California Bar Examination.* This is an attachment to the Report to the Supreme Court of California.

Klein, S. P., & Bolus, R. (2005b). *Analysis of the July 2005 California Bar Examination.* This is an attachment to the Report to the Supreme Court of California.

Report to the Supreme Court of California on the July 2002 California Bar Examination

Report to the Supreme Court of California on the February 2003 California Bar Examination

Report to the Supreme Court of California on the February 2005 California Bar Examination

Report to the Supreme Court of California on the July 2005 California Bar Examination

Standards for educational and psychological testing. (1999). Washington DC: American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education.

Ackerman, P. L., & Humphreys, L. G. (1991). Individual differences theory in industrial and organizational psychology. Chapter in M. D. Dunnette & L. M. Hough (Eds.) *Handbook of industrial and organizational psychology* (Volume 1, pp. 223-282). Palo Alto, CA: Consulting Psychologists Press.

Klein, S. P. (1983a); *Measuring legal research skills on a bar examination*, Rand Report P-6879. Rand Corporation.

Klein, S. P. (1983b). *Relationship of bar examinations to performance tests of lawyering skills.* Rand Report P-6895. Rand Corporation

Shimberg, B. (1981). Testing for licensure and certification. *American Psychologist, 36*, 1138-1146.

Additional Citations and Reference Materials

Others have offered both psychometric and principled arguments against the methods currently in use for deriving scores on the Written Section (Essay and PT) of the Bar Examination. For example, see the especially detailed analysis provided by:

Merritt, D. J., Hargens, L. L., & Reskin, B. F. (2001). Raising the bar: A social science critique of recent increases to passing scores on the bar exam. *University of Cincinnati Law Review, Vol. 69, No. 2.*

For a brief review of these points, see pp. 9-12 by D. J. Merritt in *The Bar Examiner, November 2001*.

These issues are also discussed in W. C. Kidder (2004). The bar examination and the dream deferred: A critical analysis of the MBE, social closure, and racial and ethnic stratification. *Law and Social Inquiry*, pp. 547-589.

EXHIBIT B

2018 Petition by Legal Scholars on Behalf of National Advocates to Change Local Rules in 9th Circuit Arguing this Federal Discrimination is Not Reasonably Related to any Legitimate Purpose & Rejection

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 522-4100

CHAMBERS OF
PHYLLIS J. HAMILTON
CHIEF JUDGE

April 3, 2018

Alan B. Morrison
Lerner Family Associate Dean for Public
Interest & Public Service
George Washington University
School of Law
2000 H Street, NW
Washington, DC 20052

Dear Mr. Morrison

I write in response to your letter of February 6, 2018, and accompanying petition to amend the Northern District of California's Civil Local Rule 11-1(b). As per our Civil Local Rule 83-1, your petition and supporting materials have been fully vetted first by the court's Local Rules Committee and then by the entire court. We have voted to deny your petition.

Thank you for your interest in our local rules.

Sincerely,

/s/ Phyllis Hamilton
Phyllis Hamilton
Chief Judge

cc: Hon. Richard Seeborg,
Chair, Local Rules Committee

Susan Y. Soong, Clerk of Court

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

May 23, 2018

By Federal Express
Sidney R. Thomas, Chief Judge
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
Office of the Circuit Executive
95 Seventh Street, Suite 429
San Francisco CA 94103

Dear Chief Judge Thomas:

This letter is written to you in your capacity as Chair of the Judicial Council of the Ninth Circuit. Pursuant to 28 U.S.C. § 2071(c)(1), the enclosed Petition asks the Council to review a decision of the United States District Court for the Northern District of California declining to amend its Local Rule 11-1(b) to delete the requirement that applicants for admission to the Bar of that Court must also be active members of the California Bar. An electronic version of this Petition and supporting papers are being provided by email to the Circuit Executive's office.

Respectfully submitted,

/s/ Alan B. Morrison
Alan B. Morrison
Attorney for the Petitioners

cc: Marcy Mills, mmills@ce9.uscourts.gov

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

May 23, 2019

Federal Express
Sidney R. Thomas, Chief Judge
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
Office of the Circuit Executive
95 Seventh Street, Suite 429
San Francisco CA 94103

Dear Chief Judge Thomas:

This letter is written to you in your capacity as Chair of the Judicial Council of the Ninth Circuit. A year ago I filed a Petition with the Judicial Council pursuant to 28 U.S.C. § 2071(c)(1). A complete copy of the Petition and my cover letter are enclosed.

The Petition sought review of a decision of the United States District Court for the Northern District of California declining to amend its Local Rule 11-1(b) to delete the requirement that applicants for admission to the Bar of that Court must also be active members of the California Bar. An electronic version of the Petition and supporting papers were provided by email to the Circuit Executive's office.

Although a year has passed since the Petition was filed, there has been no action on the Petition, nor have I received any communication from the Judicial Council on this matter. I would appreciate it if you would

look into this matter and advise me whether we will receive a substantive response and, if so, in what time frame.

Respectfully submitted,

/s/ Alan B. Morrison
Alan B. Morrison
Attorney for the Petitioners

cc: Marcy Mills, mmills@ce9.uscourts.gov
(w/out enclosures)

February 6, 2018

PETITION OF PUBLIC CITIZEN LITIGATION GROUP & 12 OTHERS PURSUANT TO LOCAL RULE 83-2 TO AMEND LOCAL RULE 11-1(b)

This Court and the three other federal district courts in California have promulgated rules under which attorneys may not be admitted to practice in those courts unless they are active Members of the Bar of the State of California. This Petition asks this Court to amend Local Rule 11-1(b) to delete the requirement that applicants for admission to the bar of this Court must be members of the California bar. Copies of this Petition are being sent to the Clerk of each of the District Courts in the Ninth Circuit. All of those courts require that members of their bars be admitted to the state court in which the district is located. However, within the Ninth Circuit, only three States require that all applicants for admission take the bar exam for that jurisdiction (California, Nevada, and Hawaii, plus the Territories of Guam and North Marianas). NAT'L CONFERENCE OF BAR EXAM'RS AND AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 36 (2017) ("Nat'l Conf Report") http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html#p=48

SUMMARY OF PROPOSAL

Pursuant to Local Rule 83-2 and 28 U.S.C. § 2071(c), this Petition asks the Court to amend Rule 11-1(b), after providing notice and an opportunity to

submit comments, to delete the requirement for California Bar admission, with the proposed text appearing on page 5. As more fully explained below, three reasons support this change.

(1) The requirement for California Bar admission does not bear any reasonable relationship to the actual practice in this Court because the procedures followed are established by federal rules and the issues in the vast majority of the cases in this Court arise under federal, not California law.

(2) Because the California Bar does not allow any attorney to be admitted on motion, having to take the California Bar exam imposes unjustified burdens of time and money for an attorney whose primary reason to obtain admission to that Bar is to be admitted to practice in this Court. In addition, once admitted, a lawyer must continue to be an active dues-paying member of the California Bar to remain a member of the Bar of this Court, even when a lawyer does not regularly practice in California. These burdens are wholly out of proportion to any possible benefit that might be realized for clients and the Court from imposing such a requirement.

(3) The requirements for pro hac vice admission—in particular the payment of $310 for each attorney in each case—are burdensome. The required payment must be made not only by attorneys who have a major role in a case, but also by those whose appearance is on behalf of an amicus or a class member objecting to a settlement of a class action, or in

connection with motions pertaining to a subpoena issued in support of litigation pending in a different district.

THE PETITIONERS

The Addendum to this Petition describes each of the Petitioners and explains their interests in supporting the proposed rule change. The reasons for their support vary, because the petitioners represent a variety of affected persons, including non-profit organizations providing pro bono legal services; organizations of attorneys; and a membership organization of for-profit businesses. Each Petitioner has concluded that the current requirement of membership in the California bar imposes unnecessary burdens on lawyers and clients alike, although in different ways and in different circumstances.

HISTORY OF RULE 11-1(b)

Shortly after the Federal Rules of Civil Procedure became effective in 1938, a committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DISTRICT COURT RULES (1940), *reprinted* in 4 Fed R. Serv. 969 (1941) (hereinafter, the "Knox Report"). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. The Report concluded that bar admission rules were appropriate for local adoption.

The committee also included as an Appendix to the Report model rules for bar admission and other topics that it considered appropriate. A copy of the pages of that Appendix relating to attorney admission is included in the Addendum to this Petition.

The model rule on bar admission is noteworthy in that it did not suggest that the federal courts require admission to the bar of the state in which the federal court was located. Rather, it would have allowed admission for any attorney who was admitted by the highest court of "this state . . . or any other state" with one proviso: that the applicant "must show that at the time of his admission to the bar of that [other] court, the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state." Knox Report Appendix at 29. The committee described the proviso as "a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the standards which that state requires." *Id.* at 30. Thus, to the extent that the committee envisioned admission to a district court bar to exclude attorneys admitted in other states, it was solely because a particular state—not all other states—had lower standards for admission than the state where the district court was located.

This Court first enacted local rules in 1977 and amended them in 1988. On March 22, 1994, the Court appointed a committee to review all of the local rules and make suggestions for revisions. The committee issued its report on November 1, 1994, and on January

20, 1995, the Court published the report and requested comments on the proposed changes, which included a proposed change to Rule 11 on bar admission. The first ten pages of the notice and report, which include the material relevant to Rule 11, are attached (the "Notice").

At that time, this Court had no requirement that a member of the Bar of this Court be admitted to the California Bar. The committee proposed that change, among amendments that it designated "Policy Suggestions," as one that "it felt would be wise as a matter of policy." Notice at vii. In support of the change, the committee offered no studies or other evidence beyond its self-evident observations that the proposed rule "more closely restricts bar membership to members of the California bar" and that "the previous rule was less restrictive on this issue." The Rule was adopted, with no changes, but with one noteworthy feature: it allowed those attorneys who were admitted to this Court prior to the 1995 amendment to continue as members of the bar of this Court.

As a result, Rule 11-1 of this Court now provides as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active

> membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

PETITIONERS' PROPOSED RULE

Petitioners propose that the Rule be amended by deleting the following language:

> the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

In the place of the language limiting new admissions to members of the California Bar, the following language, eliminating that restriction, would be inserted: "the bar of any State, Territory, or the District of Columbia." Under this proposal, Rule 11-1(b) would read as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia.[1]

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[1] The full text of current Local Rule 11 is included in the Addendum.

REASONS TO GRANT THE PETITION

1. The Current Rule Is Not Reasonably Related to Any Legitimate Purpose.

The requirement of admission to the California Bar is a barrier to admission to the federal courts in California by out-of-state attorneys in good standing where they primarily practice, and, therefore, there should be a good reason for it. This Petition is not like a court challenge to a bar admission rule in which the Court would have to give deference to the entity that issued the rule and would have to determine the appropriate level of scrutiny to apply. Because this Court has the power to change the rule whenever it finds cause to do so, the Petition need only show that the California Bar requirement is not reasonably necessary to serve a legitimate purpose.

(a) Federal Law Dominates the Cases in this Court.

The only possible justification for requiring licensed attorneys who wish to become members of the Bar of this Court to be admitted to the State Bar of California would be that many of the cases in this Court involve questions of California law. Yet because so many do not involve California law, that argument does not justify the rule. To begin with, federal courts apply federal procedural rules—civil, criminal, bankruptcy, and evidence, as well as the Court's local rules—to the proceedings before them. Before 1938, federal courts applied local procedural rules, and so

knowing California state procedures might have made sense then, but that is no longer the case. To the extent that California Bar admission is a proxy for a lawyer being available to be in court, the increased use of electronic filing and teleconferencing has reduced the need for counsel who live and regularly practice in California. Moreover, even when motions are not decided on the papers alone, many judges hold hearings by telephone even for lawyers who have offices in the District. *See* Civ. L. R. 7-1(b).

On the substantive side, criminal cases are governed by federal criminal statutes and the Federal Rules of Criminal Procedure and the United States Constitution. Most laws at issue in bankruptcy and admiralty proceedings are federal, although issues of state law arise regarding claims in bankruptcies and may arise in other cases as well. Even then, for reasons discussed below for civil cases generally, the applicable state law may not be that of California. In short, as the American Law Institute observed, the requirement of local bar membership "is inconsistent with the federal nature of the court's business." RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS § 3 comment *g* (AM. LAW INST. 2000).

On the civil side, cases fall into two major categories: cases arising under federal law, for which California state law is only rarely even a small part of the governing authority, and diversity cases, in which state law is the basis for the underlying claim. During the year ending June 30, 2016, 6,925 civil cases were commenced in the Northern District of California.

Statistical Tables for the Federal Judiciary, ADMIN. OFFICE OF THE U.S. COURTS Table C-3 at 5 (June 30, 2016), http://www.uscourts.gov/statisticsreports/statistical-tables-federal-judiciary-june-2016. In addition, 591 criminal cases and 10,777 bankruptcy cases were filed, for a total of 18,293 cases. *Id.* Tables D at 3; Table F at 3. Among the civil actions, the United States was a party in 651, *id.* Table C-3 at 5, and pursuant to 28 U.S.C. § 517, its attorneys may appear in any court, federal or state. Of the 6,274 private cases, 1,084 were prisoner petitions, 590 were intellectual property cases, 502 were labor suits, and 963 were civil rights suits. *Id.* at 6. Complaints in these categories all appear to be based on federal substantive law, although some cases may also include closely related state-law claims under supplemental jurisdiction. Even in those "mixed" cases, the lawyer's expertise in employment, securities, or antitrust law, for example, is far more important to the client than whether the lawyer is admitted to the state court where the federal court is situated.

Of the 3,135 remaining private civil cases, 722 were contract cases, 273 were real property cases, 411 were personal injury cases, and 662 were "other tort cases," which may well include federal admiralty cases. *Id.* The remaining 1,067 cases were not categorized, but, based on their placement in the table, and the absence of any category for securities and antitrust cases, some of them are certainly cases based on federal substantive law. The Administrative Office does not publish statistics on the basis of subject matter

jurisdiction by District for filed cases, but from its data set on case *closings*, assisted by a researcher at the Federal Judicial Center, Petitioners were advised that there were 1,038 civil cases, based on diversity of citizenship, terminated in fiscal year 2016 in the Northern District of California. On the assumption that terminations and filings were approximately the same, diversity cases represented 16.5% of the private civil cases, but only 5.6% of the total of all cases.[2]

(b) Even Cases in This Court Involving State Substantive Law Do Not Require California Expertise.

Moreover, even when state law is significant in a particular case, the state law at issue is by no means certain to be the law of California. In diversity cases, the parties will always be from at least two jurisdictions, one of which is not California. With the laws of two or more jurisdictions a possibility, there is no particular reason to think that California law would apply even in a diversity case in federal court in California, using the applicable conflicts of laws principles (which will be decided based on the choice of law principles of

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[2] The Northern District's caseload is in line with the national numbers. Thus, of the 1,187,854 cases filed in all district courts for the 12 months ending March 31, 2016, 833,515 were bankruptcy cases, 79,787 were criminal cases and 274,552 were civil cases of which only 82,990 (7.0% of total filings and 30.2% of civil filings) were diversity cases. *Federal Judicial Caseload Statistics*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 31, 2016), http://www.uscourts.govistatistics-reports/federal-judicial-caseload-statistics-2016.

the State in which the district court is located) or the choice of law provision in a contract. Moreover, a number of MDL diversity cases, including nationwide class actions, end up in California, where the judge will have to decide which state law(s) to apply to the claims. In one substantive area of law in which California is different from that of most states—it has community property—the exclusion of matrimonial cases from the scope of diversity jurisdiction, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), makes it unlikely that community property issues will arise with any frequency in this Court. To be sure, some cases in this Court involve questions of California law. But even in that subset of cases, there is no reason to presume that private lawyers who practice primarily outside of California are not fully qualified to represent their clients in those cases.

Two other reasons show that close familiarity with the substantive law of a particular state is not likely to be a significant factor in most federal court litigation. First, advising a client in advance about state law is quite different from handling a lawsuit after the claim has arisen. In the former situation, knowledge of the law can help avoid problems by careful planning, but that is no longer an option once the breach of contract or harm constituting a tort or a violation of another law has occurred. At that point, the role of the lawyer is to research existing law and apply it to the facts of the case, rather than predict what problems might arise and anticipate how to avoid them. Second, good litigators, which describes most of the lawyers who

handle civil cases in federal courts, are used to venturing into new areas of substantive law; indeed, that is one of the skills that makes them good litigators. Thus, even if there are nuances of California law at issue in a given case, that is a common aspect of practice for a federal court litigator.

(c) Other Aspects of the Current Rule Show that the California Bar Admission Requirement is Unnecessarily Burdensome.

Two features of the current rule undermine any purported basis for the requirement of California Bar admission. First, the rule makes an exception for attorneys who were admitted to the Bar of this Court prior to September 1, 1995, based on admission to the bar of another State, even if they still are not admitted in California. That exception shows that the Court recognizes that litigants, opposing counsel, and the judges of this Court are able to conduct litigation with lawyers who have been admitted to the Bar of the Court, but not the California Bar.[3]

Second, the current rule requires that attorneys must continue to be "active" members of the California Bar. As a result, if a California attorney moves his or her primary practice to another jurisdiction, the right to practice in this Court will depend on whether the

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[3] The fact that former members of the California Bar admitted to this Court after September 1995 are removed from the Court's bar if they retire from the California bar, even while maintaining active status in the bar of another state, further shows the arbitrariness of the current rule.

attorney continues to pay the $410 that is currently charged active California lawyers, as well as the costs to comply with the CLE requirement of the California Bar (25 hours of CLE every three years, http://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements). The CLE requirement may not dovetail with any CLE requirements of the lawyer's primary bar, and may require the lawyer to incur substantial additional costs.

Moreover, the requirement for admission to the local state court as a condition of admission to the federal court inevitably restricts clients' choices of who their attorneys will be. That limitation is unjustified because there is no reason to assume that clients with cases in this Court will not be able to make a proper assessment as to whether the case is one in which knowledge of local law is important or whether their preferred lawyer is able to handle the matter, even with local law issues as part of the mix. Federal court diversity contract or property claims typically involve significant matters, for which the client is either sophisticated or has advice of in-house counsel. As for plaintiffs in tort actions, there is no reason to think that the market for cases in the federal courts is so imperfect that this Court needs to require that the plaintiff hire a lawyer who is a member of the California Bar for cases in this Court, regardless of how insignificant issues of California law may be to the outcome. The argument to allow client choice is even stronger, and the local law rationale even less weighty, in federal question, criminal, and bankruptcy cases, yet the California

Bar admission requirement applies to those lawyers who only handle cases arising under federal law.

In addition, the rules of professional responsibility and the legal malpractice laws protect clients from unqualified and unethical lawyers, far more effectively than the rule requiring California Bar admission. Local Rule 11-4(a)(1) of this Court incorporates the State Bar of California's Rules of Professional Conduct, including Rule 3-110 which states:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Finally, under the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some

judges, to appear in court. *See* Civil L.R. 11-3(a)(3), (e). Unless there is some reason to believe that clients cannot make appropriate decisions about which lawyer they want to represent them in federal court litigation, a local rule insisting that clients prefer California lawyers, no matter what the legal and factual issues may be, is very hard to justify.

2. California Bar Admission Is Burdensome.

Because California does not allow admission on motion and does not provide for admission on a reciprocity basis, the burden imposed by this Court's admission rule is even greater. Even if California allowed admission on motion or through reciprocity, Petitioners would nonetheless urge this Court's to revise its rule for the reasons set forth in the prior section. Nonetheless, the requirements for admission to the California State Bar exacerbate the problem.

Everyone, no matter how long they have practiced law, no matter if their work specializes in a single subject, even one dominated by federal law, must pass the California Bar exam to be admitted to the State Bar, and thus to be eligible for admission to the Bar of this Court. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988), "[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." For lawyers who have been practicing elsewhere for a number of years, the exam requirement is particularly burdensome. The bar exam is a general test, and most

lawyers specialize, and hence have no regular contact with many areas that the exam tests. As a result, a practicing lawyer will probably have to take a not-inexpensive California Bar prep course,[4] especially given the low pass rate for the California bar (35.3% for the February 2017 exam), including the attorneys-only exam (44.5% for the same exam). *General Statistics Report, February 2017 California Bar Examination*, THE STATE BAR OF CAL. (Mar. 26, 2017), http://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/FEB2017STATS.052617_R.pdf.

In contrast to an experienced lawyer who decides to live and work in California, it is very hard for litigating lawyers practicing elsewhere to justify taking the time away from pending matters, which may result in a substantial loss of income, to take a state bar exam that is needed only to be admitted to the federal district courts of that state in order to handle an occasional matter there. Finally, the attorney exam itself costs $983, and once admitted, the lawyer must pay $410 per year to the California Bar, which the lawyer would not pay except to continue to be a member of the bar of this Court.[5]

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[4] Kaplan's discounted courses currently are priced between $1699 and $2399. *California Bar Review Course*, KAPLAN (last visited Jan. 31, 2018), https://www.kaptest.com/bar-exam/courses/california-bar-review-course?state–california.

[5] There is also a $153 laptop charge for the exam. *Schedule of Fees*, THE STATE BAR OF CAL. (last visited Jan. 31, 2018), https://www.calbarxap.com/applications/CalBar/info/fees.html.

Whether California Supreme Court is justified in continuing to insist that all applicants must take the California Bar exam is not the question that this Court must decide. Rather, given the admitted difficulty in obtaining bar admission in California, the question is whether this Court is justified in insisting that applicants for admission satisfy that requirement in addition to being in good standing in another State or the District of Columbia. And on that question, the answer is decidedly "No."

The four district courts in California that require admission in the State court are not unique among the federal district courts. However, the combination of State court bar admission and requiring all bar applicants to take the bar exam places those courts in a distinct minority. A majority of district courts nationwide require admission to the local State Bar, but only eight of the States comprising those districts require all applicants to take their state's bar exam.[6] As petitioners explain above, we see no connection between being admitted to the bar of the state where a federal district court is located, and the ability to provide quality legal

[6] The other state bars that do not allow admission on motion are Delaware, Florida, Hawaii, Louisiana, Nevada, Rhode Island and South Carolina, plus Guam and the Northern Mariana Islands. Of these, Rhode Island requires that attorneys admitted elsewhere only have to take the essay portion of the Rhode Island Bar Exam. In February 2017, South Carolina began using the Uniform Bar Exam, which will make it easier to gain admission to its bar, but not eliminate the cost of application and annual dues. NAT'L CONF REPORT, *supra* note 1, at 21-22, 27, 32, 36-37, http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html.

services in that court. We therefore oppose all such requirements as unnecessary anywhere. The requirement is also unduly burdensome for the additional reasons that admission to the California Bar requires every applicant to pass the California Bar exam and continue to be an active dues-paying member of that bar.

3. Pro Hac Vice Admission Is Not A Feasible Alternative.

The third factor compounding the problem for lawyers and clients with cases in this Courts is that admission on a pro hac vice basis is not a feasible option for several reasons. First, it is available only with the cost and burden of having local counsel in the case. N.D. Cal. Civ. R. 11-3(a)(3). Second, pro hac vice admission is not automatic, although most pro hac vice motions are granted, with no apparent requirement that the Court determine whether there are any issues of California state law in the case and whether the attorney seeking admission is qualified to handle them. Far from supporting the current practice, the ease of admission suggests that there is no real reason to have the California Bar admission requirement in the first place.

Third, the charge of $310 is for *each* individual attorney's pro hac vice admission in *each* case, and is presently the second highest pro hac vice admissions fee in the United States. The charge is the same as the fee for permanent admission to the bar of this Court,

and payment is required even if it the lawyer is simply objecting to a class action settlement or seeking to file an amicus brief. In this respect the fee operates like a toll on access to justice and is particularly harmful where a lawyer is handling a matter on a pro bono basis. For these reasons, pro hac vice admission is not a substitute for full admission, and the pro hac vice rule does not create a feasible alternative.[7]

4. State Bar Admission Is Not Needed to Discipline Unethical Attorneys.

Courts have a legitimate interest in being able to assure that Members of their Bar are subject to discipline by them. Eliminating the requirement that a lawyer be admitted to the State Bar in the district in which the federal court sits would not present a problem in this regard, especially when compared with the situation in which a lawyer is admitted pro hac vice. First, a Member of the bar of this Court who acts contrary to court rules may permanently lose the right to practice in this Court, whereas an attorney admitted pro hac vice will mainly lose the opportunity to participate in one case.

Second, if a lawyer is disciplined in one jurisdiction, that information is generally forwarded to all

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[7] Rule 11-3(b) imposes additional restrictions on pro hac vice admission. With certain limited exceptions, an applicant is not eligible for pro hac vice admission if she or he "(1) Resides in the State of California; or (2) Is regularly engaged in the practice of law in the State of California."

other jurisdictions in which the lawyer is admitted, which may not include places in which the lawyer is admitted for one case on a pro hac vice basis.

Third, the best proof that discipline is not a problem is the fact that many districts do not require admission to the local state bar, and there is no evidence of which we are aware that those districts are having any discipline problems with out of state attorneys who are Members of their Bar.

Finally, the Court has, unintentionally, conducted a limited experiment on whether there would be any discipline or other problems from an attorney's lack of admission to the California bar, and so far as Petitioners can determine, there are no reports of such problems. The experiment arose from the express exception created in 1995 for attorneys who are not members of the California Bar, but who had previously been admitted to the Bar of this Court. If any problems arose from that general exception, they surely would have surfaced in the intervening 23 years, and the fact that they have not provides further support for the conclusion that the requirement of membership in the California Bar to be eligible for membership in the Bar of this Court should be deleted, and the Petition granted.

CONCLUSION

For the foregoing reasons, the Court should institute a notice and comment rulemaking proceeding that would eliminate the requirement that an attorney must be a member of the State Bar of California to be

a member of the Bar of this Court from Rule 11-(b), which would then read as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia.

Respectfully Submitted

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ADDENDUM

DESCRIPTIONS OF PETITIONERS

Public Citizen Litigation Group is a public-interest law firm within the non-profit consumer advocacy organization Public Citizen Foundation. Our lawyers are located in the District of Columbia, but regularly appear in cases in federal courts across the country, including in the Northern District of California. At times during the firm's 45 years, we have represented in the Northern District clients litigating as parties, clients filing as amicus curiae, clients appearing as objectors to proposed class action settlements, and "John Does" challenging subpoenas to Internet Service Providers seeking information to identify the Does. In each case, we represent the client on a pro bono basis, although where we represent a plaintiff we may seek an award of attorney fees when we prevail. Currently, none of our attorneys is admitted to practice in the Northern District. Therefore, to appear in the Northern District, we must find local counsel, generally also pro bono, and the attorney from our office with primary responsibility must-apply for pro hac vice admission and pay a fee, currently $310. The requirement of paying a pro hac fee applies even to our staff attorney who is a member of the California Bar but on inactive status, because the Northern District of California deems a lawyer "inactive" who is on inactive status with the California Bar. Another of our attorneys was previously admitted to the Northern District but lost her admission after approximately 15 years, when she voluntarily retired from the California Bar (but retained

her membership in the Bar of the District of Columbia).

American Civil Liberties Union is a national civil liberties and civil rights organization founded in 1920 with affiliates or chapters in every state. It often litigates cases in California federal courts, and the rule as it stands is an impediment to its doing so, and to its working with attorneys who are not members of the California state bar, even if those attorneys are fully capable of and deeply versed in litigating in federal court. For the reasons elaborated in the petition, it supports the requested rule change.

Association of Corporate Counsel, is a global bar association of over 40,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations located in at least 85 nations. It strongly supports the amendment by this court of Local Rule 11.1(b) to delete the requirement of membership in the California bar in order to be admitted to the bar of this Court. Our members' companies may be involved in litigation in this district and wish to use the expertise of our members, as well as outside counsel, who may not be California bar members but who would be the most knowledgeable and efficient choices for their legal work. These in-house and outside counsel, admitted in other jurisdictions, perform for sophisticated corporate clients and should be allowed to practice in federal court without the unnecessary burden of gaining admission to the California bar.

Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato files *amicus* briefs in cases arising around the country, and thus has an interest in ensuring reasonable admission rules in all jurisdictions that permit the filing of *amicus* briefs, including the Northern District of California. *See. e.g.*, *Google LLC v. Equustek Solutions, Inc.*, No. 5:17-cv-04207-EJD, Dkt. 27 & 40 (N.D. Cal.). As a nonprofit organization, Cato is especially sensitive to litigation costs, and high pro hac admission fees may preclude us from filing. Cato also has a larger institutional interest in vindicating the right to choice of counsel, both as a general means of securing access to justice for all litigants, and also as a component of criminal defendants' Sixth Amendment right to the assistance of counsel. Cato supports the petition because the proposed rule change would enable parties to choose from a wider range of qualified counsel and secure representation at lower cost.

Center for Constitutional Litigation, P.C. (CCL) is a law firm located in New York, NY with a nationwide practice, that occasionally has cases and currently has one case pending in the Northern District of California, though no lawyer in the firm is admitted to that court's bar or the bar of the State of California. In that case, CCL lawyers represent the City of Oakland in *City of Oakland v. Wells Fargo & Co.*, Case No. 3:15-cv-04321-EMC, having been admitted *pro hac vice.* Because our practice takes our lawyers into federal and state courts throughout the nation, CCL is keenly interested in the

rules that govern its admission to the bar of this Court. When lawyers in the firm have cases in the Northern District, they must associate with (and pay) local counsel, whether that is in the best interests of their clients and they must apply for and pay for pro hac vice admission in each case in which they are counsel.

Competitive Enterprise Institute's Center for Class Action Fairness represents class members pro bono against unfair class action procedures and settlements. With a high volume of class actions filed in the Northern District, we regularly appear in the Northern District on behalf of individual class members objecting to unfair class action settlements. We handle all of these cases pro bono, although we may seek attorneys' fees where our work substantially improves a settlement. Only one of our five attorneys is admitted to the Northern District and is a member of the California bar. Because a large percentage of our caseload is in the Northern District, it is impractical for that single attorney to handle all of our work in the Court. As a result, our other attorneys often must apply for pro hac vice admission and pay the $310 fee, instead of paying the identical Northern District bar admission fee only once. We also are required to retain local counsel who are physically present in the district in such cases, even though those local counsel add nothing to our understanding of the local rules or the underlying law. This adds thousands of dollars a case to our expenses. Combined with the expense of litigating across the country and our limited budget, it has

affirmatively deterred us from participating in meritorious litigation.

Consumers for a Responsive Legal System ("Responsive Law") is a non-profit organization located in Washington, D.C. Responsive Law seeks to make the legal system more affordable, accessible and accountable to ordinary Americans. Responsive Law believes that requiring state bar membership for an appearance in federal court provides no benefit to individuals and small businesses seeking counsel for matters before a federal court. It does, however, limit the number and variety of lawyers from whom a litigant can select its counsel, thereby restricting consumer choice and artificially raising costs for parties in federal litigation. Unchecked protectionism of this sort is one of the reasons why the United States currently ranks 94th out of 113 countries in "affordable and accessible civil justice" according to the most recent Rule of Law Index issued by the World Justice Project.

Earthjustice is a non-profit public interest law firm. Earthjustice is headquartered in San Francisco, has an office in Los Angeles, and maintains additional offices in Alaska, Hawaii, Washington, Colorado, Montana, Pennsylvania, Florida, New York and Washington D.C. Although a number of attorneys in Earthjustices's California offices are admitted to and practice in the Northern District, some of Earthjustices's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these

non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the $310 pro hac vice filing fee for each case on which they worked.

Natural Resources Defense Council is a non-profit advocacy organization with members throughout the United States. NRDC is headquartered in New York, and maintains non-California offices in Illinois, Montana, and Washington, DC, as well as in San Francisco and Santa Monica, California. Although a number of attorneys in NRDC's California offices are admitted to and practice in the Northern District, some of NRDC's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the $310 pro hac vice filing fee for each case on which they worked.

Pacific Legal Foundation (PLF) is a national pro bono public interest litigation firm with offices in California, Washington, Florida, and Virginia. A number of PLF attorneys are members of the bar associations of states other than California, although most PLF attorneys are also members of the California State Bar. PLF litigates constitutional and other claims on behalf of its clients in federal courts across the nation. PLF attorneys are experts in several areas of federal law, including property rights and permit exactions, federal environmental law (particularly the Clean Water Act

and Endangered Species Act), race and sex preferences and discrimination, and freedom of speech and association. These legal fields employ a more or less unified national body of federal case law that is applicable in all federal courts. In litigating claims grounded in these fields, PLF attorneys' credentialing by the state bar association for the state in which the federal district court sits is not germane to their ability to represent clients and serve as officers of the federal district court. These attorneys' original credentialing as lawyers by any state bar adequately serves these purposes. The Northern District's rule requiring members of the Northern District Bar to first be members of the California State Bar serves no purpose that membership in another state bar association does not serve, and impedes PLF attorneys who are not California State Bar members from carrying out their public interest mission in representing clients with federal law claims that are properly venued in the Northern District of California.

Robert S. Peck is president of the Center for Constitutional Litigation, P.C. (CCL), a law firm located in New York, NY, and is admitted to practice in the State of New York and the District of Columbia. He is admitted to practice and has handled cases in the Supreme Court of the United States, six federal circuit courts of appeal, and five U.S. District Courts, while also having appeared pro hac vice in four other federal circuit courts and 13 other U.S. District Courts. In addition, he has litigated cases in state court in 25 states. Because his practice occasionally takes him to various

federal district courts in California, including a current matter pending in the Northern District of California, he is keenly interested in the rules that govern admission to practice in the Northern District. Currently, when litigating in that court, he must associate with (and pay) local counsel, whether that is in the best interests of his clients and must apply for and pay for pro hac vice admission in each case in which he is counsel.

Public Justice is a national public interest advocacy organization headquartered in Washington D.C. with a branch office in Oakland, California. Our in-house staff attorneys team with private attorneys around the country to fight injustice and preserve access to the courts for ordinary people. The bulk of our litigation is in the federal courts. Public Justice is supported by the membership contributions of thousands of attorneys nationwide, many of whom are not members of the California bar and hence are not eligible to be members of the Northern District bar. Instead, when they have cases in the Northern District, they must associate with (and pay) local counsel, whether or not that is in the best interests of their clients, and they must apply for and pay for pro hac vice admission in each case in which they are counsel. We support the petition because we believe that the current admissions rules in this District are unduly restrictive and burdensome. In addition, we believe that the choice of whether to have a lawyer admitted to the state court in which the federal court sits is one that should be left to the client

and the client's counsel, not imposed on the client by the Northern District rules.

John Vail is the principal of John Vail Law PLLC, a law firm located in Washington, DC, and devoted to appellate and motions practice throughout the United States. Mr. Vail is admitted to the bars of Tennessee, New Mexico, North Carolina, and the District of Columbia, and to numerous federal district and appellate courts, including the Supreme Court. He has served as counsel in cases in state and federal courts in California. He has expended significant time and effort being admitted pro hac vice in courts around the country. He has been consulted about appearing in cases pending in the Northern District. The current rules regarding admission impede him from appearing there.

LOCAL RULE 11-1 (Current Version)

11-1. The Bar of this Court.

(a) Members of the Bar. Except as provided in Civil L.R. 11-2, 11-3, 11-9 and Fed. R. Civ. P. 45(f), an attorney must be a member of the bar of this Court to practice in this Court and in the Bankruptcy Court of this District.

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction

other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

(c) Procedure for Admission. Each applicant for admission must present to the Clerk a sworn petition for admission in the form prescribed by the Court. Prior to admission to the bar of this Court, an attorney must certify:

> **(1)** Knowledge of the contents of the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of the United States Court of Appeals for the Ninth Circuit and the Local Rules of this Court;
>
> **(2)** Familiarity with the Alternative Dispute Resolution Programs of this Court;
>
> **(3)** Understanding and commitment to abide by the Standards of Professional Conduct of this Court set forth in Civil L.R. 11-4; and

Familiarity with the Guidelines for Professional Conduct in the Northern District of California.

(d) Admission Fees. Each attorney admitted to practice before this Court under this Local Rule must pay to the Clerk the fee fixed by the Judicial Conference of the United States, together with an assessment in an amount to be set by the Court. The assessment will be placed in the Court Non-Appropriated Fund for library, educational and other appropriate uses.

(e) Admission. Upon signing the prescribed oath and paying the prescribed fees, the applicant may be admitted to the bar of the Court by the Clerk or a Judge, upon verification of the applicant's qualifications.

(f) Certificate of Good Standing. A member of the bar of this Court, who is in good standing, may obtain a Certificate of Good Standing by presenting a written request to the Clerk and paying the prescribed fee.

(g) Reciprocal Administrative Change in Attorney Status. Upon being notified by the State Bar of California (or of another jurisdiction that is the basis for membership in the bar of this Court) that an attorney is deceased, has been placed on "voluntary inactive" status or has resigned for reasons not relating to discipline, the Clerk will note "deceased," "resigned" or "voluntary inactive," as appropriate, on the attorney's admission record. An attorney on "voluntary inactive" status will remain inactive on the roll of this Court until such time as the State Bar or the attorney has notified the Court that the attorney has been restored to "active" status. An attorney who has resigned and wishes to be readmitted must petition the Court for admission in accordance with subparagraphs (c) and (d) of this Rule.

(1) The following procedure will apply to actions taken in response to information provided by the State Bar of California (or of another jurisdiction or other jurisdiction that is the basis for membership in the bar of this Court) of a suspension for **(a)** a period of less than 30 days for any reason or

(b) a change in an attorney's status that is temporary in nature and may be reversed solely by the attorney's execution of one or more administrative actions. Upon receipt of notification from the State Bar that an attorney has been suspended for any of the following, the Clerk will note the suspension on the attorney's admission record:

(A) Noncompliance with Rule 9.22 child and family support;

(B) Failure to pass PRE;

(C) Failure to pay bar dues;

(D) Failure to submit documentation of compliance with continuing education requirements.

While suspended, an attorney is not eligible to practice in this Court or in the Bankruptcy Court of this District. In the event that an attorney files papers or otherwise practices law in this Court or in the Bankruptcy Court while an administrative notation of suspension is pending on the attorney's admission record, the Clerk will verify the attorney's disciplinary status with the State Bar (or other jurisdiction, if applicable). If the attorney is not then active and in good standing, the Chief District Judge will issue an order to show cause to the attorney in accordance with Civil L.R. 11-7(b)(1).

Upon receipt by the Court of notification from the State Bar that the attorney's active status has been restored, the reinstatement will be noted on the attorney's admission record.

(2) In response to information provided by the State Bar of California (or other jurisdiction that is the basis for membership in the bar of this Court) that an attorney has been placed on disciplinary probation but is still allowed to practice, the Clerk will note the status change on the attorney's admission record. An attorney with that status must, in addition to providing the notice to the Clerk required by Civil L.R. 11-7(a)(1), report to the Clerk all significant developments related to the probationary status. Upon receipt by the Court of notification from the State Bar that the attorney's good standing has been restored, the change will be noted on the attorney's admission record.

KNOX REPORT RULES APPENDIX
ATTORNEYS' PORTION

SUGGESTED LOCAL RULES FOR THE
UNITED STATES DISTRICT COURTS

1 Rule 1. Attorneys.
2 (a) *Roll of Attorneys* The bar of this court
3 consists of those heretofore and those hereafter
4 admitted to *practice* before this court, who have
5 taken the oath prescribed by the rules in force
6 when they were admitted or that prescribed by
7 this rule, and have signed the roll of attorneys
8 of this district.
9 (b) *Eligibility.* Any person who is a member
10 in good standing of the bar of (1) the highest
11 court of this state or of (2) the highest court of
12 any other state, is eligible for admission to the

13 bar of this court, but any person who may apply
14 for admission to the bar of this court on the basis
15 of his admission, after the effective date of this
16 rule, to the bar of the highest court of any other
17 state must show that at the time of his admission
18 to the bar of that court, the requirements for
19 admission to that bar were not lower than those
20 that were at the same time in force for admission
21 to the bar of this state.

Note. It is stated elsewhere in this report that nation-wide uniformity regarding eligibility for admission to practice in the various district courts is neither feasible nor desirable. However, since nearly every district has rules on this subject, and since some of those rules seem to make possible the infiltration of unfit persons into the Federal bar, and since some are couched in archaic and obscure language, this draft is

30

presented for the consideration of those judges who may feel that the substance of the practice which it states would fit the needs of their respective districts. It will be noted that the draft contains a proviso that will be a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the standards which that state requires.

22 (c) *Procedure for Admission.* Each applicant
23 for admission to the bar of this court shall file
24 with the clerk a written petition setting forth
25 his residence and office addresses, his general

26 and legal education, and by what courts he has
27 been admitted to practice. If he is not a
28 resident of this [district] [state] [and] [or]
29 does not maintain an office in this [district]
30 [state] for the practice of law, he shall des-
31 ignate in his petition a member of the bar
32 of this court who maintains an office in this
33 [district] [state] for the practice of law with whom
34 the court and opposing counsel may readily corn-
35 municate regarding the conduct of cases in
36 which he is concerned, and he shall append to
37 his petition the written consent of the person so
38 designated. The petition shall be accompanied
39 by certificates from two reputable persons who
40 are either members of the bar of this court or
41 known to the court, stating how long and under
42 what circumstances they have known the peti-
43 tioner and what they know of the petitioner's
44 character. If a certificate is presented by a
45 member of the bar of this court, it shall also

31

46 state when and where he was admitted to prac-
47 tice in this court. The clerk will examine the
48 petitions and certificates and if in compliance
49 with this rule, the petitions for admission will be
50 presented to the court at the opening of the first
51 ensuing session which convenes not earlier
52 than ___ days after the filing of the petition.
53 When a petition is called, one of the members of
54 the bar of this court shall move the admission
55 of the petitioner. If admitted the petitioner

56 shall in open court take an oath to support the
57 Constitution and laws of the United States, to
58 discharge faithfully the duties of a lawyer, and
59 to demean himself uprightly and according to
60 law and the recognized standards of ethics of
61 the profession, and he shall, under the direction
62 of the clerk, sign the roll of attorneys and pay
63 the fee required by law.

Note. It has been suggested that the rule should provide for the appointment of a committee of the bar to pass upon applications and, if necessary, examine the applicants personally. Rules of this character have long been in force in the district court of Massachusetts and have been incorporated into new rules in Arkansas and Oklahoma. Although the committee recognizes the desirability of such a procedure for some courts, it does not feel that it is necessary in the majority of districts and, therefore, It has not incorporated the provision into this rule. For judges who desire to inaugurate such a practice, the Arkansas, Massachusetts, and Oklahoma rules will serve as helpful guides.

It will be noted that the proposed rule provides that the petitions and certificates are to be presented to the court by the clerk "at the opening of the first ensuing session which convenes not earlier than ___ days after

the filing of the petition." This, of course, is a routine matter for the clerk and the provision must be varied to conform to the custom of the particular district concerned.

The alternative bracketed words "[district] [state]" in lines 28,29,30 and 33 are presented in consequence of the fact that in states where there are more than one district, the situations differ so that choice is essential.

For example, in New York there is no valid or practical distinction so far as the New York City bar is concerned between the Southern and Eastern districts of New York, and opinion, therefore, supports a requirement not measured by the district. In general, the word "state" should be used except where special reasons exist for limiting the rule to the "district."

64 (d) *Permission to Participate in a Particular*
65 *Case.* Any member in good standing of the bar
66 of any court of the United States or of the highest
67 court of any state, who is not eligible for admis-
68 sion to the bar of this district under subdivision
69 (b) of this rule, may be permitted to appear and
70 participate in a particular case. In his applica-
71 tion so to appear he shall make the designation
72 and append thereto the consent which are
73 required by subdivision (c) of this rule from non-
74 resident applicants for admission to the bar of
75 this court.

76 (e) *Disbarment and Discipline.* Any member
77 of the bar of this court may for good cause shown
78 and after an opportunity has been given him to
79 be heard, be disbarred, suspended from practice
80 for a definite time, reprimanded, or subjected
81 to such other discipline as the court may deem
82 proper.

33

83 Whenever it is made to appear to the court
84 that any member of its bar has been disbarred
85 or suspended from practice or convicted of a
86 felony in any other court he shall be suspended
87 forthwith from practice before this court and,
88 unless upon notice mailed to him at his last
89 known place of residence he shows good cause
90 to the contrary within ___ days, there shall be
91 entered an order of disbarment, or of suspension
92 for such time as the court shall fix.
93 Any person who before his admission to the
94 bar of this court or during his disbarment or
95 suspension, exercises in this district in any action
96 or proceeding pending in this court any of the
97 privileges of a member of the bar or who pre-
98 tends to be entitled so to do, is guilty of con-
99 tempt of court and subjects himself to appro-
100 priate punishment therefor.

Note. This subdivision is in accord with Rule 2 (5) of the Rules of the Supreme Court of the United States and the decision of that Court in *Selling v. Radford* (243 U. S. 46).

NOTICE OF PROPOSED RULES CHANGES
NDCA JANUARY 1995

RULES COMMITTEE
OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

450 Golden Gate Avenue
San Francisco, California 94102

January 20, 1995

TO: MEMBERS OF THE PUBLIC

FROM: JUDGE JAMES WARE, CHAIR

The United States District Court for the Northern District of California proposes to revise its Local Rules and has authorized circulation of the proposed revisions to the public generally for comment. The proposed revisions are intended to accomplish three primary objectives: (1) to conform the Local Rules to amendments to the national rules; (2) to renumber the local rules to correspond to the numbering of the national rule; and (3) to incorporate procedures which were tested under a pilot program pursuant to the Civil Justice Reform Act and which have been shown to be effective to secure the just, speedy and inexpensive determination of matters before the Court.

Enacted in 1977, the Local Rules of the Court are intended to supplement the national rules. They were last revised on November 1, 1988. Since 1988 amendments have been made to the national rules without corresponding amendments to applicable Local Rules. Effective December 1, 1993, a major amendment was

made to the Federal Rules of Civil Procedure. In addition. over the course of time, the Court received numerous suggestions fix modifications to its Local Rules from the bench and bar.

In 1993, Chief Judge Theiton E. Henderson requested the Rules Committee of the Court to undertake a major revision of the Local Rules. On March 22, 1994, pursuant to 28 U.S.C. § 2077, Chief Judge Henderson appointed an Advisory Committee on Civil Rules. The Advisory Committee was requested to review the Local Rules of the Court and to issue a report and recommendation to the Court.

On November 1, 1994, the Advisory Committee issued its report and recommendations, which were referred to the Rules Committee of the Court. The Rules committee considered the report and recommendations cite Advisory Committee, u well as suggestions from other sources. On January 10, 1995, the Rules Committee presented its proposed revisions of the Local Rules to the Court, which approved their publication for public comment.

The proposed revisions include modifications to the Bankruptcy Local Rules. October 22, 1994, the Bankruptcy Reform Ad of 1994 became effective. It made comprehensive changes in the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court for this District proposes to amend its Local Rules to reflect those amendments and to coordinate the numbering of the proposed Bankruptcy Local Rules with the proposed revisions of the Civil Local Rules.

The Court has not approved these proposed revisions but submits them for public comment. We request that all comments and suggestions be sent as soon as convenient and, in any event, no later than April 20, 1995 to:

Judge James Ware
Chair of the Rules Committee
280 South First Street
San Jose, California 95113

At the conclusion of the comment period, the Rules Committee will consider the proposed revisions in light of any comments and will make recommendations to the Court. If adopted, the Revised Local Rules would become effective on July 1, 1995.

RULES COMMITTEE
OF THE
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NORTHERN DISTRICT OF CALIFORNIA

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United States District Court
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District Judge
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United States District Court
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450 Golden Gate Avenue
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MEMORANDUM

TO: Rules Committee, United States District Court Northern District of California

FROM: Local Rules Advisory Committee

DATE: November 1, 1994

RE: Draft of Proposed New Local Rules

The Local Rules Advisory Committee hereby transmits to the Rules Committee its proposal for new civil Local Rules. This memorandum is intended to introduce the draft by explaining the method by which it was prepared and the animating goals behind some of the proposals.

This Committee was appointed by Chief Judge Henderson pursuant to 28 § 2077(b) in March, 1994. Working closely with Judge Ware, the Committee has undertaken a comprehensive revision of the Court's Local Rules. In general, this revision was designed to accomplish several objectives:

(1) to remove provisions that were no longer applicable or appeared to conflict with pertinent provisions of the Federal Rules of Civil Procedure;

(2) to remove provisions that appeared unnecessary because the matters involved are now covered by the Federal Rules of Civil Procedure;

(3) to move into the Local Rules provisions currently in the Court's General Orders

that seemed more appropriately included in the Local Rules;

(4) to arrange the provisions of the Local Rules so that they correspond to the Federal Rules of Civil Procedure;

(5) to integrate the provisions of General Order 34 into the Local Rules; and

(6) to consider possible changes in the rules on grounds of policy.

To accomplish these objectives, the Committee began with a rearrangement of the current local rules already done by Judge Ware that corresponded to the Federal Rules of Civil Procedure. Throughout the process, the Committee has worked closely with Judge Ware in fashioning the draft. Members of the Committee surveyed the current local rules to be sure that their provisions were properly re-designated to correspond to-pertinent-Federal Rules. In addition, the Court's General Orders and the standing orders of each Judge were reviewed to identify measures that might profitably be included in the Local Rules. The local rules of the other three districts in California were also reviewed to identify measures that might profitably be included in the Local Rules in this District.

Based on these various review processes, the Committee reached the conclusion that a number of matters presently covered in the local rules or General Orders should be in local rules but do not fit into civil Local Rules. Indeed, as to some of these matters other committees are drafting proposed rules. Accordingly,

the attached draft contains a general *set* of civil Local Rules. *As* explained in proposed Local Rule 1-2(a), it contemplates adoption of additional local rules governing the following areas:

(1) Admiralty and Maritime Cases

(2) Alternative Dispute Resolution

(3) Bankruptcy Proceedings

(4) Criminal Proceedings

(5) Habeas Corpus Proceedings

Based on existing rules, the Committee is preparing proposals for the first and last of the-above additional areas. Our intention is not to make any substantive change in the rules governing these areas. We understand that others are drafting rules for Bankruptcy and Criminal proceedings. A draft set of rules regarding Alternative Dispute Resolution incorporating provisions regarding arbitration from the Courts present local rules and from General Order 35 is under way but has not been completed for review by the Court.

Accordingly, the draft civil Local Rules follow the format of the Federal Bales of. Civil Procedure. The final editing was delegated to a subcommittee, and there may be the occasion for the committee to suggest some additional modifications of language in some proposed rules. The draft includes cross-references to the current local rules and also occasional committee notes regarding the purpose of the provisions. It is likely that a reading of the entire document is the most effective way to appreciate its provisions, but we thought ft

would be worthwhile to point out certain features in the cover memorandum.

The remainder of this memorandum will highlight certain of the changes in light of the various objectives the drafting committee was pursuing. These might most easily be organized as uniformity, adjusting the local rules to the national rules and taking account of the CJRA experience, simplification and policy changes. The references to specific provisions will therefore be presented in that manner.

Uniformity

Some proposals reflect the committee's conclusion that uniformity is an important objective. Although specific standards are sometimes included, the committee was more concerned with having a uniform standard than with the specific content of the standard in question.

Local Rule 1-2 (Standing Orders): This rule establishes that the goal of the entire package of rules is to provide a comprehensive and uniform set of procedures so that individual orders will not be necessary with regard to matters covered by the local rules. The committee expected that matters relating to the conduct of the trial would still be tailored by individual judges.

Local Rule 7-2(a) (Motions): This rule provides that the notice period for motions be 85 days. The committee found that different judges had different notice

requirements, but that several had directed 35 days' notice by standing orders, and the committee adopted that standard. The committee felt that the actual number of days was less important than that one uniform standard be employed by all judges.

Form A (Case Management Conference Statement and Proposed Order): Having surveyed the diverse requirements of different judges, the committee developed one form for such statements. The committee hopes not so much that this form be adopted unaltered as that it be used by all judges so that there would not be individual variations.

Adjusting to the national rules
and CJRA experience

Several members of the committee have also served in the CJRA Advisory Group and had experience in the drafting of General Order 34. As the Court is aware, the December, 1998, amendments to Rules 16 and 26 altered provisions covering similar matters. Having reflected on the experience under General Order 34 and the new provisions of the national rules, the committee attempted to develop a coherent and effective case management system for civil cases in the district.

Local Rule 16 (case management): This rule incorporates the recent changes in Federal Rules 16 and 26 as well as building on the experience of General Order 34. Except for cases excluded under Local rule 16-1, all cases will involve a tailored version of the initial

disclosure requirements of Federal Rules 26(4(1). Rule 16.2 sets out the basic ease management schedule providing that most specified events occur during the first 120 days after commencement of the case. Although early discovery by consent is allowed, Local Rule 16-3 directs that non-consensual discovery occur only after the Court has considered the needs of the case in light of the disclosures made.-parties who would suffer prejudice from waiting could obtain relief from the court to permit earlier initiation of formal discovery. Some features of General Order 34 that foreshadowed changes made in the national rules (e.g., early production of core documents) have been retained.

Largely invisible on the enclosed draft is another category of adjustments to take account of provisions of the Federal Rules. On occasion the committee eliminated provisions now in the local rules on the basis that the national rules adequately deal with the issue. For example, the draft does not include current rule 120-4 concerning calculation of time because it is inconsistent with Federal Rule 6(d). In this instance, the committee was aware that the existing rule is simple to use, but. felt that it would be dubious to deviate from the Federal Rules on this point. Similarly, the committee is recommending considerable editing of current local rule 400, so that there is no repetition of the applicable Federal Rules or statutes, and the provisions regarding handling of appeals from decisions of Magistrate Judges have been trimmed on the theory that the Federal Rules provide substantial guidance.

Other changes of this sort involved the local rules concerning the civil jury.

Simplification

In conjunction with reorganizing the rules to correspond to the arrangement in the Federal Rules, the committee tried to simplify the text of the current rules. Examples include:

Proposed Local Rules 3-4 and 3-5 on the form of papers filed would therefore cover all the materials appearing in current rules 120-1, 120-2, 200-1 and 200-2.

Proposed Local Rule 7.8 restates current local rule 220-9 so that it is easier to follow.

Policy Suggestions

The committee also included some changes that it felt would be wise as a matter of policy.

Local Rule 11 mere closely restricts bar membership to members of the California bar; the previous local rule was less restrictive on this issue. It also requires lawyers admitted to practice before the Court to notify the Court of any change in their status in other courts that might bear on their status as members of the bar of this Court. In addition, Local Rule 11-11 spells out requirements for student practice before the Court.

Local Rule 37 sets out a new means of resolving discovery disputes involving an informal chambers

conference or an expedited motion. Some judges have experimented with such alternative devices, and the committee is recommending that the Court make them generally available to streamline and reduce the cost of discovery.

The committee has also recommended that chambers copies may be lodged at any branch of the clerk's office (Local Rule 3-7), as well as a mechanism for receipt of sealed documents (Local Rule 79-6). In addition, it has amplified the related case procedures to take advantage of economies that might result from coordination of cases (Local Rule 3-13).

CONFERENCES AND COUNCILS

COMMENTARY ON 1988 REVISION

by David D. Siegel

Expanded Role of Judicial Council in Rule-Making Process

One of the principal aims of the Judicial Improvements and Access to Justice Act (Pub.L. 100-702) of 1988 was to impose openness requirements on the various courts' rule-making procedures. A key part of the plan was to subject all rule making of the district courts to the scrutiny of the local judicial council.

The amendment of § 332 accomplishes that. The scrutiny is not to be limited, moreover, to the initial promulgations of rules. It is to be on-going. The new paragraph (4) added to subdivision (d) of § 332 says that each judicial council shall "periodically" review district court rules "for consistency with rules prescribed under section 2072", meaning principally, in the case of civil practice, the Federal Rules of Civil Procedure. The council is empowered to "modify or abrogate" any rule found inconsistent.

These adjustments in the district courts' rule-making process are a consequence of widespread discontent, communicated to Congress, about "a proliferation of local rules"; Congress found that the rule-making procedures "lacked sufficient openness" and that local rules often "conflict with national rules of general applicability". See the statement of Representative

Kastenmeier in House Report 100-889, August 26, 1988, p. 27.

An example of such a local rule was the rule of some of the district judges in the Second Circuit that an attorney secure the judge's permission before making a motion. Attorneys complained about this, often bitterly, but there was no effective review procedure such as the 1988 act now supplies. And of course the barrier to interlocutory appeal built into federal practice under §§ 1291 and 1292 of Title 28 made effective appellate review of such a rule impossible sometimes, impractical most times, and impolitic always. Rules requiring permission to make motions therefore remained in place for years. Then, when one of them did manage to squeeze through the federal system's massive appellate barrier for some review, the Court of Appeals struck the rule- down with the admonition that "a court has no power to prevent a party from filing pleadings, motions or appeals". *Richardson Greenshields Securities, Inc. v. Mui-Hin Lau*, 825 F.2d 647 (July 30, 1987). The court did not reject a requirement for the "conferencing" of motions, but it did stress that judges "must conduct such conferences promptly upon the request of the moving party", especially when the court is shown that "time is of the essence, as in the instant case where a statute of limitations concern was raised".

The late, widely respected District Judge Edward Weinfeld, participating in a federal practice seminar several years ago, was asked by a member of the audience (and of the bar) about his view of a judge's rule

requiring permission to make a motion. His response was that he never had such a rule and did not believe he had the authority to make one. The Federal Rules of Civil Procedure authorize motions, he said, and lawyers in his court could make a motion under those rules without requiring any authority from him. Only after the *Richardson* case did that notion become a matter of circuit-wide policy in the Second Circuit.

With a review procedure in place such as § 332 now enacts for all district court rule making, rules of the kind that it took case law—and a long time—to strike down in the past should find their way into the practice less frequently in the future. And any that do will presumably last only until the judicial council has had a chance to review it.

Section 2071(b), the part of the 1988 act that requires "public notice and an opportunity for comment" before a district court can prescribe rules in the first place (see the Commentary on § 2071 in the 28 USCA set), has a counterpart in paragraph (1) of subdivision (d) of the present section (§ 332). The paragraph was amended to require that the judicial council, too, in making any "general order relating to practice and procedure", which presumably includes any made by the council as part of its review of a district court rule, also be made "only after giving appropriate public notice and an opportunity for comment". Promulgating a local rule without satisfying this requirement can invalidate it. Local rules are not immune "from judicial examination for procedural regularity". *Baylson v.*

Disciplinary Board, 764 F.Supp. 328 (E.D.Pa.1991), aff'd 975 F.2d 102 (3d Cir.1992).

For the effective date of section 332, see the "Effective Date" caption at the end of the Commentary on § 2071. The Commentary applies to all of the amendments contained in Title IV of the Judicial Improvements and Access to Justice Act (Pub.L. 100-702), the title that amended § 332.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 448 (Mar. 3, 1911, c. 231, § 306, as added Aug. 7, 1939, c. 501, § 1. 53 Stat. 1223).

The final sentence of section 448 of Title 28, U.S.C., 1940 ed., excepting from the operation of said section the provisions of existing law as to assignment of district judges outside their districts, was omitted as surplusage, since there is nothing in this section in conflict with section 292 of this title providing for such assignments.

1971 Acts. Senate Report No. 91-1511, see 1970 U.S.Code Cong. and Adm.News, p. 5876.

1980 Acts. Senate Report No. 96-362, see 1980 U.S.Code Cong. and Adm.News, p. 4315.

1988 Acts. House Report No. 100-889, see 1988 U.S.Code Cong. and Adm.News, p. 5982.

1990 Acts. Senate Report No. 101-416, related House Reports, and President's Signing Statement, see 1990 U.S.Code Cong. and Adm.News, p. 6802.

The requirement for attendance of circuit judges, unless excused by the chief judge, was included in conformity with a similar provision of section 331 of this title.

Changes in phraseology were made. 80th Congress House Report No. 308.

1963 Acts. Senate Report No. 596, *see* 1963 U.S.Code "Cong. and Adm. News, p. 1105.

1991 Acts. House Report No. 102-322, see 1991 U.S.Code Cong. and Adm.News, p. 1303.

References in Text

Rule 45(c) of the Federal Rules of Civil Procedure, referred to in subset. (d)(1), is rule 45(c) of the Federal Rules of Civil Procedure, this title.

Codifications

Subsec. (d) of this section was *amended* by Pub.L. 95-598, Title II, § 209, Nov.

COMMENTARY ON 1988 REVISION

by David D. Siegel

Additional Scrutiny Required for District Court Rulemaking

Changes in § 2071, which contains the general authorization for rulemaking by the courts, were made by the Judicial Improvements and Access to Justice Act (Pub.L. 100-702) in 1988. The section previously consisted of a single paragraph. It was designated subdivision (a) in the 1988 amendment and its reference to the Supreme Court was struck out and a reference to § 2072 substituted.

The change, applicable to all courts (with the exception of the U.S. Supreme Court) but adopted with the district courts primarily in mind, requires rules promulgated on the authority of § 2071 to conform to the requirements of § 2072 instead of merely to rules promulgated by the Supreme Court. The § 2072 to which conformity is required is not, however, what was contemplated by the House of Representatives.

The § 2072 that the House planned had a subdivision (b) that would have eliminated the controversial "supersession" clause, under which a duly promulgated procedural rule prevails over all conflicting "laws", which include Acts of Congress. The House deemed it unseemly that any rule of procedure adopted through the rule-making process should supersede an Act of Congress. Its initially adopted draft of § 2072 therefore

replaced the supersession clause with a much softer one. But the Senate had its way on this point in the final version, and the supersession clause remains substantially as it was. It now appears as the second sentence of the terse subdivision (b) of § 2072, as amended. Its language, as it appeared in the first sentence of the fourth paragraph of the pre-amendment § 2012, is retained to the last syllable. (See the Commentary on § 2072, below.)

After designating as subdivision (a) the single pre-amendment paragraph that constituted § 2071, the 1988 act added subdivisions (b) through (f). A brief seriatim review of these subdivisions may be helpful.

Subdivision (b), modeled on but more expansive than Rule 83 of the Federal Rules of Civil Procedure (as amended in 1985), requires that "appropriate public notice and an opportunity for comment" precede the making of rules by any court on the authority of what is now subdivision (a). The details of how this is to be done are not supplied. Excepted is the Supreme Court, which can make its own rules without the "notice" fetter of this provision. In prescribing the "general" rules of practice that it has the continued authority to do under the amended § 2072, the U.S. Supreme Court will follow the more formal requirements of what is now a new § 2014. (See the Commentaries on those sections, below.)

The court promulgating rules under subdivision (a) is also empowered by subdivision (b) to fix their effective date and to determine the extent to which they

shall apply to pending proceedings. Congress was especially sensitive about this retroactivity point in the 1988 legislation. Indeed, in § 2074(a), which applies to the promulgation of the general rules by the U.S. Supreme Court, it is now provided that the application even of a newly promulgated general rule—such as an amended rule in the Federal Rules of Civil Procedure—to further proceedings in a pending action must be left to the judge presiding in the action. One can extrapolate from this a broad statement of Congressional intent that as far as retroactivity is concerned, the facts vary so much from case to case that it is best to leave to the presiding judge the question of the retroactivity of any new rule, including even a rule drawn by the court of which that judge is a member.

The new subdivision (c), in its paragraph (1), acknowledges, as Rule 83 does, the role played by the judicial council in the rule-making process by providing that all existing rules made by a district court or judge remain in effect, but only until such time as the local judicial council may modify or abrogate it. A coordinate amendment is made in this regard in § 332 of Title 28, the statute setting up the judicial circuits, to confirm that power of review explicitly. A paragraph (4) is added to § 332(d), requiring periodic review by the council of all rules made by district courts under § 2071 to make sure they are consistent with the general rules (e.g., the Federal Rules of Civil Procedure) promulgated under § 2072.

All said about the rules of a district "court" must of course apply *a fortiori* to the rules of an individual

judge. All such rules are subject to the scrutiny of the judicial council. Congress found that there was "a proliferation of local rules, many of which conflict with national rules of general applicability" (see p. 27 of House Report 100-889 [August 26, 1988], Representative Kastenmeier's report to Congress for the House Judiciary Committee), and the individual rules that many of the federal judges have adopted were a prime part of Congress's thinking in adopting these review procedures. Individual rules have been a sore spot in some parts of the federal system. In the Second Circuit it took a Court of Appeals decision to stop judges from requiring advance permission just to make a motion. (See the Commentary on § 332 earlier in the 28 USCA set.) Indeed, it was found that even the three-step, Committee/Supreme Court/Congress procedure for enacting the general rules (see the pre-amendment §§ 331 and 2072 in Title 28) "lacked sufficient openness" (Kastenmeier Report above, page 27), and it was the mission of these amendments to open it wider.

As with the court-wide rules, so with individual-judge rules presently in place. They remain in place unless and until the judicial council modifies or abrogates them (or, indeed, the individual judge withdraws them). The obligation placed on the judicial council now by statute is that it "periodically" review all rules. (See the paragraph 4 added to 28 USCA § 332[d] by the 1988 act.) Hence there is to be no such thing as a rule's becoming sacrosanct merely for having passed judicial council scrutiny the first time. It is subject to on-going scrutiny, as are all rules in existence on December 1,

1988, the date these requirements take effect (see below).

Rules prescribed by other courts than the Supreme Court or a district court are subject to review by the Judicial Conference, a nationally constituted body, rather than a judicial council (which has only circuit-wide scope). The Conference is set up by § 331 of Title 28, and § 331, too, was amended by the 1988 act to establish this review power and require that it be used to make sure that such rules are consistent with "Federal law". As with a judicial council, so with the Judicial Conference: it can modify or abrogate any rule it is required to review.

To implement the requirement of judicial council review, subdivision (d) of the amended § 2071 requires that copies of all rules be furnished to the council. With the exception of the rules of the U.S. Supreme Court, all courts must furnish copies of their rules to the Director of the Administrative Office of the U.S. Courts.

The new subdivision (e), recognizing that there may arise "an immediate need" for a rule, permits its promulgation without fulfillment of the notice and opportunity to be heard requirements imposed by subdivision (b). But in that instance those requirements must be carried out "promptly thereafter".

Finally, subdivision (f) instructs that the rule-making process prescribed for the district courts by this section is to be exclusive. Implicit in that instruction, of course, and in the tenor of the § 2071 amendments overall, is that these requirements not be

circumvented by giving a rule some other name, *e.g.*, by conferring the title "standing orders" or "information sheets" or some other verbal combination on them. If the court's or judge's rule is proper, it can expect judicial council approval. If it's not a rose by that name, it won't be by any other.

Indeed, recognizing that an order of the judicial council may itself amount to an order affecting practice, the 1988 act requires openness in the council's proceedings as well. An amendment of 28 USCA § 332(d)(1) requires that

> Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment

The language used is the same as that imposed on the district court's own rule-making procedures. The premise of the § 332(d)(1) amendment is that visibility achieved at the level of original enactment should not be obscured through the very process that was designed to assure it.

Effective Date of 1988 Amendment

The 1988 act containing the above amendments was signed by the President on November 19, 1988. Unlike some of the other parts of the act, however, such as those affecting the diversity statute, which don't take effect until well into 1989 (see the Commentaries following § 1882 above), the amendment of § 2071 takes effect on December 1, 1988. It is part of Title IV

of the act, and all of Title IV's provisions have December 1, 1988, as their effective date.

All rule-making procedures subject to the amended section and not complete as of that date would have to follow the requirements of the 1988 act. As noted in the course of the above Commentaries, all rules already in effect, whether of the court or of an individual judge, remain in effect unless and until modified or overturned by the local judicial council. The latter is charged with on-going surveillance of all district court and district judge rules under the "periodically review" requirement imposed by 28 USCA § 882(d)(4).

HISTORICAL AND STATUTORY NOTES

1988 Amendments

Subsec. (a). Pub.L. 100-702, § 403(a)(1)(A), (B), designated existing provisions as subsec. (a) and substituted "under section 2072 of this title" for "by the Supreme Court".

Subsec. (b) to (f). Pub.L. 100-702, 403(a)(1)(C), added subsecs. (b) to (f).

Effective Date of 1988 Amendment

Section 407 of Pub.L. 100-102 provided than "This title [enacting sections 332(d)(4), 604(a)(19) [redesignated (a)(20)], 2071(b)-(f), and 2072-2074 of this title; amending sections 331, 332(d)(1), 372(c)(11), 636(d), 2071(e) [formerly designated 2071], and 2077(b) of this title and sections 4600-11 of Title 16, Conservation and

3402 of Title 18, Crimes and Criminal Procedure; redesignating as 604(a)(23) former section 604(18) of this title; repealing former section 2072 and section 2076 of this title and sections 3771, 3772 of Title 18; and enacting note provisions set out under this section] shall take effect on December 1, 1988."

Effective Date of 1983 Amendment

Pub.L. 97-462, § 4, Jan. 12, 1983, 96 Stat. 2530, provided: "The amendments made by this Act [which amended Rule 4 of the Federal Rules of Civil Procedure, added Form 18-A, Appendix of Forms, enacted provisions set out as notes under this section, and amended section 951 of Title 18, Crimes and Criminal Procedure] shall take effect 45 days after the enactment of this Act [Jan. 12, 1983]."

Short Title of 1983 Amendment

Pub.L. 97-462, § 1, Jan. 12, 1983, 96 Stat. 2527, provided: "That this Act (which amended Rule 4 of the Federal Rules of Civil Procedure, enacted Form 18-A, Appendix of Forms, enacted provisions set out as notes under this section, and amended section 951 of Title 18, Crimes and Criminal Procedure) may be cited as the 'Federal Rules of Civil Procedure Amendments Act 1982'."

Savings Provisions

Section 406 of Pub.L. 100-702 provided th[XX] "The rules prescribed in accordance with [[xx] before the effective date of this title [Dec. 1, 19[XX] and in effect on the date of such effective d[XX] [Dec. 1, 1988] shall remain in force until chang[XX] pursuant to the law as amended by this title [s[XX] Effective Date of 1988 Amendment note hereunder]."

Tax Court Role Making Not Affected

Section 405 of Pub.L. 100-702 provided th[XX] "The amendments made by this title [see Effective Date of 1988 note set out hereunder] shall not affect the authority of the Tax Court to presrib[XX] rules under section 7453 of the Internal Revenue Code of 1986 [section 7453 of Title 26, Internal Revenue Code]."

Amendments Proposed April 28, 1982

Pub.L. 97-462, § 5, Jan. 12, 1983, 96 Stat. 2530, provided: 'The amendments to the Federal Rules of Civil Procedure [Rule 4], the effective date [Aug. 1, 1982] of which was delayed [to Oct. 1, 1983] by the Act [Pub.L. 97-227] entitled 'A[XX] Act to delay the effective date of proposed amendments to rule 4 of the Federal Rules of Civil Procedure [proposed by the Supreme Court of the United States and transmitted to the Congress by the Chief Justice on Apr. 28, 1982],' approved August 2, 1982 (96 Stat. 246), shall not take effect." Section 2 of Pub.L. 97-227 had provided that Pub.L. 97-227 be effective as of Aug. 1, 1982, but be

inapplicable to service of process taking place between Aug. 1, 1982, and the date of enactment on Aug. 2, 1982.

Legislative History

For legislative history and purpose of Pub.L. 100-702, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

COMMENTARY ON 1988 REVISION

by David D. Siegel

Federal Rule-Making Procedure Altered

Section 2071 having addressed rule making by individual courts, §§ 2072-2074 address the general rule-making power of the U.S. Supreme Court and the procedures authorized in its exercise.

The old § 2072 of Title 28, empowering the U.S. Supreme Court to promulgate the general rules that govern practice and procedure in the federal courts, including such compilations as the Federal Rules of Civil Procedure, and prescribing the method of their promulgation, was repealed and replaced in an amendment contained in the Judicial Improvements and Access to Justice Act (Pub.L. 100-702) in 1988. The U.S. Supreme Court's rule-making power continues, but with a closer public and Congressional scrutiny provided. The new § 2072 is terser than its predecessor, but the terseness is more than compensated for by the enactment of two new sections, §§ 2073 and 2074, elaborating the rule-making steps.

The gist of the general rule-making power conferred on the U.S. Supreme Court by the old § 2072 is retained, but in a pithy subdivision (a). The equally terse subdivision (b) continues the instruction that no rules adopted under (a) may alter any substantive right, an instruction previously contained in the second paragraph of the superseded § 2072. Also in that paragraph was the direction that the rules not impair

the right to trial by jury guaranteed by the Seventh Amendment. That direction is omitted, but without moment: the Constitution needs no statute to remind us that neither a rule nor a statute can upset a constitutional requirement.

The second sentence of the new subdivision (b) of § 2072 was a key player in the 1988 act. It's the famous supersession clause, purporting to subordinate all "laws", including Acts of Congress, to the rules promulgated under subdivision (a). It was the wish of the House of Representatives that the supersession clause be repealed and that a more circumspect substitution be made for it, and so the House draft of § 2072 had it. (See page 3 of House Report 100-889, dated August 26, 1988, and Representative Kastenmeier's comments on the subject at pages 27-28.) But the Senate would not go along, and the amended § 2072(b) preserves the supersession clause with not even a verbal alteration. Viewing the supersession clause as "unwise and potentially unconstitutional" in its permitting the rules to "trump" existing statutes, Representative Kastenmeier confessed his disappointment at the Senate's refusal to go along with its repeal, which he called "the single most important reform" contained in the House bill. (Congressional Record, Oct. 19, 1988, H-10440.)

For the role played by §§ 2078 and 2074 in the newly defined rule-making process, see the Commentaries on those provisions, below.

For the effective date of the amendment of § 2072, see the "Effective Date" caption at the end of the Commentary on § 2071, above, which applies as well to § 2072.

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 2072, Acts June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, ch. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323. which authorized the Supreme Court to prescribe rules of civil procedure, was repealed by Pub.L. 100-702, Title IV, §§ 401(a), 407, Nov. 19, 1988, 102 Stat. 4648, 4652, effective Dec. 1, 1988.

1990 Amendment

Subsec. (c). Pub.L. 101-650 added subsec. (c).

Effective Date

Section effective Dec. 1, 1988, see section 407 of Pub.L. 100-702, set out as a note under section 2071 of this title.

Legislative History

For legislative history and purpose of Pub.L. 100-702. see 1988 U.S. Code Cong. and Adm. News, p. 5982. See also, Pub.L. 101-650, 1990 U.S. Code Cong. and Adm. News, p. 6802.

No resolution presented herein represents the policy of the American Bar Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

AMERICAN BAR ASSOCIATION

LAW PRACTICE MANAGEMENT SECTION
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL
SPECIAL COMMITTEE ON PROFESSIONAL MEDICAL LIABILITY
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
CUYAHOGA COUNTY BAR ASSOCIATION
FEDERAL COMMUNICATIONS BAR ASSOCIATION
AKRON BAR ASSOCIATION
DAUPHIN COUNTY BAR ASSOCIATION
CLEVELAND BAR ASSOCIATION
FEDERAL ENERGY BAR ASSOCIATION
THE BAR ASSOCIATION OF METROPOLITAN ST. LOUIS
SAN DIEGO COUNTY BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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

REPORT

THE PROBLEM

Some United States District Courts restrict practice privileges to lawyers who are admitted to the state bar in which the district is located.

For example, in the Washington, DC metropolitan area, a lawyer admitted to practice in the United States District Court for the District of Columbia may be admitted to the bar of the United States District Court for the District of Maryland regardless of Maryland State bar membership. See D. Md. Local Rules 101, 701 attached hereto.*

However, in the United States District Court for the Eastern District of Virginia, located in Alexandria, Virginia, District of Columbia bar members may not become members of the Eastern District of Virginia bar without being members of the Virginia bar, which

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* Copies of attachments are available from the Law Practice Management Section upon request. Please call Alice Tully at 312-988-5661.

requires a bar exam for non-Virginia residents. See E.D. Va. Local Rule 7, copy attached hereto. Similar problems exist in many other contiguous Federal District Courts. See attached random survey.*

IMPACT

This is not a local or regional problem. See attached random survey. * The Law Practice Management Section has discussed and reviewed this problem through its Goal 6 Task Force and debated it at its Spring 1993 Section meeting. While not all districts are as restrictive as the Eastern District of Virginia, many others require local counsel to at least be on all pleadings and restrict the number of times an out of district attorney may appear pro hac vice. We submit these are unnecessary and drive up the cost of litigation to clients.

This exclusionary policy inhibits competition, restricts lawyers from representing clients without incurring the substantial cost of local counsel and drives up costs to clients. Therefore, appropriate action should be taken to eliminate such exclusionary and anticompetitive practices.

POSSIBLE OBJECTIONS AND REBUTTAL

OBJECTION 1. Knowledge of local law is required in each state

Rebuttal: Local law can be learned by any lawyer or local counsel will be retained or consulted as necessary.

OBJECTION 2. Out of state lawyers will not know the local rules.

Rebuttal: Each lawyer must certify that he or she has read and is familiar with the local rules prior to being admitted to the bar of the local District Court. See D. Md. Local Rule 701.

OBJECTION 3. Out of state lawyers will be disciplinary problems or hard to reach.

Rebuttal: Out of state lawyers will be subject to the same discipline as in state lawyers and will be reachable in the same way.

OBJECTION 4. Local counsel are needed in cases.

Rebuttal: This should be the decision of the lawyer and client, not mandated by local rule.

CONCLUSION

Given the global nature of law practice today, parochial local rules are inefficient, unduly costly to

clients and/or lawyers and anti-competitive. Therefore, this proposal should be adopted.

Respectfully submitted,

Donna M. Killoughey
Chair
Section of Law
Practice Management

Dated: November 21, 1994

February, 1995

AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20
STANDING COMMITTEE
ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

ABA Model Rule on Admission by Motion

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 J.D. or LL.B. degree 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 applicant matriculated or graduated;

   (c) have been primarily engaged in the active practice of law in one or more states, territories or

the District of Columbia for ~~five~~ three of the ~~seven~~ five 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 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 purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

   (a) Representation of one or more clients in the private practice of law;

(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 in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For 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.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.

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.

[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.

The Commission's work in this area was informed by the efforts of the ABA Commission on Multijurisdictional Practice ("MP Commission"), which completed its work a decade ago. In August 2002, the ABA House of Delegates adopted as Association policy all nine of the MP 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 adopted[5] and produced many benefits for

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[2] *See Client Representation in the 21 Century*, Report of the Commission on Multijurisdictional Practice (2002), http://www.americanbar.org/groups/professionalresponsibility/committees commissions/commissiononmultijurisditional_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.

clients and their lawyers. It has enabled lawyers to represent their clients more 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.

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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 MIP Recommendations 8 & 9* (2010), 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.

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

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[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.

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 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.

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[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.

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 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

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[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).

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

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[10] *See* Comparison Chart, *supra* note 8.

[11] *Id.*

[12] *Id.*

[13] *Id.*

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

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and
Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105e: Admission by Motion

- The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.

- The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will 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.

- Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions that have admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2. Approval by Submitting Entity.

   The Commission approved five of these Resolutions and Reports at its April 12-13, 2012 meeting.

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

   No.

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

   The adoption of this proposal would result in amendments to the ABA Model Rule on Admission by Motion.

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

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002. One aspect of this transformation has been the extent to which lawyers now need to relocate to new jurisdictions during their careers. The proposed amendments to the Model Rule on Admission by Motion respond to this increased need for mobility while providing adequate safeguards for clients and the public.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically amendments to the ABA Model Rule on Admission by Motion. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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

   None

9. Disclosure of Interest. (If applicable)

10. Referrals.

   From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment

to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal

Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105e: Admission by Motion

- The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.
- The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will 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.

- Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

The ABA Model Rule on Admission by Motion was adopted in 2002, as part of the package of resolutions unanimously adopted by the House

of Delegates to address increased cross-border practice. At the time of its adoption, the Model Rule required that lawyers could qualify for admission by motion only if they had been engaged in the active practice of law for 5 of the last 7 years.

Much has changed in the last decade, resulting in increased lawyer mobility. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating there or who regularly do business in that jurisdiction. Resolution 105e responds to this need, thus benefitting both lawyers and their clients, by reducing the time in practice requirement in the Model Rule for Admission by Motion to 3 of the last 5 years. The Commission's research revealed that the Model Rule has produced no problems in the jurisdictions that have adopted it and no problems in the jurisdictions that already allow admission by motion after only three years of practice.

3. <u>Please Explain How the Proposed Policy Position will address the issue</u>

A reduction of the time in practice requirement in the ABA Model Rule on Admission by Motion will facilitate the cross-border practice that clients demand in a 21st century legal marketplace.

The Commission's research revealed that there is no reason to believe that lawyers who have spent 3 of the last 5 years engaged in law practice will be any less able to practice law

responsibly and competently in a new jurisdiction. The Commission found no evidence that lawyers admitted by motion are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted by examination. The Commission also found no evidence that the admission by motion process has produced any 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. Finally, the Commission found that the five jurisdictions that already have a duration-of-practice requirement of three years have not encountered any problems.

Resolution 105e also adds language to make clear that time spent practicing pursuant to the proposed ABA Model Rule on Practice Pending Admission does not count toward the Model Rule of Admission by Motion's active practice requirement.

Additionally, given the increasing importance of lawyer mobility and the success of the Model Rule on Admission by Motion, the ABA should encourage the adoption of the Model Rule for Admission by Motion in the eleven jurisdictions that have not yet adopted such a process. The ABA also should encourage jurisdictions that have an admission by motion process to eliminate restrictions that do not appear in the Model Rule and that pose unnecessary obstacles to using the process.

The Commission has concluded that these changes will facilitate lawyer mobility in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105e as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105e relating to Admission by Motion: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The

Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website (click here). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.