SUMMARY OF THE COMMENTS

Division 18 recommends that the District of Columbia Court of Appeals not adopt the proposed amendments to Rule 46-I-(c)(3), governing the admission of attorneys by motion. Rather, Division 18 recommends the establishment of a committee to consider the administrative difficulties incurred by the Court in the application of the current rule, study possible alternatives, and make recommendations to the Court.

The recommendation of Division 18 is based on the following:

1. The proposed changes represent a radical departure from the mainstream requirements in other jurisdictions for admission by motion.

2. No need for speed has been shown.

3. The proposed changes may neither provide adequate assurance of minimal attorney competence nor cure the administrative ills which led to their proposal.

4. The amendments may exacerbate the anti-competitive impact on District of Columbia attorneys of the admission practices in neighboring jurisdictions.

COMMENTS OF DIVISION 18 (LITIGATION),
DISTRICT OF COLUMBIA BAR, ON PROPOSED
AMENDMENTS TO RULE 46-I(c)(3) OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS
(ADMISSION OF ATTORNEYS BY MOTION)

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The views expressed herein represent only those of Division 18 (Litigation) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

COMMENTS OF DIVISION 18 (LITIGATION)
ON PROPOSED AMENDMENTS TO
RULE 46-I(c)(3) OF THE DISTRICT
OF COLUMBIA COURT OF APPEALS

I. INTRODUCTION AND SUMMARY

On March 28, 1983, the District of Columbia Court of Appeals proposed amendments to Rule 46-I(c)(3), Admission of Attorneys by Motion. Division 4 of the Bar has already submitted comments generally favoring the proposed changes. However, that Division was not unanimous in its support. A number of its members were concerned that the rule proposed "will not provide a reliable or rational way of evaluating fundamental attorney competence." As a result, the comments of Division 4 include two dissenting views, one written by David J. Lloyd and the other by G. Joseph King. More recently, Division 17 has unanimously approved the submission of comments opposing adoption of the proposed rule.[1]

Division 18 is the litigation division of the District of Columbia Bar. We are the largest division, with over 1200 members from the private and public sectors. As trial lawyers, we have an interest in maintaining pride in our membership and in the competence of our colleagues in the District of Columbia

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[1] Division 17 concluded that the amendments fail to provide any reliable basis for evaluating applicants, establish minimal standards that are contrary to the public interest, and have an anti-competitive impact on District of Columbia lawyers.

Bar. Representing the trial bar, we oppose adoption of the proposed rule changes at this time.

Division 18 shares the concerns expressed by Division 17 and by some of the members of Division 4. We believe that the proposals constitute a major relaxation in current admission standards. While we realize that there are problems in fairly administering the prior practice standard contained in the present rule, we are not persuaded that the proposed change is an acceptable -- much less the only possible -- alternative. We are influenced in our views by the fact that every jurisdiction which permits out-of-state attorneys to be admitted on motion requires a specified period of prior law practice. None bases admission on active bar membership alone. We are concerned that an abandonment of this universal standard for admission by motion may adversely impact lawyer competence without necessarily curing the Court's administrative difficulties.

We also are troubled by the proposed "educational alternative" to the bar membership standard. While it may make sense to substitute educational achievement in lieu of actual practice, as the District did prior to 1978, we do not believe an educational alternative bears a logical relationship to bar membership, nor are we convinced that the proposed alternative adequately assures attorney competence when considered on its own merits.

Finally, we do not believe the District should abandon its efforts to redress the unfair competitive advantage enjoyed by lawyers in neighboring jurisdictions. Indeed, we believe such efforts should be increased.

In light of our concerns, and the lack of any compelling evidence that immediate action is necessary, Division 18 recommends that the proposed changes not be adopted, but rather that a committee reflecting a cross-section of the legal community be established to study the matter further and make recommendations to the Court.

II. THE PROPOSED AMENDMENTS

Admission of attorneys to the Bar of the District of Columbia upon motion is governed by Rule 46-I(c) of the District of Columbia Court of Appeals. Attorneys admitted in other jurisdictions are allowed to "waive-in" if they meet the practice requirements set forth in Rule 46-I(c)(3). That Rule now provides that:

> (i) Members of the Bar of a court of general jurisdiction of any state or territory may, upon proof of general fitness to practice law and good moral character, be admitted to the Bar of this Court without examination provided such member has engaged in the practice of law for a period of not less than five years of the eight years immediately preceding the date of his or her application.
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> (ii) In the event that the requirements for admission without examination of the state or territory upon which the application for admission is based provides for a

period of practice of less than five years, the applicant may seek admission based on the time period requirements of that jurisdiction.

"Practice of law" is defined in Rule 46-I(c)(3)(iv).

The proposed amendments call for deletion of existing Rule 46-I(c)(3) in its entirety, and the adoption of a new Rule 46-I(c)(3) which would provide as follows:

(3) Admission Requirements

Any person may, upon proof of his or her good moral character as it relates to the practice of law, be admitted to the Bar of this Court without examination, provided that such person:

(i) Has been an active member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States for a period of five years immediately preceding his or her application; or

(ii)(A) has been awarded a Juris Doctor degree or its equivalent by a law school which, at the time of the awarding of the degree, was approved by the American Bar Association, and

(B) has been admitted to the practice of law in any state or territory of the United States upon the successful completion of a written bar examination and has received a scaled score of 133 or more on the Multistate Bar Examination which was taken as a part of such examination. Prior to July 1, 1988, application for admission under this subparagraph (ii) must be made within five years from the date of the Multistate Bar Examination that is being used as the basis of the application. On or after July 1, 1988, application for admission under this subparagraph (ii) must be made wihin twenty-five months from the date of such Multistate Bar Examination.

The proposed amendments make at least three significant changes to the present rules governing admission of attorneys "on motion". First, the proposed amendments would replace the five year practice of law requirement with a five year "active member in good standing" requirement. Second, as an alternative to the member in good standing requirement, an attorney may be admitted without examination if he or she: (a) has been admitted in any state or territory based on the successful completion of an examination; (b) has achieved a scaled score of 133 or more on the Multistate Bar Examination taken as part of such examination; and (c) has been awarded a J.D. degree by an ABA approved law school. Third, the proposed amendments eliminate the provision for reciprocal treatment of attorneys who do not otherwise meet admission standards.

III. ADMISSION REQUIREMENTS OF OTHER JURISDICTIONS

In order to place the proposed amendments in context, we have reviewed the analogous rules in every jurisdiction having an organized bar. Using materials published by the ABA[2], augmented by telephone calls from members of the drafting committee to various bars, we have ascertained that thirty-eight

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[2] ABA Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States: Law Schools and Bar Admissions Requirements (1980)

jurisdictions permit out-of-state attorneys to either waive in on motion (thirty-one jurisdictions) or take an abbreviated written examination (seven jurisdictions). Twelve require a full examination of all applicants. Of the thirty-eight jurisdictions with relaxed standards for out-ofstate attorneys, nine have reciprocity provisions. However, all thirty-eight require that out of state attorneys have practiced law for a specified period of time in order to qualify for admission. None permits admission based upon the mere membership in good standing in the bar of another state. Thus, if the proposed changes are adopted, the District of Columbia will have the least restrictive admission-by-motion requirement in the United States. While this fact is not necessarily compelling in support of or in opposition to the proposed amendments, it suggests that caution is appropriate in making the changes in question.

IV. ANALYSIS OF ARGUMENTS IN FAVOR OF THE PROPOSED CHANGE

The fundamental arguments in favor of the proposed change appear to be the following: (1) The practice requirement is unworkable; (2) the reciprocity provision is not an appropriate standard as it is anti-competitive and unrelated to attorney competence; (3) in any event, the reciprocity provision has been ineffective in persuading neighboring jurisdictions to relax their own anti-competitive admission-by-motion rules; (4)

the new rule would be at least as effective as the old in assuring a minimum level of attorney competence; and (5) the largely federal nature of D.C. practice makes familiarity with local law and procedure less important and justifies an admission-by-motion rule which will attract talented federal practice attorneys.

1. Even If the Practice Requirement is Unworkable, the Proposed Rule Should Not Be Adopted without Further Study.

A fundamental argument made by proponents of the change is that the current practice requirement is unworkable. It is argued that the definition of "practice" in rule 46-I(c)(4) is insufficiently flexible to deal with substantial segments of the attorney population in law-related jobs -- such as corporate attorneys, judges, law professors and government lawyers. It is also argued that the integrity of the rule has been undermined by the perceived need to except certain individuals and categories of lawyers from the practice requirement. It is then argued that the new rule eliminates these problems by eliminating the practice requirement altogether and substituting a rule which is simpler to administer.

Division 18 is sensitive to the problems which this Court has faced in administering the practice requirement. Our concern is that the admitted difficulties not prompt a cure which

proves worse than the disease.[3J] In this regard, we cannot help but be influenced by the fact that adopting the proposed change would make the District of Columbia the only jurisdiction permitting out-of-state attorneys to be admitted by motion without either taking the same written examination covering local law and procedure as is required of initial applicants or having actually practiced law in some capacity.

In the absence of a need for speed, we urge caution in making such a radical departure from the mainstream approach to admission by motion requirements. Indeed, we are not persuaded by the meager evidence currently available that any change is justified. We do not know whether, as opponents of the change argue, the new standard will open the floodgates to incompetent attorneys who know nothing of the practice of District of Columbia law -- federal or local. But we do think that the

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[3J] There may be reason to doubt, moreover, that the proposed change will actually cure all of the Court's administrative problems. Even if determining what constitutes "active membership" proves to be easier than defining "practice," there are categories of public officials who may not meet the active membership or educational alternative that the Court may still want to consider for admission by motion. For example, in many states -- including the District of Columbia -- sitting judges are not considered to be active members of the bar. Indeed, in California there is a constitutional prohibition against such membership. Since the new rule requires five years of active membership immediately preceding one's application, and since few currently sitting judges have taken the Multistate, it would appear that sitting judges in the District of Columbia, California and elsewhere, who desire to leave the bench and practice law, will be ineligible for admission by motion to the D.C. Bar should the new rule be adopted.

possibility is troublesome enough to warrant substantial further study.

2. The Reciprocity Standard is Not Anti-Competitive and Inappropriate.

It has been argued that conditioning admission by motion on the willingness of another jurisdiction to accept similarly situated District of Columbia attorneys is an inappropriate use of this Court's rules, and that the only legitimate purpose of an admission standard is to assure a minimum level of competence among local lawyers.

Division 18 agrees that assuring competence is the primary purpose of any set of admission rules. The current rule is based on the assumption that actually practicing law for five years is an acceptable substitute for the rigors of the D.C. Bar examination. The existing reciprocity provision is primarily a courtesy extended to other jurisdictions offering similar privileges to District of Columbia lawyers. Combined with the deletion in 1978 of an educational alternative, it may have been hoped that the reciprocity provision would encourage neighboring jurisdictions to adopt similar provisions of their own and thereby alleviate the substantial competitive disadvantage of District lawyers that existed in 1978 and which exists now. But even so, it was the deletion of the educational alternative, and not the adoption of a reciprocity provision per se, that had restrictive implications. Indeed, reciprocity itself is a pro-competitive doctrine. It is a vehicle for easing barriers to entry on a mutual basis.

The proposed rules have also been defended on the ground that they will decrease the need for multiple representation of clients having multi-jurisdictional problems. This is true. Unfortunately, they do so by making it easier for lawyers in neighboring jurisdictions to take over District of Columbia cases. From the perspective of the local District lawyer, who is unable to compete for suburban business, it is difficult to understand how the proposed changes could be viewed as having any pro-competitive features. If anything, they add to the monopoly power already enjoyed by our neighbors.

3. Reciprocity Has Not Been Proven Ineffective.

Recasting this argument in light of the above analysis, it is that deleting the educational alternative in 1978 has not motivated neighboring jurisdictions to either lower their barriers to entry or to enact a reciprocity provision to take advantage of that adopted by the District.

This argument is undoubtedly sound -- so far as it goes. However, Division 18 believes it is premature to conclude that the 1978 amendments are ineffective. It is too early to tell what impact there will be on neighboring jurisdictions as out-of-state attorneys admitted under the less restrictive standard prevailing prior to 1978 leave the practice. Moreover, even if the 1978 amendments have not worked as well or as soon as their authors hoped, they reflect a concern with a still-important problem. Local lawyers are severely disadvantaged in obtaining

business from clients with multi-jurisdictional legal problems. Such clients are unlikely to hire two sets of lawyers when one will do. The proposition that admission-by-motion rules should not be used to create artificial barriers to entry seems to have escaped our neighbors. In light of the increased application of anti-trust laws to the legal profession, perhaps these jurisdictions will be more amenable now than they have been in the past to joint efforts to redress the problems faced by District of Columbia lawyers in multi-jurisdictional practice. Perhaps the time is ripe for renewed efforts on the part of the District of Columbia Bar, and by this Court as well, to address the artificial and anti-competitive admissions practices of adjoining jurisdictions. In any event, the unfair competitive disadvantage that currently exists will only be exacerbated by the relaxed admission standards of the proposed rule.

4. The New Rule Can Not Be as Effective as the Current One in Assuring Attorney Competence.

Division 18 is highly skeptical that the "member in good standing" standard provides meaningful assurance of attorney competence. While no empirical evidence has been presented either way, common sense suggests the new rule provides a lower level of protection. For example, the new rule would permit the admission by motion of an individual who for fifty years has been a member in good standing of some bar, but who has never practiced a day in his or her life. Requiring actual

practice may not be a perfect standard -- but it gives more assurance that the applicant understands the law and can operate within an organized disciplinary system than does a requirement that he or she pay bar dues for some number of years. We believe that further study should be given to possible modifications of the practice standard to alleviate the Court's administrative difficulties before a decision is made to adopt a rule which seems to provide little assurance that incoming lawyers will be minimally competent.

Division 18 does agree that an educational requirement may be an adequate alternative, under certain circumstances, to a practice requirement. The logic of the pre-1978 rule appears to have been that either on-the-job training or education provides assurance of competence. However, we do not see the logic in establishing an educational substitute for bar membership. Under the proposed rule, an applicant who does not meet the educational requirement may still be admitted on motion after five years of dues payments to the bar of original admission. Unless the applicant has actually practiced during the interim, there would seem to be no assurance under the new rule that the deficiencies which prevented earlier admission will have been cured by the mere passage of time.[4]

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[4] A more logical, if implausible, way to combine bar membership and an educational requirement would be to drop the five year waiting period altogether. But such a rule would make passing the bar anywhere tantamount to admission to the D.C. Bar, assuming the educational standard is met.

Moreover, there is no empirical evidence regarding the quality of the educational alternative chosen by the drafters of the new rule. The pre-1978 educational requirement prevented "forum-shopping" by applicants seeking the easiest bar examination to take. That rule required that an applicant have passed the bar in the state where he or she lived or went to law school. The current rule has no such restriction. It permits an applicant to seek out states with easier examinations and far higher pass rates than the District of Columbia. The sole objective test proposed is that an applicant have scored 133 on the Multistate portion of the bar examination he or she passed. This may or may not be an appropriate cut-off. For example, Maine requires a score of 155 to partially excuse an attorney from that state's written examination.[5]

Further, we have some questions regarding the value of the Multistate examination as a measure of lawyer competence, especially since the Multistate does not cover civil practice and

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[5] This cut-off may also prove to be a disincentive for initial applicants to take the D.C. bar examination. According to the Educational Testing Service, which administers the Multistate, the mean scaled Multistate score of those who passed the July D.C. bar examination has been higher than 133 for each of the past four years. Another disincentive is the fact that, under the proposed rule, initial applicants contemplating a multijurisdictional practice in the District of Columbia can avoid having to take two examinations by passing the bar in another state.

procedure. If an educational alternative is to be adopted, it should provide an appropriate gauge of the competence of lawyers who anticipate practicing in the District of Columbia. This is particularly true when the educational alternative, as here, may encourage the admission of younger, inexperienced lawyers to the bar by the method over which the District has the least control. There is no hard evidence to suggest that a Multistate score of 133 is an adequate substitute for five years of actual practice, or a test on local law and procedure. If attorney competence is indeed the primary purpose of admission restrictions, surely some effort to validate the proposed educational standard ought to be undertaken.

5. The Uniqueness of the District of Columbia Does Not Support the Proposed Amendments

The last major argument made by proponents of the rule change is that the emphasis placed in other states on knowledge of local law and procedure is not necessary in the District, as practice here is largely federal in nature. Moreover, because we are unique in this regard, we attract large numbers of talented out-of-state attorneys desiring to conduct federal practice here. Thus, our admission-by-motion rules should reflect the needs of such lawyers, whose understanding of local law and procedure is largely irrelevant to their practice.

It is true that the District of Columbia is unique in the opportunity it affords for a national, federally-oriented law

practice. And it is true that many lawyers here have a national, as opposed to a local practice.[6] But not all District lawyers have such a practice. Many practice criminal law, domestic relations law, personal injury law, landlord-tenant law and other disciplines equally local in their nature. Moreover, the unique character of the District expresses itself in its statutes and court procedures. Thus, local lawyers must be knowledgeable about District of Columbia law and practice in order effectively to serve their clients. The proposed changes, however, may make it more likely that lawyers admitted by motion to the District of Colubmia Bar will have little or no knowledge of our local laws governing the above-mentioned areas of practice, nor of the procedures in our local courts.[7]

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[6] A question that deserves study, perhaps by the committee which we propose, is whether it would make sense to establish a Federal Bar within the D.C. Bar. Federal Bar members would be authorized to practice in the federal courts and before federal agencies, but would not be permitted to practice in the local courts of the District of Columbia without passing an examination on local law and procedure. Division 18 expresses no opinion on the merits of such a proposal, but we do suggest that it is an alternative that should be explored.

[7] It has also been argued that it is in the public interest to increase the available choice of competent attorneys. District residents, however, will hardly be benefitted by expanding their choice of national practice lawyers unfamiliar with District law and procedure. They need knowledgeable local practice lawyers, and it is this category of lawyer which is the most disadvantaged by competition from neighboring jurisdictions, and which may suffer the most from the proposed changes.

VI. CONCLUSION

The proposed changes to rule 46-I(c)(3) have no counterpart in other jurisdictions, may prove detrimental to the goal of assuring attorney competence, and seem to abet the anti-competitive practices in neighboring jurisdictions. Division 18 recommends, therefore, that they not be adopted. Instead, we believe that a committee should be established with a broad membership from the legal community to consider the administrative difficulties with the present rules governing admission by motion, study possible alternatives, and make recommendations to the Court. In the interim, we feel that the current rule should remain in force. It involves difficulties in application, but it is a satisfactory way of assuring at least minimal competence of incoming lawyers and is consistent with the practice in a majority of jurisdictions.

Either in conjunction with the above study, or as a separate initiative, we also urge that this Court join with the Bar in a renewed effort to address the artificial barriers to competition which have been erected by our neighbors and which continue to plague District lawyers. Division 18 would be happy to provide whatever assistance it can in these efforts.