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# A UNIFORM RULE GOVERNING THE ADMISSION AND PRACTICE OF ATTORNEYS BEFORE UNITED STATES DISTRICT COURTS

Michael S. Ariens\*

## INTRODUCTION

In *Supreme Court of New Hampshire v. Piper*,<sup>1</sup> the United States Supreme Court held that the Supreme Court of New Hampshire cannot require a bar applicant to reside in New Hampshire before admitting the applicant to its bar. Such a residence requirement violates the privileges and immunities clause of the United States Constitution.<sup>2</sup> Implicit in the *Piper* decision is the understanding that the practice of law and the role of the lawyer is changing in scope.<sup>3</sup>

Today, lawyers often practice in more than one state. *Piper* was not the first Supreme Court decision to recognize this change in the lawyer's role. In 1979, the Supreme Court noted "the high mobility of the bar."<sup>4</sup> Legal commentators have also noted the increase in the interstate practice of law.<sup>5</sup> Further, the American Bar Association's Code of Professional Responsibility recognized the increase in the interstate practice of law and determined that the legal profession should avoid the implementation of unreasonable terri-

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1. 105 S. Ct. 1272 (1985).

2. *Id.* at 1280-81. U.S. CONST. art. IV, § 2, states, in pertinent part, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

3. The lawyer is viewed as a protector of the "well-being of the Union" and is an important actor in protecting the federal rights of litigants. *Piper*, 105 S. Ct. at 1277. *See also* H.R. REP. No. 422, 99th Cong., 1st Sess. 27-28 (1985) (urging federal courts to reexamine, among other things, rules restricting admission to federal district courts to residents within the state in which the court is located).

4. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). The Second Circuit also used this phrase in *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966), to determine that a New York client must pay the fee of an antitrust lawyer licensed in California who counseled a client in New York. The court thus rejected a defense of the unauthorized practice of law.

5. *See* Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 700 (1975); Note, *Certification of Out-of-State Attorneys Before the Federal District Courts: A Plea for National Standards*, 36 GEO. WASH. L. REV. 204, 204-05 (1967); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1711-12 (1967). These commentators suggested that the mobility of our society, the nationalization of the economy and business, the increase in litigation concerning federal constitutional rights, and the concomitant specialization of the practice of law are factors that contribute to the mobility of the bar.

torial limitations on the practice of law.<sup>6</sup> Finally, surveys conducted by national legal publications in 1985 found that 181 of the 250 largest law firms maintained offices in more than one state,<sup>7</sup> and 271 of the 499 largest law firms maintained interstate offices.<sup>8</sup> In contrast, a 1978 survey found that sixty-five of the one hundred largest law firms,<sup>9</sup> and only twenty-seven of the next one hundred largest law firms,<sup>10</sup> maintained law offices in more than one state. The surveys exemplify the rapid growth recently experienced in the interstate practice of law.

The increase in the interstate and international practice of law, particularly in relation to litigation, necessitates a review of the rules governing the admission of attorneys to practice before federal district courts. By virtue of the sweep of their jurisdictional net, federal district courts are likely to be the fora for litigating most interstate or international disputes.<sup>11</sup> The present rules, based upon the antiquated notion that lawyers only rarely practice law in federal district court, and then only in the federal district court located in the state where the lawyer is admitted to practice, do not address this change in the practice of law.

This Article proposes a Rule concerning the admission to practice law in federal district courts and is designed to account for the recent changes in the practice of law. The Rule is based on the theory that lawyers will act ethically by handling only those legal matters within their competence and

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6. [T]he demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9 (1970).

7. NAT'L L.J., September 30, 1985 (Special Insert); LEGAL TIMES, September 16, 1985, at 15-51. These results do not include firms that opened only foreign branches. A 1984 survey found that 178 of the 250 largest law firms maintained offices in more than one state. NAT'L L.J., September 24, 1984 (Special Insert).

8. LEGAL TIMES, *supra* note 7, at 15-51. In its 1984 survey, LEGAL TIMES found that 269 of the 500 largest law firms maintained offices in more than one state. LEGAL TIMES, September 16, 1984 (Special Section).

9. NAT'L L.J., September 18, 1978, at 14-17.

10. NAT'L L.J., September 25, 1978, at 14-17.

11. The Constitution defines the jurisdiction of federal courts in article III, which states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty, and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to controversies between two or more states; between a State and Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

that clients (consumers) will act intelligently when hiring a lawyer. The proposed Rule will not result in a system of perfect client representation by lawyers in federal district courts, but will provide the federal district courts with some assurance of lawyer competence.

This Article first sets forth the various and chaotic rules concerning admission of lawyers to practice law before federal district courts. Second, an examination and criticism of previous federal bar admission proposals is given. Finally, this Article explains the basis for the proposed Rule.<sup>12</sup>

## I. PRESENT STATUS OF ADMISSION TO PRACTICE BEFORE UNITED STATES DISTRICT COURTS

### A. *General Admission to Practice*

Congress delegated to the courts the authority to regulate the admission of lawyers to practice before federal courts.<sup>13</sup> The Supreme Court exercised its statutory authority by instituting Supreme Court Rule 5.<sup>14</sup> The United States Circuit Courts of Appeals, through Federal Rule of Appellate Procedure 46,<sup>15</sup> adopted a uniform rule of admission to practice before

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12. This Article does not question the long-standing right and duty of the states to license and regulate the practice of law within their jurisdictions. The proposed Rule attempts only to standardize and nationalize the admission to practice law before United States District Courts.

13. 28 U.S.C. § 1654 (1984) states:

*Appearance personally or by counsel.*

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. § 2071 (1984) states:

*Rule-making power generally.*

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 by the Supreme Court.

*See also In re Roberts*, 682 F.2d 105, 109 (3d Cir. 1982) (federal courts authorized to set criteria for admission of attorneys through 28 U.S.C. § 2071 and FED. R. CIV. P. 83).

14. The section concerning eligibility to admission to practice generally before the Supreme Court appears in SUP. CT. R. 5.1, which states:

It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application, and that the applicant appears to the Court to be of good moral and professional character.

15. FED. R. APP. P. 46(a) states, in pertinent part:

An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

its courts.<sup>16</sup>

The Federal Rules of Civil Procedure, however, lack a provision or rule concerning the admission of lawyers to practice before United States District Courts. Instead, pursuant to Rule 83 of the Federal Rules of Civil Procedure<sup>17</sup> and to 28 U.S.C. § 1654 and § 2071,<sup>18</sup> each district court has instituted local rules that regulate and limit admission to practice before it.<sup>19</sup>

The restrictiveness of the rules governing admission to the bar promulgated by each district widely vary. The Eastern District of Wisconsin, for example, states that, "Any licensed attorney in good standing before any United States court, the highest court of any state, or the District of Columbia is eligible for admission to practice in this Court."<sup>20</sup> In contrast, the United States District Court for the Eastern District of Virginia limits eligibility generally

16. While the procedure is uniform, a flaw of Rule 46(a) is that an attorney must apply to become a member of each circuit court of appeals. As recently noted by the Supreme Court, Rule 46 of the Federal Rules of Appellate Procedure does not regulate the admission and discipline of attorneys to practice before federal district courts. *In re Snyder*, 105 S. Ct. 2874, 2880 n.3 (1985).

17. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83. As recently amended, Rule 83 provides for public notice and the opportunity to comment before promulgation of a new local rule by a federal district court.

A number of commentators question the widespread practice of implementing local rules pursuant to Rule 83. See, e.g., Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?* 24 FED. B. NEWS 325 (1977). But see *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985), in which the court stated:

The local rule device fulfills important informational purposes, placing the bar on notice of a court's policies. Similarly, a local rule may well be the most effective means of ensuring that all members of the bar are aware that a particular practice is deemed improper, and thus subject to a sanction. Local rules may also alert rulemakers to the need for changes in national rules and supply an empirical basis for making such changes. Furthermore, a local rule may be a powerful implement for rationalizing diverse court practices and imposing uniformity within a given district.

*Id.* at 570 (citing Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?* 14 LOY. L.A.L. REV. 213 (1981)).

18. See *supra* note 13.

19. The United States District Courts for the Western District of Wisconsin, Middle District of Georgia and Eastern District of Kentucky have not published any local rules for admission of attorneys to practice law.

20. E.D. Wis. R. 2, § 2.02.

to practice before it to "[a]ny person who is a member in good standing of the Supreme Court of Virginia . . . if he is a resident of Virginia and maintains an office to practice [in Virginia]." <sup>21</sup> Generally, most district court rules concerning admission to practice law are more akin to the requirements of the Eastern District of Virginia than to the requirements of the Eastern District of Wisconsin. Specifically, however, the requirements for admission vary greatly from one federal district to another. <sup>22</sup>

21. E.D. VA. R. 7(B). These restrictions result in the incongruous situation where an attorney who is a member in good standing of the Supreme Court of Virginia, but who is a resident of the District of Columbia, or whose office to practice law is located in the District of Columbia, may practice before any court or agency of the Commonwealth of Virginia, but may not practice before the United States District Court for the Eastern District of Virginia. See *In re Brown*, 213 Va. 282, 191 S.E.2d 812 (1972) (if applicant takes bar exam, no requirement to practice full-time in Virginia to become member of bar of Commonwealth). See also *Supreme Court of New Hampshire v. Piper*, 105 S. Ct. 1272, 1280-81 (1985) ("New Hampshire's bar residency requirement violates Art. IV, § 2, of the United States Constitution").

22. Fifty-nine district courts require an attorney to be admitted to practice before the highest court of the state in which the district court is located and/or be a member in good standing of the bar of that state. M.D. ALA. R. 1; N.D. ALA. R. 7(a)(1); D. ALASKA R. 3(A)(1); D. ARIZ. R. 6; C.D. CAL. R. 2.2.1; E.D. CAL. R. 180(a); N.D. CAL. R. 110(1); S.D. CAL. R. 110-3(a); D. COLO. R. 300; D. DEL. TITLE VIII, R. 8.1; S.D. FLA. R. 1; N.D. FLA. R. 4(A)(1); M.D. FLA. R. 2.01(b); N.D. GA. R. 110-1(a); S.D. GA. § IV, R. 2; D. HAWAII R. 110-1(a); D. IDAHO R. 2-101; N.D. ILL. R. 3.00 A; N.D. IOWA R. 1.5.2; S.D. IOWA R. 1(a); D. KAN. R. 4(b); W.D. KY. R. 2(b); E.D. LA. R. 21.2; M.D. LA. R. 1B; W.D. LA. R. 2(b); D. MD. R. 2 IV A 3; D. MASS. R. 5(a)(1); W.D. MICH. R. 13; D. MINN. R. 1B; N.D. MISS. R. 1(2)(1); S.D. MISS. R. 1(2)(1); W.D. MO. R. 1B; E.D. MO. R. 2(A); D. NEV. R. 4(b); D.N.H. R. 4(a); D.N.J. R. 4B; D.N.M. R. 3(b); W.D.N.Y. R. 3A; M.D.N.C. R. 103(b); W.D.N.C. R. 1A; E.D.N.C. R. 2.02; S.D. OHIO R. 2.5.2; S. OR. R. 110-1; E.D. PA. R. 11(a); W.D. PA. R. 1(b); D.P.R. R. 201.1; D.R.I. R. 4(b); D.S.D. R. 2, § 2; E.D. TENN. R. 1(a); M.D. TENN. R. 1(b); S.D. TEX. R. 1B; D. UTAH R. 1(b); E.D. VA. R. 7(B); W.D. VA. R. 1; E.D. WASH. R. 1(a); W.D. WASH. R. GR 2(b); N.D. W. VA. R. 1.04(b); S.D. W. VA. R. 1.05(b); D. WYO. R. 10 3(a).

If the particular state has a unitary bar, meeting both requirements is not a problem. Some states do not require a licensed member to join the state bar. The district courts that require admission to practice before the highest court of a state *and* membership in good standing of the bar of that state effectively prevent the admission of some attorneys to practice. This is merely one example of a rule without a reason.

Federal district courts in Arkansas and the Eastern District of Tennessee require an applicant to be admitted either to the bar of the state of the applicant's residence, or to a United States District Court located in the state of the applicant's residence, or both. E.D. & W.D. ARK. R. 2(b)(2); W.D. TENN. R. 1(a).

The federal district court for Vermont requires an applicant to be a member of the bar of the state of Vermont or a member of the bar of a federal district court within the First or Second Circuit Courts of Appeals. D. VT. R. 1.A.I. See also N.D.N.Y. R. 2A as amended (effective June, 1985).

Ten district courts require an applicant to be a member of any state bar or a United States court. D.D.C. R. 104(b); N.D. IND. R. 1(b); S.D. IND. R. 1(b); E.D. MICH. R. 12b; N.D. OHIO R. 2.02; N.D. OKLA. R. 4(c); W.D. OKLA. R. 4(c); E.D. OKLA. R. 4(C); W.D. TEX. R. 200-1(a); E.D. TEX. R. 2(a).

Six district courts require an applicant to be a member of the bar of the state in which it is

The balkanization of the admissions process is the result of an antiquated view of the practice of law in federal district courts. This view assumes that the vast majority of lawyers who practice law before a federal district court will be members of the bar of the state in which the district court is located and will reside and litigate in that state. This view unnecessarily, and perhaps unconstitutionally,<sup>23</sup> limits and restricts the practice of law in federal district

located or of a United States court. D. CONN. R. 2(a); D. ME. R. 3(b); D. MONT. R. 110-1(a); E.D. PA. R. 11(a); M.D. PA. R. 201.1; D.S.C. IN THE MATTER OF ATTORNEY ADMISSION AND DISCIPLINE.

Finally, nine district courts require an applicant to be a member of any state bar. S.D. ALA. R. 1B; C.D. ILL. R. 1(a); S.D. ILL. R. 1; D. NEB. R. 5C; W.D.N.Y. R. 3F; N.D.N.Y. R. 2A; D.N.D. R. 2(b); N.D. TEX. R. 13.1(a); E.D. WIS. R. 2, § 2.02.

In addition to these requirements, twelve courts require the applicant to have an office in the state in which the court is located. D. HAWAII R. 110-1(b)2; D. KAN. R. 4(b); *see* W.D. KY. R. 2(a); M.D. LA. R. 1B; E.D. MO. R. 2(A); E.D.N.C. R. 2.02; E.D. PA. R. 11(a); M.D. PA. R. 201.1; D.R.I. R. 4(b)(1); E.D. VA. R. 7(B); W.D. VA. R. 1. *See also* D.D.C. R. 104(a) & (b) (to be resident counsel, attorney must have an office in the District of Columbia or Maryland).

Thirteen district courts require residence in the state or district. M.D. ALA. R. 1(a); D. HAWAII R. 110-1(b)2; D. IDAHO R. 2-101; D. KAN. R. 4(b); M.D. LA. R. 1B; E.D. MO. R. 2(A); D. NEV. R. 4(b); D.N.M. R. 3b; M.D.N.C. R. 103(b); D.N.D. R. 2(b); W.D. PA. R. 1(b); E.D. VA. R. 7(B); N.D. W. VA. R. 1.04(b); *see* D. WYO. R. 103(b).

Ten other courts require either an office or residence in the state or district. N.D. ALA. R. 7(a)(1); D. COLO. R. 300; S.D. ILL. R. 1; E.D. LA. R. 21.2; D. ME. R. 3(b); S.D. OHIO R. 2.5.2; D.S.D. R. 2, § 2; S.D. TEX. R. 1B; D. UTAH R. 1(b).

Two courts require that the applicant maintain an "active" practice within the state or district. M.D. LA. R. 1B; D.R.I. R. 4(b)(1).

Other district courts have further restrictions on general admission to practice law. *See, e.g.*, S.D. FLA. R. 1 of the Special Rules Governing the Admission and Practice of Attorneys (applicant must pass an examination concerning the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the law of federal jurisdiction and venue, and the court's local rules). *See also* W.D. TEX. R. 200-1(a) (requiring previous one-year membership in any United States District Court or in the highest court of any state).

23. There is no reported decision that declares unconstitutional any United States district court local rule concerning admission to practice before a district court. However, several other court decisions have held such rules constitutional. *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475); *see In re Roberts*, 682 F.2d 105 (3d Cir. 1982); *Brown v. McGarr*, 583 F. Supp. 734 (N.D. Ill. 1984), *aff'd*, 774 F.2d 777 (7th Cir. 1985); *Galahad v. Weinshienk*, 555 F. Supp. 1201 (D. Colo. 1983).

Local federal bar admission rules that require an attorney's residence in or license from the state in which the district court is located are inconsistent with *Piper*. *But see Frazier v. Heebe*, 788 F.2d 1049, 1052 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475) (Eastern District of Louisiana local rule barring attorneys who neither reside nor maintain an office in Louisiana not invalidated by *Piper* since privileges and immunities clause not applicable to federal government and its officers). Other limitations to admission that discriminate against certain lawyers, including an office requirement, an active practice requirement or a waiting-period requirement, may also be unconstitutional. The limitations are not rationally related to the applicant's fitness to practice law. Also, these rules may unconstitutionally infringe the client's right to choice of counsel. *See Note, Recent Developments—Constitutional Right to Engage an Out-of-State Attorney*, 19 STAN. L. REV. 856 (1967). *But see In re United States*

courts. A review of current legal practice exemplifies the severity of these restrictions. Civil rights lawyers litigate cases in a number of courts in the United States. Some personal injury and criminal defense attorneys also practice in federal courts across the United States. Many corporations use the same counsel wherever they sue or are sued.

States have legitimate interests in regulating the admission of lawyers to practice within their respective jurisdictions. By requiring a prospective lawyer to show competence in the practice of law, a state protects its public. One state interest is to license only those lawyers who demonstrate competence by showing a familiarity with local law. This requirement is important, even with the proliferation of uniform acts.<sup>24</sup> A second state interest is to inform those who seek representation by, or counselling from, lawyers licensed by the state that such lawyers are *prima facie* capable of serving the public's needs. Third, regulating the ethical practice of law by lawyers either licensed by it, or located within the state's borders, is a legitimate and important state interest. Fourth, the state is interested in maintaining the ethical administration of justice in its courts, which concomitantly permits it to discipline its lawyers for unethical or illegal conduct. A final purported state interest is the economic protection of its lawyer-residents.<sup>25</sup>

The interest of federal district courts in regard to the admission and practice of lawyers is quite different. Federal district courts are courts of limited jurisdiction and exercise their authority only after the institution of a lawsuit. Federal courts are enabled by statute to decide, among other disputes, cases against foreign states,<sup>26</sup> civil actions arising under the Constitution, laws or treaties of the United States,<sup>27</sup> and civil actions where there is a complete diversity of citizenship between the parties.<sup>28</sup>

This limited authority, therefore, places different duties upon a federal court than those duties placed upon a state. For example, the requirement of a license by a state is an attempt by the state to inform *prospective* consumers that the lawyer has some degree of competence to handle legal

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v. Panzardi-Alvarez, 623 F. Supp. 108 (D.P.R. 1986) (rule permitting non-resident attorney to appear *pro hac vice* only once yearly does not contravene any right granted by either statute or Constitution, including sixth amendment); *In re Admission Pro Hac Vice* of Chokwe Lumumba, 526 F. Supp. 163 (S.D.N.Y. 1981) (same). Cf. *Sheinbart v. Certain-Teed Prods. Corp.*, 367 F. Supp. 707, 710 (S.D.N.Y. 1973) ("inconvenience caused plaintiff due to the need to retain local counsel in the transferred district is of little if any weight on a motion to transfer").

24. See UNIFORM LAWS ANNOTATED (West Master ed. 1976).

25. Cf. *Piper*, 105 S. Ct. at 1279 n.18 (protecting lawyers from competition not a 'substantial reason,' since privileges and immunities clause designed primarily to prevent economic protectionism) (citing Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978)).

26. 28 U.S.C. § 1330(a) (1984).

27. *Id.* § 1331.

28. *Id.* § 1332(a).



problems.<sup>29</sup> The license also informs prospective consumers that the lawyer has a specific knowledge of local law. On the other hand, federal district courts do not have a legitimate interest in helping consumers select attorneys who have made a minimum showing of competence.<sup>30</sup> The parties in federal court have already completed their search and have hired counsel versed and knowledgeable in the applicable law upon the institution of the lawsuit.

Another example of the difference between the interests of the states and the federal district courts is that a state protects consumers of legal services from the unethical "office" practice of law. Office practice includes the drafting of wills, assisting in real estate transactions or handling client funds. The state has a legitimate interest in protecting local consumers of such services from unethical office practice. Federal courts, however, are accountable to the claims of a much narrower public. The federal courts are primarily concerned with fulfilling their duty to balance the rights and duties of the *specific* litigants involved in any case properly before the court.<sup>31</sup> Thus, the first three state interests set forth above are satisfied without regard to any federal district court bar admission rules.

Federal district courts do, however, have a legitimate interest in insuring the competent practice of law by attorneys appearing before them. Federal courts presume that lawyers will act competently. This presumption of competence and ethical practice in federal court is implied in Rule 3 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.<sup>32</sup> Federal

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29. Some states further certify that lawyers are specialists in particular fields of law. *See, e.g., Florida Bylaws Under the Integration Rule of the Florida Bar*, art. 19, app. I, § 2 (West Supp. 1986) (detailing requirements to become certified civil trial lawyer). Florida recognizes other certified specialties, such as a tax lawyer, and marital and family lawyer. *Id.* at apps. II & III.

30. The sixth amendment guarantees indigent criminal defendants competent counsel, so their lack of choice in counsel does not legitimate any additional court interests. Federal district courts have the discretionary authority to request counsel to represent *in forma pauperis* litigants under 28 U.S.C. § 1915(d) (1984), which some courts have construed as authority to appoint counsel. *See* *McKeever v. Israel*, 689 F.2d 1315, 1318-19 (7th Cir. 1982) and cases cited therein. The use of this statute to authorize the appointment of counsel has been criticized by Judge Richard Posner, who argues that an indigent litigant with a meritorious claim will be able to obtain retained counsel. *Id.* at 1323-25. *See also* *Merritt v. Faulkner*, 697 F.2d 761, 769-71 (7th Cir. 1983) (Posner, J., dissenting) (same).

The use of §1915(d) does not, however, alter the interest of the federal courts in insuring the ethical administration of justice. The Rule proposed in this Article may result in a greater assurance that appointed counsel is competent.

31. The federal court may be concerned secondarily in interpreting federal laws and accompanying administrative regulations, while balancing the rights and duties of all citizens or residents of the United States.

32. R.P. J.P.M.D.L. 3. Admission to Practice Before the Panel and Representation in Transferred Actions.

Every member in good standing of the Bar of any district court of the United States

courts do not assume that lawyers not admitted to practice in those courts are incompetent, since most courts routinely permit lawyers to litigate a particular case in federal court.<sup>33</sup> If incompetence is later found to exist, the court can take appropriate disciplinary action.<sup>34</sup> Federal courts must trust litigants to choose competent counsel. A federal court should give any party before it a great deal of leeway in being represented by counsel of the party's choice. This should be the case even when the matter before the courts is due solely to diversity of citizenship.<sup>35</sup>

The asserted state interest of protecting the lawyer-resident's economic interests cannot be a valid policy of federal district courts.<sup>36</sup> Federal district courts were created by an act of Congress. A special interest in protecting only some citizens of the United States is both indefensible and unconstitutional.<sup>37</sup>

Federal district courts are solely concerned with litigation. The courts are not regulators of lawyer counselling. The mandate of the federal courts is to ensure the ethical administration of justice and to discipline attorneys appearing before it for any unethical or illegal conduct.

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is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record in any action transferred under Section 1407 may continue to represent his client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred.

This Rule implicitly acknowledges the uniformity of the federal rules of procedure and evidence. Further, this rule eliminates the argument that the variety and breadth of local rules require the use of local or resident counsel.

33. In fact, admission to practice in federal courts historically has been based on the *prima facie* showing of competence of admission to a state bar. See *Theard v. United States*, 354 U.S. 278, 281 (1957).

34. See *In re Rappaport*, 558 F.2d 87, 89 (2d Cir. 1977).

35. Although the decision of *Erie v. Tompkins*, 304 U.S. 64 (1938), necessitates the application of state substantive law in diversity jurisdiction cases, this is not an argument against a uniform, national rule. First, lawyers may handle only those legal matters specifically within their competence. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1970); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1:1 (1983). Second, clients should be permitted to choose non-resident counsel to represent them in federal court without undue interference. Third, bifurcation of the bar on this ground would be an administrative nightmare. Fourth, diversity jurisdiction was created by Congress and may be eliminated by Congress. Finally, a state's conflicts of law rule can often result in a state court applying the substantive law of another state to decide a particular case.

36. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Brakel & Loh*, *supra* note 5, at 702. See also *supra* note 25. Additionally, the commerce clause was designed to prevent states from erecting barriers to protect its residents from economic competition. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

37. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

### B. Pro Hac Vice Admission

Almost all district courts provide for the admission of attorneys to practice *pro hac vice*.<sup>38</sup> Admission is discretionary with the court,<sup>39</sup> and most courts require an attorney admitted *pro hac vice* to be associated with resident or local counsel.<sup>40</sup> However, the use of *pro hac vice* admission is not a panacea to restrictive rules governing general admission to practice law. It protects neither the court's interest in some assurance of lawyer competence nor the client's interest in hiring counsel of its choice. The additional requirement of local counsel is simply economic protectionism. Fees paid to local counsel are an unnecessary litigation expense. The client rarely chooses the local counsel. Therefore, the local counsel's advice, if ever sought, is usually given a corresponding weight.

The local counsel requirement may also create conflicts in the attorney-client relationship. Associated counsel may offer conflicting legal advice to the client, and, therefore, the client may become the arbiter of local and

38. *Pro hac vice* is defined as, "For this turn; for this one particular occasion. A lawyer may be admitted to practice in a jurisdiction for a particular case only." BLACK'S LAW DICTIONARY 1091 (5th ed. 1979). A review of state and federal *pro hac vice* rules is found in E. MICHELMAN, *PRO HAC VICE REGULATION—IN THE NATIONAL INTEREST?* (ABA Monograph 1984).

The district courts that allow admission *pro hac vice* are M.D. ALA. R. 1b; N.D. ALA. R. 7(c); S.D. ALA. R. 2A; D. ALASKA R. 3(c)(1); D. ARIZ. R. 6(b); E.D. & W.D. ARK. R. 2(d); C.D. CAL. R. 2.2.3.1; E.D. CAL. R. 180(b)(2); N.D. CAL. R. 110-2(b); S.D. CAL. R. 110-3(e); D. COLO. R. 301A; D. CONN. R. 2(d); D. DEL. R. 8.1 C & D; D.D.C. R. 104(b); S.D. FLA. R. 4F OF THE SPECIAL RULES GOVERNING THE ADMISSION AND PRACTICE OF ATTORNEYS; N.D. FLA. R. 4(D)(1); M.D. FLA. R. 2.02(a); N.D. GA. R. 110-2; S.D. GA. § IV, R. 4; D. HAWAII R. 110-1(d); D. IDAHO R. 2-104; C.D. ILL. R. 1(d); N.D. ILL. R. 3.12; S.D. ILL. R. 1(a); N.D. IND. R. 1(c); S.D. IND. R. 1(c); N.D. & S.D. IOWA R. 1.5.6; D. KAN. R. 4(f); W.D. KY. R. 2(c); E.D. LA. R. 21.5; M.D. LA. R. 1E1; W.D. LA. R. 2(d); D. ME. R. 3(d)(1); D. MD. R. IV, F of R. 3; D. MASS. R. 6(b); E.D. MICH. R. 12(d); W.D. MICH. R. 14; D. MINN. R. 1D; N.D. MISS. R. 1(a)(4)(A); S.D. MISS. R. 1(a)(4)(A); W.D. MO. R. 1E; E.D. MO. R. 2D; D. MONT. R. 110-2(c); D. NEB. R. 5E; D. NEV. R. 4(e)(1); D.N.H. R. 4(c); D.N.J. R. 4C; D.N.M. R. 3d; S.D. & E.D.N.Y. R. 2(c); W.D.N.Y. R. 3H; N.D.N.Y. R. 3; M.D.N.C. R. 103(d)(1); W.D.N.C. R. 1B; E.D.N.C. R. 2.05; D.N.D. R. 2(d)(6); S.D. OHIO R. 3.0.4; N.D. OHIO R. 2.08; N.D. OKLA. R. 4(f); W.D. OKLA. R. 4(F); E.D. OKLA. R. 4(f); D. OR. R. 110-2(b); E.D. PA. R. 13(a); M.D. PA. R. 202.3; W.D. PA. R. 1(e); D.P.R. R. 204.2; D.R.I. R. 5(c); D.S.C. IN THE MATTER OF ATTORNEY ADMISSION AND DISCIPLINE; D.S.D. R. 2, § 5; E.D. TENN. R. 1(g); M.D. TENN. R. 1(d); W.D. TENN. R. 1(b); S.D. TEX. R. 1E; N.D. TEX. R. 13.3; E.D. TEX. R. 2(d); D. UTAH R. 1(c); D. VT. R. 1.B.1; E.D. VA. R. 7(D); W.D. VA. R. 3; E.D. WASH. R. 1(c); W.D. WASH. R. GR 2(d); N.D. W. VA. R. 1.04(c); S.D. W. VA. R. 1.05(c); D. WYO. R. 103(b).

39. W.D. KY. R. 2(c) (permission to act as attorney for party *pro hac vice* may be withdrawn at any time); W.D.N.C. R. 1B (special admission is exception, not rule); S.D. OHIO R. 3.0.4 (permission may be withdrawn at any time).

40. Only fourteen courts that permit *pro hac vice* appearance also permit a waiver of the local counsel requirement. FED. LOCAL CT. R. E.D. & W.D. ARK. R. 2(d); N.D. FLA. R. 4(D)(2); M.D. FLA. R. 2.02(a)(1); E.D. LA. R. 21.6; W.D. MO. R. 1F; D. NEB. R. 5E; D. NEV. R. 4(e)(4); W.D.N.C. R. 1B; W.D. TENN. R. 1(b); W.D. TEX. R. 200-3; N.D. TEX. R. 13.4; N.D. W. VA. R. 1.04(c); S.D. W. VA. R. 1.05(c).

outside counsel's differences. Moreover, the rules of several district courts require that local counsel be prepared to try the case alone.<sup>41</sup> This requirement abrogates the client's choice of counsel.<sup>42</sup>

The uniformity of federal procedure vitiates any need for local counsel.<sup>43</sup> Local counsel is not necessary to receive papers or service of process. Any designated agent will suffice.<sup>44</sup> Further, local counsel is not necessary for unscheduled hearings. As noted by the majority in *Piper*, "In many situations, unscheduled hearings may pose only a minimal problem for the non-resident lawyer. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters."<sup>45</sup> In some instances, local counsel may be located a greater distance from the courthouse than outside counsel.<sup>46</sup> Moreover, local counsel is unnecessary for a court to exercise disciplinary control. Any attorney who practices before a federal district court is subject to its disciplinary sanctions.<sup>47</sup> Finally, local counsel may be unavailable to prosecute or defend certain kinds of cases.<sup>48</sup>

## II. PRIOR UNITED STATES DISTRICT COURT BAR ADMISSION PROPOSALS

### A. An Overview

Committees organized to discuss the efficacy of a uniform rule to practice before United States District Courts have met sporadically since 1938.<sup>49</sup> As

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41. See E.D. LA. R. 21.5; S.D. OHIO R. 3.0.1.

42. *But see In re Admission Pro Hac Vice of Chokwe Lumumba*, 526 F. Supp. 163 (S.D.N.Y. 1981) (counsel both competent and voluntarily chosen did not alter court's decision to refuse to admit counsel to practice *pro hac vice*).

43. See *supra* note 32. Even "informal" local rules or standing orders, such as requesting permission from the judge before approaching the witness, can be learned from the court clerk. The clerk likely knows these rules as well as any local counsel.

44. See C.D. ILL. R. 1(e). *But see Ma v. Community Bank*, 686 F.2d 459, 471 (7th Cir.), *cert. denied*, 459 U.S. 962 (1982) (local rule concerning court's discretion to require litigant to utilize local counsel is designed to facilitate mechanical service, not to deprive plaintiff of right to select attorney).

45. 105 S. Ct. at 1280 n.21 (citing Hanson, Olson, Shuart & Thornton, *Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?* 66 JUDICATURE 408, 408-09 (1983)).

46. See *Fidelity Bank v. Commonwealth Marine & Gen. Assur. Co. Ltd.*, 581 F. Supp. 999, 1003 n.2 (E.D. Pa. 1984) (local counsel requirement of Pennsylvania waived since counsel maintained office in Wilmington, Delaware, much closer to courthouse than most of Pennsylvania). *But see Frazier v. Heebe*, 788 F.2d 1049, 1054 n.6 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475) (Frazier, member of bar of Louisiana whose office and residence were in Mississippi, denied admission to bar of Eastern District of Louisiana in part because of distance from court, although court admitted that others were admitted to that bar because they were residing or working in Louisiana despite greater distance than Frazier from court).

47. The uniform, national Rule advocated in this Article would likely result in even greater disciplinary control over unethical lawyers, since suspension or disbarment from the bar would prohibit the lawyer from practicing in any federal district court.

48. *Lefton v. City of Hattiesburg*, 333 F.2d 280, 286 (5th Cir. 1964) (if no local counsel available, court rule requiring local counsel should be waived).

49. Report of the Judicial Conference of Senior Court Judges, 24 A.B.A. J. 905 (1938).

recently as September, 1985, a report proposing uniform federal bar admission requirements was approved by the Judicial Conference of the United States.<sup>50</sup>

The history of the proposals for admission to practice before the federal district court has been thoroughly canvassed.<sup>51</sup> In 1940<sup>52</sup> and 1947,<sup>53</sup> committees advised the Judicial Conference of the United States that "varying conditions that exist in the different districts" militate against the implementation of a uniform rule concerning admission to practice.<sup>54</sup> In 1973, the Judicial Conference affirmed its opposition to "any uniform rule for admission to the bar of the courts of the United States,"<sup>55</sup> even though the House of Delegates of the American Bar Association had adopted a resolution that urged a uniform rule the previous year.<sup>56</sup> As recently as 1985, a committee urged the Judicial Conference to reaffirm its opposition to a national federal district court bar admission rule.<sup>57</sup>

### B. Other Proposals

#### 1. Clare Committee Proposal

In 1974, Chief Judge Irving Kaufman of the Second Circuit Court of Appeals, on behalf of the Judicial Council of the Second Circuit, appointed

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50. The Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice [hereinafter cited as the King Committee Report] recommended that the proposals for federal bar admission reported in the Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, September 19, 20, 1979, 83 F.R.D. 215 (1979) [hereinafter cited as the Devitt Committee Report] be adopted. *See also* Tentative Recommendations, 79 F.R.D. 187 (1978). The Judicial Conference adopted the recommendations of the King Committee at its September, 1985 meeting. *See infra* notes 65-86 and accompanying text.

51. Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 258-66 (1975).

52. Committee on Local District Rules, 1938-1940.

53. Judicial Conference Committee to Consider the Advisability of Regulating Admission to the Bar of the Federal Courts by Uniform Rules, 1944-47.

54. Report of Committee on Local District Rules, at 1. For an early plea for uniform requirements, see Crotty, *Uniform Requirements for Admission to Practice in the Federal Courts*, 17 B. EXAMINER 35 (1948).

55. Report of the Proceedings of the Judicial Conference of the United States, at 43-44 (April 5-6, 1973).

56. "Be It Resolved, That the American Bar Association urges the promulgation by the Judicial Conference of the United States of a uniform system for admission of attorneys to the federal courts and agencies and that disciplinary control of the practice of attorneys in federal courts and agencies be administered by an appropriate agency as a function of the federal judiciary." AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION HOUSE OF DELEGATES, MIDYEAR MEETING at 26 (1972).

*See also* Agata, *supra* note 51, at 263-64, in which the author noted that a 1972 survey of federal district court judges found wide support for a uniform admission to practice rule.

57. King Committee Report, *supra* note 50, at 24.

a committee to make "recommendations for amendments in the rules of admission to the federal courts."<sup>58</sup> The committee, popularly known as the Clare Committee, concluded that the quality of trial advocacy needed improvement.<sup>59</sup> The Clare Committee's solution provided that the federal district courts within the Second Circuit should require a bar admission applicant either to have assisted in the preparation or to have attended the hearing of four proceedings on the merits, including two federal court proceedings. An alternative solution suggested by the committee required the applicant to have observed six complete hearings on the merits, at least three before a federal court.<sup>60</sup>

The requirements of the Clare Committee proposal go both too far and not far enough. The "assisting" requirement necessitates that the applicant aid an attorney already admitted to the bar of the federal district court. The opportunity to assist before two federal court proceedings may not be available to a sole practitioner or small firm lawyer, and may not be affordable to the client or to the lawyer. Moreover, the "assisting" requirement resembles a local counsel requirement, which, as discussed above,<sup>61</sup> is unnecessary and may be harmful to the attorney-client relationship.

The alternative "observing" requirement serves to familiarize the lawyer with local customs, but fails to provide any indicia of competence. Many reporters and courtroom regulars can fulfill the "observing" requirement without becoming competent advocates. Likewise, many lawyers need not observe testimonial proceedings to adequately represent a client.

The Clare Committee proposal also limited admission to practice to those attorneys either already a member of the bar of the state in which the district court is located or to those admitted to a federal district court located in a

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58. Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 159, 161 (1975) [hereinafter cited as the Clare Committee Report].

59. *Id.* at 182. One federal district court judge sitting in the Eastern District of New York took issue with that conclusion. Weinstein, *An Argument Against Federal Admission Rules (Part I)*, 172 N.Y.L.J. 108 (1974). In his dissent to the King Committee Report, Judge Higginbotham also disputed this general conclusion made by the Clare Committee. King Committee Report, *supra* note 50, at 41-46 (Higginbotham, J., dissenting). Judge Higginbotham noted that a survey of federal district court judges revealed that only nine percent of attorneys were deemed to have performed either "not quite adequate" or worse, while ninety-one percent of attorneys were deemed to have performed adequately or better. *Id.* at 43-44 (Higginbotham, J., dissenting). The majority of the King Committee admitted that it lacks "empirically demonstrable evidence" concerning the existence of lawyer incompetence, *id.* at 90-91, and further concluded that gathering evidence was beyond its mandate. *Id.* at 83. See also Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 622 (1977) ("If anybody needs an example of a 'finding' unsupported by competent evidence, the quoted one will do"); Pedrick & Frank, *Trial Incompetence: Questioning the Clare Cure*, TRIAL, March, 1976, at 47, 52 & 54 ("We begin with a 'deficiency' which is shaky at best. We leap to a cure without a scintilla of evidence [of trial incompetency] . . .").

60. Clare Committee Report, 67 F.R.D. 159, 188 (1975) (app. M).

61. See *supra* notes 40-48 and accompanying text.

state where the lawyers are admitted and maintain offices, provided that that district court reciprocates admission.<sup>62</sup> These requirements fail to nationalize admission to practice, and, indeed, the reciprocity requirement erects a barrier that can only be described as an economic-protection measure.<sup>63</sup> Federal district courts should not protect lawyers from the economics of competition.

Finally, the Clare Committee decided not to require the applicants to demonstrate their knowledge of federal rules of procedure and jurisdiction by way of examination. The Committee proposal merely required course study of the law of evidence, civil and criminal procedure, professional responsibility, and trial advocacy. These course requirements inadequately assure the court of a lawyer's familiarity with the federal rules of procedure or evidence, and thus any level of lawyer competence. These reasons illustrate that the Clare Committee recommendations failed to adequately address the question of federal district court admission to practice.<sup>64</sup>

## 2. *The Devitt Committee Recommendations*

The most recent proposal concerning standards for admission to practice in federal courts was issued in September, 1979, by the Devitt Committee.<sup>65</sup> As a minimum standard of each federal district court, the Devitt Committee recommended that an applicant be required:

- 1) to pass an examination concerning the subjects of Federal Rules of Criminal, Civil and Appellate Procedure, the Federal Rules of Evidence, federal jurisdiction and the Code of Professional Responsibility.
- 2) as a condition of trying cases, a requirement of four trial experiences, including two actual trials.<sup>66</sup>

The Judicial Conference of the United States adopted the Devitt Committee report on September 20, 1979. Several district courts, by local rule, have adopted either one or both of these recommendations.<sup>67</sup> The King Committee,

62. Clare Committee Report, 67 F.R.D. 159, 187 (1975) (app. M).

63. See, e.g., Brakel & Loh, *supra* note 5, at 704 ("Reciprocity requirements, for example, imply a disregard of legitimate concerns and instead are explicable solely in terms of economic protectionism"). Cf. Goldfarb v. Supreme Court of Va., 766 F.2d 859, 863 (4th Cir. 1985), cert. denied, 106 S. Ct. 862 (Jan. 21, 1986) (No. 85-528) (limiting reciprocity to those lawyers who intend to practice full-time in Virginia not a violation of the commerce clause).

64. Compare Pedrick & Frank, *supra* note 59, at 47 with McLaughlin, *Trial Incompetence: In Defense of the Clare Cure*, TRIAL, June, 1976, at 62.

65. 83 F.R.D. 215 (1979).

66. *Id.* at 222 & 224.

67. N.D. FLA. R. 4(A)(1) (both requirements); S.D. FLA. R. 1 of the Special Rules Governing the Admission and Practice of Attorneys (both requirements); N.D. ILL. R. 3.10B (trial experience); S.D. IOWA R. 1(a) (examination); D. MD. R. II, B & C, 2 (trial experience); D. MASS. R. 5 (examination); D.P.R. R. 201.2 (examination); D.R.I. R. 4(b)(2) (examination). Other courts adopted other Devitt Committee recommendations, such as peer review and student practice. See, e.g., N.D. CAL. R. 110-10 (peer review) & 110-11 (student practice).

instituted by the Judicial Conference to oversee and assess pilot district court programs, adopted at least some of the Devitt Committee recommendations. The King Committee also concluded that each federal district court should adopt the examination and trial experience requirements.<sup>68</sup> The Judicial Conference adopted the King Committee report in September, 1985.<sup>69</sup>

The Devitt Committee proposal and the King Committee report are flawed in several respects. First, these bar admission standards are recommended as minimum requirements to practice before *each* federal district court. Each court, therefore, is free to establish additional standards before admitting a lawyer to practice law.<sup>70</sup> The failure to nationalize admission requirements is a major shortcoming.

This shortcoming is exacerbated by the King Committee's decision not to recommend a national federal bar admission rule. The decision was based on two dubious propositions. First, the King Committee was concerned that the Judicial Conference would lack the legal authority to require federal district courts to adopt such a rule.<sup>71</sup> Second, a national federal district court bar admission rule would not improve the quality of advocacy, since the rule would sacrifice programs designed to enhance advocacy skills above a minimal level.<sup>72</sup>

Neither reason is sensible, much less persuasive. A lack of legal authority on the part of the Judicial Conference to implement a national admission rule does not mean that no legal authority to implement a national rule exists. Both Congress<sup>73</sup> and the Supreme Court<sup>74</sup> have such authority. The Judicial Conference, if necessary, could request these bodies to implement or enforce a national bar admission rule.<sup>75</sup>

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68. King Committee Report, *supra* note 50, at 10-15.

69. The Devitt Committee recommendations were disfavored by eighty-five percent of attorneys polled in one survey. Spears, *Federal Court Admission Standards—A 45 Year Success Story*, 83 F.R.D. 235, 236 n.6 (1979). See *LEGAL TIMES*, September 23, 1985, at 2, cols. 1-3; *NAT'L L.J.*, September 30, 1985, at 9, col. 1. Then Chief Justice Warren Burger endorsed the King Committee report in his 1985 Year-End Report on the Judiciary, stating, "No valid reason has been advanced suggesting why these minimum requirements should not be instituted." *Id.* at 9.

70. 83 F.R.D. 215, 221 (1979). Other standards could, of course, include membership in the bar of the state in which the district court is located, or having an office within the district.

71. King Committee Report, *supra* note 50, at 24.

72. *Id.*

73. U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 1.

74. 28 U.S.C. § 2072 (1978) states, in pertinent part, "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions." See also *id.* § 2071 (1948) (granting the Supreme Court authority to require inferior courts to prescribe rules consistent with rules prescribed by the Supreme Court).

75. Further, the authority cited by the King Committee in support of its first proposition is inapposite. The Supreme Court, in *In re Snyder*, merely concluded that Federal Rule of Appellate Procedure 46 does not provide for the admission or suspension of attorneys from practice in federal district court. 105 S. Ct. 2874, 2880 n.3 (1985).



The second reason given by the King Committee also completely misses the mark. The implementation of a national rule would not sacrifice other programs aimed at improving advocacy beyond minimal standards of competence. As noted earlier, some federal district courts currently ignore the issue of a minimal level of lawyer competence.<sup>76</sup> A national rule would provide these districts with some level of assurance of lawyer competence. A national rule would not bar the Judicial Conference nor any other body from implementing programs designed to improve the levels of competence. The King Committee utterly failed to support the reasoning behind its conclusions.

The second flaw in the Devitt and King Committees' reports is found in the requirement of four trial experiences before permission to conduct a trial. This requirement, a stricter one than that of the Clare Committee,<sup>77</sup> is not a legitimate tool to determine competence as a trial advocate.<sup>78</sup> Three reasons militate against this rule. First, clients who are litigating or who wish to litigate in federal district court already have chosen lawyers whom they trust and upon whom they rely. The prior-trial requirement unduly interferes with that relationship. A prospective litigant may be forced to choose between a known, competent, but ineligible counsel who is familiar with the litigant or the problems of the case, and an admitted counsel whose competence is not otherwise known to the litigant. Forcing a litigant to make this choice serves neither the litigant nor the court's interest in assuring the competence of counsel. If the client hires both ineligible general litigation counsel and special trial counsel, fees will increase, and the client may be given conflicting litigation advice. Conflicts of this type disserve the client and may present ethical problems for counsel.<sup>79</sup>

Second-chairing or observing a trial may help an attorney obtain experience as a trial lawyer, but it does not make a competent advocate.<sup>80</sup> Competence is not gained if the second-chair lawyer is merely another spectator or observer.<sup>81</sup> Inferring competence simply from the fact that a lawyer has

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76. See generally *supra* notes 20-48 and accompanying text.

77. See *supra* notes 60-61 and accompanying text.

78. This proposition is supported by the survey relied upon by the Devitt and King Committees. The survey found that ninety-one percent of the attorneys were deemed to have performed adequately or better at trial, while only nine percent were deemed to have performed not quite adequately or worse. King Committee Report, *supra* note 50, at 43 (Higginbotham, J., dissenting). The King Committee recommended the trial experience requirement, even though it acknowledged that "the available data are insufficient to prove or disprove the effectiveness of an experience requirement." *Id.* at 15.

79. See *supra* notes 41-42 and accompanying text.

80. Judge Higginbotham makes the point that an experience requirement, satisfied by second-chairing, easily would be met by new attorneys in major law firms, but would be difficult to hurdle by those attorneys representing the poor. This situation could result in the exclusion of a significant class of litigants to the federal courts. King Committee Report, *supra* note 50, at 61-62 (Higginbotham, J., dissenting).

81. Moreover, the knowledge acquired in previous state court trials may not be of any value in conducting a trial in federal court.

observed trials may violate the ethical rule that no lawyer is permitted to represent a client in a legal matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it."<sup>82</sup>

The grandfather exception<sup>83</sup> to the Devitt Committee proposal also poses problems. The exception permits lawyers already admitted to a federal district court to use their access to federal district court, rather than their expertise, as their selling point. This makes these lawyers more attractive to prospective clients. Moreover, this limits the fora available to litigants who hire the competent but not technically qualified lawyer and also skews the market for legal services.<sup>84</sup>

The third weakness of the King Committee's report is that the examination includes testing on the Federal Rules of Appellate Procedure and the Code of Professional Responsibility. The former is unnecessary to the admission to practice law in federal district courts,<sup>85</sup> and the latter is now tested by most states as part of the bar examination in the Multistate Professional Responsibility Examination.<sup>86</sup>

Finally, the Devitt Committee proposal separates the bar. The barrister-solicitor distinction extant in Great Britain<sup>87</sup> has never taken hold in the United States. The practice of law in the United States has not thereby suffered. Implementing this distinction at this time is untenable and un-

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82. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1970); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1:1. *See also Piper*, 105 S. Ct. at 1279 (lawyers must be trusted to maintain high ethical standards of conduct, and courts must presume ethical practice by lawyers).

83. Attorneys already admitted to practice are exempted from satisfactory completion of the Devitt Committee recommendations under the King Committee rule. Judge Higginbotham argues that this would disproportionately exclude two groups which have recently increased their numbers as a percentage of the lawyer population, women and minorities. King Committee Report, *supra* note 50, at 65-71 (Higginbotham, J., dissenting).

84. *Id.* at 60-61 (Higginbotham, J., dissenting). Judge Higginbotham also asserts that the cost of legal services will increase if the experience requirement is implemented. *Id.* at 62-64 (Higginbotham, J., dissenting). He noted that pilot districts have experienced significant decreases in membership. *Id.* at 52-54 (Higginbotham, J., dissenting).

85. *See Spears, supra* note 69, at 242 n.31 ("[S]ince the examination is only for admission before the Western District of Texas, applicants are not tested over the Federal Rules of Appellate Procedure"); *see also* S.D. FLA. R. 1 (no testing of knowledge of the Federal Rules of Appellate Procedure).

86. 1985 INFORMATION BOOKLET, NATIONAL CONFERENCE OF BAR EXAMINERS 3 (thirty states require satisfactory score on the MPRE as part of obtaining bar admission). The ABA *Model Rules of Professional Conduct* are intended to replace the *Code of Professional Responsibility* and are now in effect in a number of states, albeit with some modification. LEGAL TIMES, August 12, 1985, at 1, cols. 1-5. Several states are considering whether to enact the Model Rules.

87. *See, e.g.,* LEGAL TIMES, December 23/30, 1985 at 1, cols. 4-6 (discussing two challenges by English solicitors to the custom of permitting only English barristers to represent clients in court).

workable. The distinction shows a disrespect of the judgment and intelligence of both lawyers and their clients.

### 3. *Wilkey Proposal*

Judge Malcolm R. Wilkey of the United States Circuit Court of Appeals for the District of Columbia proposed a "United States Bar" in an article published in 1972.<sup>88</sup> The strength of the proposal is that admission to all federal district courts is provided upon admission to this newly created Bar.<sup>89</sup>

The drawbacks are that the proposal retains the local counsel requirement,<sup>90</sup> and that all licensed attorneys are admitted to the Bar as of the date of the Bar's creation.<sup>91</sup> Thus, only prospective lawyers are tested.<sup>92</sup> The Wilkey proposal's benefits outweigh its drawbacks, however, and it is used as a model for the Rule proposed in this Article.

## III. THE PROPOSED RULE

The following Rule contains six interrelated sections. The most efficient and understandable method of introducing the Rule is to present and explain each section separately.

### A. *Eligibility*

A lawyer who is admitted to practice before the highest court of any state, the District of Columbia or any United States Territorial possession, or who is a licensed member in good standing of the bar of any state, the District of Columbia or any United States Territorial possession, and who has attained a successful score on the United States District Court Bar Examination is eligible to become a member of the Bar of the United States District Court.

This examination will test the applicant's knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the law of federal jurisdiction and venue. The examination will consist of one hundred multiple-choice questions. The Judicial Conference of the United States will set a satisfactory score. Any person who has completed sixty hours of study at an ABA-accredited law school and any graduate of an unaccredited law school is eligible to take this examination. An applicant may take this examination as often as it is offered. It shall be offered at least two times every year. The examination fee is \$50.00.

Eligibility to the Bar of the United States District Court is predicated on two conditions: present admission to practice before the highest court of a

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88. Wilkey, *Proposal for a "United States Bar,"* 58 A.B.A. J. 355 (1972).

89. *Id.* at 357.

90. *Id.*

91. *Id.* at 358.

92. *Id.* This test also failed to focus on federal procedural and evidentiary rules. The Federal Rules of Evidence, however, were not implemented as of the date of the Wilkey proposal.

state, the District of Columbia, or a territorial possession, or status as a licensed member in good standing of a bar of a state, District of Columbia, or territorial possession *and* a passing score in the District Court Bar Examination.

The first requirement is written in the disjunctive in order to insure that all lawyers practicing, or permitted to practice, in a given state fall within the requirement.<sup>93</sup> Admission to the bar of a state is an indication of some minimum level of competence, and practice has proven to be valuable in assessing a minimum level of competence. Moreover, this requirement historically has been the basis of admission to federal district courts.<sup>94</sup>

The second requirement is based on the recommendation of the Devitt Committee, the Wilkey proposal and local rules in force in federal district courts in Florida, Iowa and Texas. The examination does not test knowledge of the Federal Rules of Appellate Procedure or the Code of Professional Responsibility, but does test knowledge of venue as well as knowledge of federal jurisdiction. An examination requirement may be more readily accepted if a lawyer is permitted to practice law in all federal district courts.

The test should be offered at least twice yearly, preferably at the same time as the bar examination. Law students from ABA-accredited law schools should be permitted to satisfy this requirement before graduation and after

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93. See *Hicks v. Committee on Admissions to Practice in U. S. Dist. Court for E. Dist. of Tenn.*, 439 F. Supp. 302, 303 (E.D. Tenn. 1977). Counsel was admitted to the Bar of the State of Tennessee but was not formally admitted to practice before the Supreme Court of Tennessee. The district court restricted admission to attorneys admitted to practice before the Supreme Court of Tennessee, and thus Hicks was ineligible to practice before the district court.

Similarly, the Fifth Circuit recently upheld the Eastern District of Louisiana's rule restricting admission to attorneys either residing or maintaining an office in Louisiana. *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475).

Frazier was permitted, as a member of the bar of the State of Louisiana, to practice in all state courts. See *id.* at 1051 n.1. Frazier's home and office in Mississippi were conceded to be closer to the courthouse than the residences and offices of members of the bar of the Eastern District. *Id.* at 1054 n.6. However, the belief held by the clerk, two magistrates and two judges that non-residents in general caused more "problems" than Louisiana lawyers permitted the court to uphold this rule *as to Frazier*. *Id.* at 1054. The dissent reviewed the testimony of the clerk, magistrates and judges, and found it insular and provincial, and hardly telling of problems with out-of-state lawyers or with Frazier. *Id.* at 1058. The dissent concluded that the residence or office rule upheld by the majority was not based on evidence that the rule furthered the administration of justice or on evidence that Frazier would not comply with its procedural rules, but on a feeling that the rules are a good idea since they have long existed. *Id.* at 1056. The dissent stated that "the challenged rules are indeed unreasonable and arbitrary." *Id.* The Supreme Court has granted *certiorari* to determine the constitutionality of these rules. 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475).

These are the kind of irrational rules that must be eliminated. There is no indication that Hicks's or Frazier's competence was at issue. These district court rules simply make no sense.

94. See, e.g., *Theard v. United States*, 354 U.S. 278, 281 (1957) (lawyer admitted into a federal court by way of state court); *Leis v. Flynt*, 439 U.S. 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions").

sixty hours of study, in order to permit students enough time to prepare for the state bar examination. Sixty hours is approximately two full years of law school, by which time most students will have had the opportunity to study the subjects to be examined. Graduates of unaccredited law schools also should be permitted to take this examination, since graduates of those schools are eligible to take bar examinations in several states.<sup>95</sup> A distinction is made between students at accredited law schools and students at unaccredited law schools based on the ascribed proposition that the former are generally better qualified to prepare for and pass this examination.

The examination may be taken as many times as necessary, in accordance with the bar examination policy of a number of states.<sup>96</sup> Previous failures should not preclude an applicant from taking the test again because this examination is not intended to exclude lawyers from practicing in federal district courts, but rather is intended to ensure a minimal level of competence.<sup>97</sup>

The eligibility section is not conditioned upon such requirements as residence, a waiting period, previous trial experience, affidavits of good moral character, an office in any state, or an active practice.

### 1. Residence

Since the *Piper*<sup>98</sup> decision, a federal district court requirement of state or United States residence will not likely withstand a constitutional challenge.<sup>99</sup> In the case of *In re Griffiths*,<sup>100</sup> the Supreme Court held violative of the

95. See *1984 Bar Examination Statistics*, 54 B. EXAMINER 23, 23-25 (1985) (listing by state the number of graduates of unaccredited law schools passing the bar examination).

96. See, e.g., D. C. CIR. R. 4-1(b)(14) (1984) of the Rules Governing Admission to the Bar.

97. But see S.D. FLA. R. 2B.1 (examination given six times a year, but applicant may take it only three times a year and must wait one full year to retake the examination after failing three times).

98. 105 S. Ct. 1272 (1985). See *supra* note 1 and accompanying text.

99. See *Galahad v. Weinshienk*, 555 F. Supp. 1201 (D. Colo. 1983), in which the court stated:

At first glance, these [privileges and immunities] clauses would appear to have no bearing upon *federal* action, such as rulemaking by the federal courts. Yet it would seem anomalous to hold that the federal government may abridge privileges and immunities of federal citizenship whereas the states may not. Federal privileges and immunities should, therefore, find protection in other constitutional language.

*Id.* at 1206 (citation omitted) (footnote omitted) (emphasis in original). *Contra Frazier v. Heebe*, 788 F.2d 1049, 1052 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475) ("privileges and immunities clause of Art. IV, § 2, cl. 1 . . . does not apply to the federal government and its officers").

However, Congress has the constitutional authority to regulate commerce under article I, § 8, cl. 3, and could likewise repeal 28 U.S.C. § 2071 (1984), which authorizes the federal courts to regulate admission to its bar, and among other things, to enact a statute that limits federal bar admission. It is unclear whether such a statute would be held constitutional.

100. 413 U.S. 717 (1973).

equal protection clause of the fourteenth amendment a state bar admission restriction barring aliens.<sup>101</sup> Since the due process clause of the fifth amendment has been determined to contain an equal protection component,<sup>102</sup> a federal law requirement of state or United States residence may not survive a constitutional attack.<sup>103</sup>

In any event, a residence requirement is unnecessary. Most practicing federal district court litigators will likely reside in the United States, if only to be visible to their clients. Those living outside the United States, especially those practicing in foreign offices of United States law firms, are not thereby shown to be incompetent. As a matter of policy, the client's choice of counsel should not be abrogated based on a court's disapproval of a lawyer's choice of residence.

## 2. *Waiting Period*

The Western District of Texas and the District of South Carolina require applicants to be admitted to practice by a state one and three years, respectively, before becoming eligible for admission to the federal bar.<sup>104</sup> A waiting period in order to "season" an attorney is an out-dated concept. Graduates of law schools are sufficiently well-trained to make this requirement obsolete, and passing the proposed examination confirms the value of their education. The federal rules of procedure and evidence are taught at most law schools, either as model rules or as adopted by states. Many bar examinations test at least some of these subjects. One year of experience as a lawyer does not indicate that the lawyer has learned more about federal procedure. A three-year waiting period indicates less knowledge of federal procedure than at graduation due to a lack of experience practicing in federal court. Further, lawyers who decide to open their own practices immediately after law school will be competitively disadvantaged by such a requirement.

## 3. *Previous Trial Experience*

Previous trial experience does not aid in ensuring lawyer competence and hinders the attorney-client relationship.<sup>105</sup> Such a requirement represents both

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101. *Id.* at 722.

102. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (equal protection analysis in fifth amendment area same under fourteenth amendment); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (same).

103. State residency is not a suspect classification. See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 389-91 (1977). Therefore, the statute need only be rationally related to a governmental interest in order to survive an attack on equal protection grounds. This author argues that a federal bar admission residency requirement is not rationally related to the interest of insuring the competence of practicing attorneys. Local rules are available from private publishing companies and the Administrative Office of the United States Court. See *FED. R. CIV. P.* 83. Indeed, this is precisely at issue before the Supreme Court in *Frazier v. Heebe*, 788 F.2d 1049, 1052 (5th Cir.), *cert. granted*, 107 S. Ct. 454 (Nov. 17, 1986) (No. 86-475).

104. W.D. TEX. R. 200-1(a); D.S.C. IN THE MATTER OF ADMISSION AND DISCIPLINE OF ATTORNEYS.

105. See *supra* notes 60-61 & 77-82 and accompanying text.

a failure to trust the ethics of lawyers and a disregard for the intelligence of the client. The use of a "barrister" also evidences a disregard for the sensitive nature of the attorney-client relationship and necessitates a substantial increase in attorney fees.<sup>106</sup>

#### 4. Affidavits of Good Moral Character

Many district courts require an attorney to submit affidavits affirming the applicant's good character as a requirement of admission to the bar.<sup>107</sup> This requirement is unnecessary because the proposed Rule requires a state license to become a member of the United States District Bar, and most states conduct character reviews when initially admitting lawyers to practice. Affidavits from hand-picked friends guarantee that the applicant will satisfy the state requirement. A requirement that the applicant file affidavits from one or more members of the federal district court to which the applicant is applying unduly burdens the applicant's mobility.<sup>108</sup> An applicant may not be acquainted with any lawyers in the district to which admission is requested. Thus, the lawyer's application may be denied for reasons unrelated to the lawyer's competence or the court's interest in having ethical and competent lawyers practice before it. The federal court cannot always judge the value of the affidavit. In fact, many federal district courts traditionally rely on state character examinations in admitting lawyers to practice in federal district court.<sup>109</sup> This reliance has not resulted in the admission to practice law of an abnormal number of incompetent or unethical lawyers.

#### 5. Office

With the advent of regular transcontinental flights and hearings by conference call, there is no need for an office requirement.<sup>110</sup> An office require-

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106. Attorney fees are the subject of intense debate. See, e.g., LEGAL TIMES, July 29, 1985, at 1, col. 3, and at 6, cols. 1-4 (reporting proposal by insurance companies to place cap on legal fees).

107. See C.D. CAL. R. 2.1.1(d).

108. If necessary, some courts will waive this requirement. D. Md. R. 21.A.2. Moreover, the requirement may implicate the applicant's constitutional right to travel. Rules that limit the right to travel have been struck down as unconstitutional. See *Shapiro v. Thompson*, 394 U.S. 618 (1960) (state residency requirement for eligibility for welfare benefits unconstitutionally limits right to travel). But see *Wilson v. Wilson*, 430 U.S. 925 (1977), *summarily aff'g*, 416 F. Supp. 984 (D. Ore. 1976) (state can require bar applicant to express an intent to become resident at time of admission without violating right of interstate travel).

109. See *In re Braverman*, 549 F.2d 913, 921 (4th Cir. 1976) (reliance placed on prior admission to bar of state supreme court) (quoting *In re Dreier*, 258 F.2d 68, 69 (3d Cir. 1958)). See also *Theard v. United States*, 354 U.S. 278, 281 (1957). The Third Circuit Court of Appeals, in *In re Discipline of Ashton*, 768 F.2d 74, 81, *reh'g en banc denied*, 769 F.2d 168 (3d Cir. 1985), concluded that a *prima facie* showing of present good moral and professional character, in addition to re-admission to practice in state courts, was required for admission to the federal district court bar for the Western District of Pennsylvania. The circuit court was very critical of the district court's method of investigating the applicant's character.

110. The increased use by lawyers of computers to aid in the practice of law may also make

ment discriminates against lawyers practicing outside the ambit of the private law firm, such as corporate counsel, law professors and attorneys for civil rights or legal services organizations. The rise in staffing of inside corporate counsel and the increase in civil rights organizations, especially those that litigate, necessitates an elimination of the office requirement.

The office requirement is a vestige of an era when attorneys and judges were intimately familiar with one another, and the practice of law was more local in scope. This kind of legal community no longer exists, particularly in federal district courts.

#### 6. *Active Practice*

Some courts require a lawyer's practice to be an "active" practice.<sup>111</sup> This is perhaps the least defensible federal bar admission requirement. "Active" is a vague term, easily defined to be as lax or restrictive as the spirit moves. The court should not be concerned with the state of a lawyer's practice. A solo practitioner's practice may be active only in the sense that the lawyer is looking for, and wants to represent, clients. Retired lawyers may want to handle one particular case. In neither instance is the competence of the lawyer reflected.

A minimum level of competence is shown by successful completion of both requirements of section A of the Proposed Rule. A lawyer is ethically required to handle only those legal matters which the lawyer is capable of undertaking. A client should be expected to choose a lawyer intelligently. Admittedly, this Rule only evidences a minimum level of competence and requires that courts trust both lawyers to act ethically and litigants to make an informed decision concerning their counsel. The court should permit litigants to make up their own minds in selecting lawyers to litigate claims in federal district court.

#### B. *Admission*

An applicant shall file with the Judicial Conference of the United States an application for admission evidencing eligibility to the Bar of the United States District Court. Upon admission to the Bar of the United States District Court, the applicant shall pay a fee (of \$100) (prescribed by rule).

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the traditional office obsolete or at least irrelevant. It should also be noted that ethical problems may exist in the use of computers to communicate across state lines, since this may constitute the unauthorized practice of law. A recent American Bar Association committee has focused on this and other similar problems. See STANDING COMMITTEE ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, AMERICAN BAR ASSOCIATION, LAWYERS ON LINE: ETHICAL PERSPECTIVES ON THE USE OF TELECOMPUTER COMMUNICATION (1986).

111. See D.R.I. R. 4(b). See also *In re Stormont*, 238 Kan. 627, 712 P.2d 1279 (1986) (denying petitioner's application for admission to the bar pursuant to reciprocity rules since he had failed to actively practice law on full-time basis for five years preceding application).



This section merely sets forth the mechanics of being admitted to practice before federal district courts. A one-time administrative fee of one hundred dollars may be determined to be an incorrect fee to be charged an applicant. An open alternative is thus included.

### C. Representation

Any member of the Bar of the United States District Court shall be permitted to fully and completely represent any party or intervenor or *amicus curiae* in any action pending or instituted in any United States District Court.

This section provides that admission to practice permits the lawyer to represent a client in any federal district court without utilizing "local" counsel. This representation is not limited to any particular kind of litigation and specifically includes diversity litigation as well as federal-question litigation.<sup>112</sup>

### D. Discipline

Any member of the Bar of the United States District Court shall be subject to suspension or disbarment from the Bar when it is shown that the member has been suspended or disbarred from practice in any other court of record or by any other bar or has engaged in conduct unbecoming a member of the Bar in any United States District Court. The member shall be afforded an opportunity to be heard why the member should not be suspended or disbarred. Any United States District Court before which a member is practicing may take appropriate disciplinary action against a member after a hearing upon good cause.

This section specifically restates the authority of district courts to discipline attorneys practicing before it.<sup>113</sup> The section also permits each federal district court, consonant with due process guarantees, to conduct hearings and determine the suspension or disbarment of a lawyer from the Bar. The courts have the authority to suspend or disbar any lawyer who has been suspended or disbarred from any court, or who has been disciplined by a state bar or other disciplinary authority as a result of unethical "office" practice. In conjunction with sections E and F, below, section D gives individual district

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112. See *supra* note 35.

113. 28 U.S.C. § 2071 (1984) (grants federal courts authority to prescribe rules governing conduct of court's business). See also *In re Snyder*, 105 S. Ct. 2874, 2880 (1985) (courts have long recognized inherent authority to suspend or disbar lawyers) (citing *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1867), and *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)); *Eash v. Riggins Trucking Co.*, 757 F.2d 557, 565-68 (3d Cir. 1985) (courts have authority to discipline attorneys); *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1204 (D. Colo. 1983) (federal courts exercise *inherent* judicial power to regulate admission, practice and discipline of attorneys).

courts significant authority to ensure ethical practice, because suspension or disbarment would be effective with respect to practice before any United States District Court.

#### *E. Nonmember Practice*

A lawyer not admitted as a member of the Bar of the United States District Court shall not be permitted to practice before any United States District Court except upon a showing of exceptional circumstances, or as permitted in Section F, below. The non-member attorney shall be permitted to practice only in a particular case and only in the United States District Court before which the lawyer petitions to practice under this Section. Any lawyer so admitted shall be subject to all disciplinary authority of the United States District Court before which the lawyer is practicing.

The general rule is that a nonmember cannot practice in any federal district court. The reason is that the showing of a minimum level of competence has not yet been made. An exception is made for nonmembers to practice in a particular case before a particular court, but *pro hac vice* admission is not to be encouraged. This special admission provision permits the courts the opportunity to balance its interest in ensuring that the lawyer has attained a minimum level of competence with the interest of the client in being represented by a chosen attorney. Since the admission process proposed by the Rule is not designed to be exclusive, competent lawyers should not have to resort to this provision.

#### *F. Grandfather Clause*

A lawyer may continue to practice before any United States District Court to which the lawyer is admitted at the time of adoption of this Rule without complying with the provisions of Section A, above. Lawyers practicing under this section shall be subject to the disciplinary authority of the United States District Court(s) before which the lawyer is permitted to practice.

The grandfather clause permits a lawyer generally admitted to practice before one or more federal district courts at the time the Rule is made effective to continue practicing before those courts. It is likely that the competence of the lawyer has been assured, and the administrative costs outweigh the benefits in retesting those lawyers. However, practice is limited to those courts to which the lawyer has already been admitted. If the lawyer wishes to practice in a district court to which the lawyer is not admitted, the lawyer must comply with the provisions of section A, or, in the exceptional case, section E. This limitation of practice is an attempt to strike a balance between the special benefit afforded to those lawyers already admitted with the cost of providing a second check on the competence of lawyers who wish to "widen" or expand their practice.

## CONCLUSION

Federal district courts have promulgated numerous and various rules that restrict the admission of lawyers to practice based on antiquated notions of the practice of law. Most of these rules are not legitimate tests of lawyer competence. The increased mobility of lawyers and the increase in the interstate practice of law in the United States requires the implementation of a modern, uniform rule. The Rule proposed in this Article simplifies the admission process and is based on the ethical practice of law by lawyers and on the competent, informed decision-making of clients who are involved in litigation. The Rule places a premium on trust in lawyers and the marketplace. A single rule providing for the admission of lawyers to practice law before all federal district courts should have been adopted over a decade ago, and thus, this Rule should be implemented as soon as possible.