February 23, 2023

BEFORE THE COMMITTEE ON

RULES OF PRACTICE AND PROCEDURE

PROPOSAL TO ADOPT A RULE FOR UNIFIED BAR ADMISSION TO ALL FEDERAL DISTRICT COURTS

The individual attorneys and organizations that are listed in the Addendum to this request (the Proponents) ask the Committee on Rules of Practice and Procedure to consider and then adopt a rule under which there would be a single application for admission to the bar of all United States District Courts. Under that rule, an attorney would apply for admission to practice in all the United States District Courts, and once admitted, the attorney could practice in all 94 districts. A draft of the proposed rule is set forth below, as are two alternative proposals that would achieve most, but not all, of the benefits of the unified rule.

Introduction & Summary of Rationale for the Rule

The question of whether local or national rules should govern admission to the bars of the district courts was raised shortly after the Federal Rules of Civil Procedure became effective in 1938. A committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report about local rules generally, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DIST. COURT RULES (1940), *reprinted* in 4 Fed. R. Serv. 969 (1941) (the "Knox Report"). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. In concluding that bar admission rules were appropriate for local adoption, this was the committee's entire rationale: "[C]onsiderations of local policy and conditions play a controlling role. Calendar practice and

assignment of cases for trial is another of those subjects on which nearly every district has rules but with wide variations of detail. The necessity for these variations is readily apparent." *Id.*

There is no need to debate whether the Report's conclusion as to the desirability of having local rules for bar admission was correct in 1940. Rather, the question before this Committee is whether a uniform rule would best serve the federal courts, the attorneys who practice there, and their clients. For the reasons that follow, the answer to that question is that the time has arrived for a unified admission rule for the district courts.

The principal reason why a unified rule should be adopted is that the similarities among the practices in the district courts vastly exceed their differences. Both civil and criminal cases are now predominately governed by federal substantive law, and all procedural and evidentiary rules are federal. On the other side, multiple admissions and renewals impose significant burdens of time and expense on the federal courts, the attorneys who must obtain individual admission to numerous different districts, including pro hac vice admission, and the clients that they serve.

In 2015, the United States District Court for the District of Maryland undertook a comprehensive survey of the admission rules of the 94 district courts (the Maryland Report).[1] Although that Report is eight years old, our analysis indicates that it remains an overall accurate reflection of the status of admission rules in the district courts today. The Report is very detailed, but two significant conclusions are apparent. First, there are major differences among the districts in their requirements for admission to what is, in essence, a single court system. Second, many of the requirements are burdensome and appear to be mainly relics from a different era. This welter of requirements, and the lack of any apparent reason for these

[1] https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf.

variances, should prompt the Committee to seek a more sensible alternative to the current situation. This proposal for a one-time admission rule for all district courts is that alternative.

For the Proponents there is one particular aspect of the current situation that has impelled them to undertake prior efforts with individual district courts and to support this proposal. *See* Exhibits 1 & 2 attached. As shown in the Maryland Report, 60 of the 94 districts include in their admission rule a requirement that members of their bars be admitted to the local state court bar. That requirement is unnecessary in today's federal court litigation world, and, more importantly, it imposes on attorneys the additional annual cost of another state bar membership and/or multiple discretionary pro hac vice admissions. Moreover, the state bars in the district courts in California, Florida, Hawaii, and Delaware, all of which impose this requirement, also require even lawyers already admitted to practice elsewhere to pass their state bar exam, which is a further barrier to district court admission. *See* Exhibit 1 at 14, note 6. Prior to filing this request, many of the Proponents joined petitions to a number of district courts, asking them to eliminate the local bar requirement, but in every case their requests were rejected (without explanation) or no response was given. *See* Exhibits 1 & 2. It is therefore apparent that, if change is to occur within the federal judiciary, it can only come from this Committee.

In the sections below, we explain why a unified admission rule is desirable, and why a state bar admission requirement is unnecessary. Then we explain our main and alternative proposals. Although our request is for the adoption of a final rule, we recognize that the Committee has a process that must be followed. Accordingly, our immediate request is that the Committee consider this proposal at a forthcoming meeting and begin the process of gathering additional information that will bear on this Proposal.

The Benefits of a Single Admission Rule

Before discussing the advantages of a single admission rule, we decided to deal upfront with the issue of how the financial impact of a decision to create a unified bar admission rule should be factored into the decision. Although we do not have access to the data on how much money is received by all 94 districts from fees for regular admissions, renewals, and pro hac vice admissions, we assume it is significant, although probably not in terms of the overall budget for the federal judiciary.[2] But whatever the order of magnitude, a significant part of the revenue raised is offset by the costs incurred by the court system in administering the multiple admission system. Those include direct out of pocket expenses for printing and mailing certificates, as well as the time spent by staff in each district processing applications, reminding attorneys to renew when they fail to do so in a timely fashion, and handling situations in which an attorney has been disciplined in another jurisdiction. By contrast, a system in which an attorney will be admitted once for all district courts, and in which renewals and any disciplinary matters will be done centrally, will cut down dramatically on both out of pocket expenses and staff time. And to the extent that the current system provides additional revenue beyond the costs, we do not believe that bar admissions should be a profit center for the judiciary. In our view, a unified admission system should assure that its costs are covered, but not otherwise generate any significant net revenue.

The most obvious reason for having a unified admission system for all federal district courts is that they all operate under the same rules of civil, criminal, and bankruptcy procedure,

[2] The minimal charge for admission for all district courts is set by the Judicial Conference (28 U.S.C. § 1914). The current minimum is $188, but some courts charge more than $300. *See* Exhibit 3 at 1-2. There are also renewal fees that must be paid at various times in various amounts. *Id.* at 2.

all trials use the same federal rules of evidence, and all appeals are governed by the Federal Rules of Appellate Procedure (FRAP). Indeed, the admission rules for all the courts of appeals are governed by FRAP 46, although they are administered by the individual circuits. Under FRAP, there is one admission rule, just as the courts of the States of New York, California, Texas, and Florida, have one bar admission, even though those systems are divided in several geographic subdivisions. Under FRAP 46, as well as United States Supreme Court Rule 5.1, the sole admission requirement is that an applicant be admitted to the highest court of any state. A unified admission system for the district courts would eliminate the need for each district court to have its own staff doing admissions and renewals, handling the paperwork, and properly depositing the money received. A lawyer would have only one certificate of admission to all the federal district courts, and if an attorney were disciplined by any court, there would only have to be one federal office/court to resolve the matter.

From the perspective of attorneys, the change would simplify their lives greatly and save them significant amounts of money and time. Once admitted to one federal district court, the attorney would never have to apply to another district. The savings would be monetary – the cost of the application, plus the cost of obtaining a certificate of good standing from their principal bar – and equally important, they would not have to spend time obtaining the additional information now required in some districts as part of the application. They would also avoid the delay in their practice until their application is approved. Finally, state courts will be relieved of being asked for certificates of good standing so that attorneys can be admitted to additional federal district courts.

Because of the limitations on district court admission discussed below, lawyers often must move for admission pro hac vice in each case in which they wish to appear. The Supreme

Court has recognized the inadequacy of pro hac vice admissions because they do "not allow the nonresident attorney to practice on the same terms as a resident member of the bar. An attorney not licensed by a district court must repeatedly file motions for each appearance on a pro hac vice basis…. [T]he availability of appearance pro hac vice is not a reasonable alternative for an out-of-state attorney who seeks general admission." *Frazier v. Heebe*, 482 U.S. 641, 650-51 (1987). In addition, there is generally a fee for each case, up to $500 in one district, and some districts include annual or lifetime limits on pro hac vice admissions as well as other restrictions. *See* Exhibit 3 at 3-4. [3]

Under our proposal, a lawyer would only have to make a single application to be admitted to all federal district courts. The applicant would only have to have been admitted to practice in a single state bar (defined to include the District of Columbia and the territories of the United States). We also do not see the need for a sponsor who is admitted to the district courts, but would not oppose such a requirement.

We think it would be appropriate to require that applicants state in their application that they are familiar with the federal rules of the subject areas in which they expect to practice (*i.e.*, civil, criminal, or bankruptcy). It would also be reasonable to require applicants to affirm in their application that they recognize that most districts have local rules and that it is their responsibility to familiarize themselves with them when practicing in a new district. Our proposed rule would not preclude a district court from requiring an attorney to meet certain additional experience requirements before the attorney can be lead attorney in a civil or criminal

3 For a case in which a local rule forbids an attorney not admitted to practice before the district court from being permitted to appear in more than three unrelated cases in any twelve-month period, or in more than three active unrelated cases at any one time, where there are expected to be thousands of cases filed under a statute that requires that they all be filed in that district, see *Malafronte v. United States*, Docket No. 7:22-cv-00168 (E.D.N.C).

trial. But it would preclude a district from requiring that one of the attorneys in a case reside in or maintain an office in the district. That kind of requirement may once have been appropriate, but in the world of the Internet and videoconferencing, it cannot be justified.[4]

The Need to Eliminate Local Bar Admission Requirements

The reasons for adopting a unified rule are not what has primarily motivated the Proponents to submit their proposal. Instead, it is the requirement in sixty districts that to be admitted to practice, the applicant must be a member of the local state bar. Because that requirement is both unjustified and burdensome, and it will not be changed by the district courts that impose it, the Proponents ask this Committee to forbid district courts from requiring it, whether by issuing a unified admission rule that does not contain it, or by directing districts to remove it from their existing rules.[5]

Attached as Exhibits 1 and 2 are copies of petitions filed with various district courts seeking the elimination of the local state bar requirement and the responses to them. The local courts could not, of course, issue a unified rule, although they could have asked this Committee to do so. Exhibit 1 was filed in the Northern District of California in February 2018, and although it asked for a rule change, its immediate request was that the court publish the proposal

[4] There is also considerable academic support for reducing barriers to district court admission standards. *See e.g., The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temp. L. Q. 945, 960-964 (1982); *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 978 (1992); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 379 (1994); *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?* 30 Geo. J. Legal Ethics 125 (2017).

[5] Most district courts with this requirement mandate that attorneys continue their state bar membership as a condition of their district court bar membership, whereas others make exceptions. For example, the Northern District of California has a grandfathered exception in local rule 11-1. "For any attorney admitted to the bar of this court before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility." If the local state bar requirement serves any purpose at all for the federal courts, the courts that make exceptions seem particularly irrational, although less burdensome.

for public comment. Instead, less than two months later, the Chief Judge of the District advised the petitioners that their proposal had been rejected, but with no reasons given for the refusal to seek public comment. Petitioners then asked the Judicial Council of the Ninth Circuit to exercise its authority under 28 U.S.C.§ 2071(c)(1), to review and order changes to the Northern District's local bar rule. That request went unanswered for almost four years, and when a response came, it was a rejection, again without any explanation. *See* Exhibit 1.

Exhibit 2 was filed in the Eastern District of Virginia on July 5, 2022, along with similar petitions filed in fifty-nine districts that currently do not admit attorneys without a local state bar license. While some districts have responded that they will review the proposal in upcoming committee meetings, the only definitive responses so far have been rejections of the proposal, again without explanation (sample attached with Exhibit 2). Even if some, or even all, of these districts amend their rules to permit attorneys with out-of-state licenses to be admitted, that still would not achieve the simplicity and efficiency of a unified rule for district court admission.

Before the Federal Rules of Civil Procedure became effective in 1938, the district courts followed the procedural rules of the state courts in which they were located, and so it made sense to require that those who practiced in federal court be knowledgeable about the local state rules. The adoption of federal civil rules was followed by the Federal Rules of Criminal Procedure (1946) and the Federal Rules of Evidence (1975). The bankruptcy courts have always had their own rules, and their current Rules became effective in 1983. With all district court procedures federalized, that leaves only the argument that membership in the local state bar is needed

because the governing substantive law is that of the state where the district court sits. But even if true in some cases, that possibility cannot justify the local bar requirement. [6]

First, the governing law can be state law only in civil cases and only in those in which the basis for subject matter jurisdiction is diversity of citizenship. For fiscal year 2022 among the private civil cases filed, about two-thirds were diversity cases (including the large numbers in MDLs discussed below).[7] By definition, in diversity cases, with citizens from more than one state as parties, there is, generally speaking, a substantial chance that the applicable law will be that of a state other than the one in which the case was filed. As the Supreme Court noted thirty-five years ago, in a case in which it set aside a district court's residence requirement as an undue barrier to admission to its bar, "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." *Frazier v. Heebe,* 482 U.S. 641, 648 n.7 (1987).

Second, as the data in Exhibit 1, pp 7-8, shows, the vast majority of diversity cases involve tort and contract claims. [8] In the experience of the Proponents, the outcomes in most of those cases depend heavily on the facts, with the substantive state law playing a smaller role. And to the extent that there are issues of local state law to be resolved, there is no reason to suppose that competent lawyers on both sides will need local lawyers to assist them in making

[6] Given the increasing number of cases that are subject to MDLs, where the cases are transferred to a single district, even if a client in such cases wanted a local lawyer, that desire would be thwarted in those situations.

[7] https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2022.pdf. There were 105,212 diversity cases filed and 131,131 federal question cases. In addition, there were 38,428 civil cases involving the United States. If those are included, fewer than half of all civil cases filed were diversity actions.

[8] The data in Exhibit 1 are from the fiscal year ending June 30, 2016. Because this proposal only asks the Committee to begin consideration of this matter, and because the Committee has access to much more up-to-date and more refined data than do the Proponents, we have not updated our data set at this time, but could do so if that would assist the Committee.

the legal arguments. Indeed, federal law already allows one group of lawyers who are admitted to a single bar to practice in every federal (and state) court. Under 28 U.S.C. § 517, "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Although many cases involving the United States raise only issue of federal law, suits under the Federal Tort Claims Act are specifically based on state law under 28 U.S.C. § 2674.

Third, a local bar requirement cannot be justified on a paternalistic theory that such a rule is in the best interest of the clients. Diversity cases in federal court require a controversy of at least $75,000, and generally the amount is much larger. There is no reason to assume that the clients in those cases are unsophisticated and cannot make rational determinations about their choice of counsel, taking into account all the relevant factors, not just the governing law (if it can be known when counsel are selected). There are many ways in which clients may make unwise selections of their counsel, but except in limited situations like class actions, the federal courts do not supervise those choices. There is no reason for the district courts to do that by means of the local state bar admission rule that is found in the rules of sixty district courts.

Fourth, the trend towards states adopting the Uniform Bar Examination (UBE) has continued to accelerate. As of the time of this filing, thirty-nine of the fifty states and the District of Columbia accept the UBE, including fourteen that did not do so when the petition to the Northern District of California was filed in February 2018.[9] If most state bars now accept the

[9] https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F196.

UBE, which covers procedure as well as substance, there can be no reason why district courts should insist on local state bar admission.

Among the holdouts from the UBE are California, Delaware, Florida and Hawaii, which have traditionally been the most restrictive in terms of bar admission generally by requiring a local state bar examination even for experienced attorneys. Each of the district courts in those states has a local state bar requirement for admission to their courts. *See* Exhibit 1 at 14, note 6. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 68 (1988), "[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." For lawyers who have been practicing elsewhere for a number of years, the examination requirement is particularly burdensome. The bar exam is a general test, and most lawyers specialize, and hence have no regular contact with many areas that the exam tests. Taking a bar exam also entails expenses for the exam, a prep course, and travel to the exam's location, not to mention the time away from the lawyer's practice. We do not argue that these burdens alone warrant the elimination of the local bar admission requirement, but they surely must be taken into account in determining whether that requirement should be maintained.[10]

Last, there is a trend that is significant for this proposal, which was underway when the Northern District petition was filed and has greatly accelerated in recent years: the massive increase in Multi-District Litigation (MDL) cases. Most of those cases are based on state law tort claims, mainly those involving unsafe drugs or other products. As of November 15, 2022, there were 397,845 cases pending in MDL proceedings, which were sent from all over the country under 28 U.S.C. § 1407 to a single district judge for all pre-trial matters, including

[10] Attorneys with their primary practice area in another state must pay bar dues to other states if they wish to be admitted to the federal court there. Those dues add up. The 2023 bar dues for California are $510 annually. https://www.calbar.ca.gov/Attorneys/For-Attorneys/About-Your-State-Bar-Profile/Fees-Payment.

settlements, and in some cases trials.[11] These proceedings routinely involve hundreds or thousands of cases, whose lawyers are not members of the bar of the state or federal court where the proceedings take place. Indeed, in the 3M earplug case, there are upwards of 300,000 plaintiffs. Quite sensibly, most judges in those cases do not require counsel to be admitted to the district court bar, or even require pro hac vice applications, even though almost all of those claims are based on state tort laws. If they did, their clerks' offices would be overwhelmed with processing pro hac vice paperwork.

The MDL cases are important for another reason. To our knowledge, the federal judges who handle them have never suggested that there are problems of any kind, let alone serious ones, because the lawyers are not members of the state bar of the district to which the case happens to be sent. If cases of such monetary and social significance can be litigated successfully by attorneys who are not members of the local state bar, there is no reason for that requirement to apply to any other case. In short, as the American Law Institute observed, the requirement of local bar membership "is inconsistent with the federal nature of the court's business." RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS § 3 comment *g* (AM. LAW INST. 2000). Support for eliminating local bar admission requirements for district courts also comes from the American Bar Association (ABA). At its Midyear Meeting on February 13-14, 1995, the ABA approved a resolution stating that it "supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules."

[11] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-15-2022.pdf. As of September 30, 2022, there were a total of 596,136 civil actions including those in MDLs, which means that about two-thirds of all civil cases are now in MDL proceedings.

Finally, although the 1940 Knox Report supported local bar admission rules, the model rule that it proposed did not require membership in the local state bar. Admission to another bar was an acceptable alternative to the Knox Committee as long as "the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state." *See* Exhibit 1, Addendum at 7. If that option were satisfactory in 1940, it surely should suffice today.

The Federal Courts Today Have the Infrastructure for a Unified Admission Rule

Even if it made sense in the past to create a single admission to all federal district courts, it would have been impracticable to implement, but not today. Until recently, every federal district court maintained its own system for attorney filings, and it would have been a herculean task to enable every district court to use the same attorney registration, account management, and now, e-filing, but the situation has been changing. As of August 2022, all federal district courts now use the same system to handle all these functions.

Since 1988, each district court has managed its documents, dockets, e-filing, and its use of the PACER system which is overseen by the Administrative Office of the United States Courts. PACER has evolved and improved over time. In August 2014, the Administrative Office activated PACER NextGen. The change from PACER to PACER NextGen provided "users with several new benefits. One of these benefits is Central Sign-On, a login process which allows e-filing attorneys to use one PACER login and password to access any NextGen court (district, appellate and bankruptcy) in which they practice."[12] It took eight years for all the district courts

[12] https://www.mow.uscourts.gov/attorney/nextgen-cmecf

to make the transition to PACER NextGen, but today all federal district and appellate courts (except the Supreme Court) use PACER NextGen.

While some code changes would be necessary to update PACER NextGen to allow for a single, uniform admission to all federal district courts, these changes would be small. The PACER NextGen system is already set up for a Central Sign-On with access to all federal district courts. Attorneys already have just one username for maintaining their Pacer NextGen account, for accessing every federal district court, and for e-filing in every court. All district courts are using this same system. A change to a single admission would impose little burden, if any, on the system.

Text of Proposed Unified Admission Rule

There is hereby created a Bar of the District Court for the United States. Admission to the bar shall be governed by the provisions below and shall be administered by the Administrative Office of the United States Courts. Subject to the direction of the Judicial Conference of the United States, that Office shall set the fees for admission and renewals and shall administer a disciplinary system for admitted attorneys.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, and who is currently a member of the bar of any United States District Court, shall automatically be a member of the Bar of the District Court of the United States and shall be entitled to practice before any United States District Court.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, but who is not currently a member of the bar of any United States District Court, may become a member of the Bar of the District Court of the

United States by filing an application with the Administrative Office of the United States Courts showing such good standing membership.

Comment: This proposal will eliminate any role for the individual district courts in the admission, renewal, and disciplinary processes, and it will shift all those responsibilities to the Administrative Office of the United States Courts. It will also eliminate any current requirement for admission to the District Court bar beyond being a member in good standing of a state bar (broadly defined). This alternative should also drastically reduce the need for pro hac vice admissions because admission to the District Court Bar will be simple to obtain.

Reciprocal Practice Rule (First Alternative)

An attorney who is admitted to practice before any District Court of the United States shall be entitled to practice before any other District Court of the United States without being specifically admitted to the bar of that court.

Comment: This alternative would have almost the same substantive impact as the unified rule, but it would not centralize the admission, renewal, and disciplinary processes. It would still enable district courts to utilize restrictive admission requirements, but their impact would be limited to attorneys who first seek admission to those courts, and it could not prevent out-of-district attorneys from practicing in a restrictive-admission court.

Elimination of Local State Bar Admission Requirement (Second Alternative)

Rule to be issued under 28 U.S.C. § 2071.

No district court may enact a rule requiring that an attorney seeking admission to the bar of that court, including for pro hac vice admissions, must be a member of the bar, or a resident of

the state in which that court is located. Any existing rule requiring local state bar admission or in-state residence is invalid and unenforceable.

Comment: This alternative eliminates existing requirements that an applicant must be a member of the local state bar of that district or a resident of that state. The existing structures for admission, renewal, and discipline, under which those matters are handled by each district, are retained. In that respect, this alternative would be similar to FRAP 46, which eliminated prior local rules that imposed additional requirements for admission to the circuit court bars, but did not create a central admissions process.

ADDENDUM - PROPONENTS

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Hamilton Lincoln Law Institute, www.hlli.org

LawHQ, P.C., www.lawhq.com

Military Spouse JD Network, www.msjdn.org

Pacific Legal Foundation, www.PacificLegal.org

Public Citizen Litigation Group, www.citizen.org

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