DISTRICT OF COLUMBIA BAR

DIVISION IV

COMMITTEE ON

THE DISTRICT COURT

# PROPOSED RULE PROVIDING FULL RECIPROCITY AMONG THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF COLUMBIA AND MARYLAND AND FOR THE EASTERN DISTRICT OF VIRGINIA


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# PROPOSED RULE PROVIDING FULL RECIPROCITY AMONG THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF COLUMBIA AND MARYLAND AND FOR THE EASTERN DISTRICT OF VIRGINIA

The United States District Court for the District of Columbia permits Maryland and Virginia lawyers whose offices are in Metropolitan Washington to be members of its bar (Rule 4-1):

> "(a) Who May Be Admitted. An attorney who is a member in good standing of the District of Columbia Bar and who maintains an office for the practice of law within the District of Columbia or in the counties of Montgomery or Prince Georges in the State of Maryland, or the counties of Arlington or Fairfax, or in the City of Alexandria in the State of Virginia (said counties and city to be hereinafter referred to as a contiguous area) may be admitted to the bar of this court subject to the provisions of this Rule."

But practice in that court is essentially restricted to resident attorneys (Rule 1-4(a)):

> "Appearance and Withdrawal of Attorneys
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> (a) Who May Practice.
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> (1) An attorney who is a member in good standing of the bar of this court may enter an appearance, file pleadings and practice in this court if he either (i) maintains an office for the practice of law within the District of Columbia, or (ii) maintains an office in a contiguous area in whose courts a member of the bar of this court who is also a member of the bar of the highest court of the State in which the contiguous area is located is permitted to appear, file pleadings and practice without being required to join of record an attorney having an office in the contiguous area.

"(2) An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State but who does not qualify under the requirements of subsection (1) above may enter an appearance, and file pleadings in this court, provided that such attorney joins of record a member of the bar of this court who does meet the requirements of subsection (1) and who will at all times be prepared to go forward with the case. If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge."

The United States District Court for the District of Maryland provides by rule that "a member in good standing of the bar of any court of the United States or of the highest court of any State. . ." may be a member of its bar (Rule 2). But, except in criminal cases or when appearing pro se, lawyers who practice in that court must associate resident counsel (Rule 3):

"Except where a party conducts his own case and criminal cases, no Court paper shall be accepted by the Clerk unless it is signed by resident counsel. Resident counsel is an attorney who shall have been admitted to practice in this Court and in the Court of Appeals of Maryland, and who resides in and maintains an office for the practice of law in this District and whose office address and telephone number are noted thereon. As used in this rule, 'office for the practice of law' means an office maintained for the practice of law in which an attorney usually devotes a substantial part of his time to the practice of law during ordinary business hours in the traditional work week. An attorney shall be deemed to be 'in' such an office even though he is temporarily absent therefrom in the performance of duties of a law practice actively conducted by him from that office. Subject to the exceptions set forth in the first sentence, appearance before the Court shall be limited to those attorneys admitted to the Court, who are either resident counsel or who are co-counsel of record in a case with resident counsel. Service on such resident counsel shall be equivalent to service on the party for whom he appears."

The United States District Court for the Eastern District of Virginia has no provision for admission of non-resident counsel and requires association of resident counsel in all cases except pro se matters:

> "(A) Roll of Attorneys. The bar of this court shall consist of those attorneys admitted to practice before this court who maintain their residence and law office in Virginia.
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> . . .
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> "(D) Foreign Attorneys. A practitioner from another state or the District of Columbia may, upon motion made in open court, be permitted to appear and conduct specific cases in association with a duly qualified member of the bar of this court, if the rules of the federal courts of the district in which he maintains his office extend a similar privilege to attorneys of this district; provided, however, that such foreign attorney in all appearances in court shall be accompanied by his resident associate. Except where a party conducts his own case, no pleading or notice required to be signed by counsel shall be accepted by the clerk unless signed by counsel who shall have been admitted to practice in this court, who shall be a resident of and maintain a bona fide office in this state, who shall have entered his appearance of record in the case, with the office address in the state where notice can be served upon him, and who shall have such authority that the court can deal with him alone in all matters connected with the case. Such appearance shall not be withdrawn without leave of the court. Service of notice or other proceedings on him shall be equivalent to service on the parties for whom he appeared. Where a party is conducting his own case, he shall file with his pleading a memorandum of one address within the district where notice can be served."

The organized Bars of Maryland, Virginia and the District of Columbia are considering whether full reciprocity should be extended to lawyers from any of the three federal districts to practice in the federal district courts of any of the others, without the need to associate resident counsel. The close and contiguous nature of the commerce of these three areas and the fluidity of legal and business transactions between and among them support such a reciprocal arrangement. The present requirement that a lawyer resident in one district retain additional counsel in order to represent clients in the federal district court of another increases the cost to clients of litigation in any of the three districts and gives rise to legitimate questions about legal featherbedding. Some firms have felt compelled to open satellite law offices in two or more of the three districts or to set up artificial correspondent relationships. Granted that familiarity with the substantive law of the State of Maryland, the Commonwealth of Virginia, and the District of Columbia may sometimes be required in federal court litigation in those jurisdictions, it may appear to the leadership of the three organized Bars that the decision whether to associate local counsel for assistance in a particular cause is one that may generally be left to counsel and not imposed automatically by court rule.

In the local rules of the United States District Courts across the country, numerous examples can be found of rules providing either fuller reciprocity or varying forms of open admission to non-resident lawyers. Perhaps the most open rule is that of the Western District of New York, which provides simply:

> "Rule 2. Admission to the Bar.
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> (c) A member in good standing of any United States District Court outside the State of New York may on motion of an attorney of this court be admitted to practice in this court, provided he shall have been admitted to practice in the highest court of the state in which he maintains an office for the regular practice of law in person. Upon his ceasing to maintain such office he shall ipso facto cease to be a member of the bar of this court."

The only limitation in that district, as in the Southern District of New York, is that non-resident counsel, when appearing of record in any cause, must specify a resident attorney upon whom service of papers may be made.

Most courts that have reciprocity or open-admission rules have fashioned certain limiting provisions, however. In the Middle District of Florida, for example, general admission is restricted to members in good standing of the Florida Bar (Rule 2.01(b)), but a rule covering "special admission to practice" provides for an automatic sort of pro hac vice admission, limited mainly by a provision against

"frequent or regular appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law in the State of Florida. . . ."[1/]

A rule similar in operation to that of the Middle District of Florida but articulated in a different fashion is that of the Western District of North Carolina, providing essentially for pro hac vice admission in particular cases

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1/ "Rule 2.02. Special Admission to Practice.

(a) Any non-resident attorney who is a member in good standing of the bar of any District Court of the United States, outside the State of Florida, may appear specially and be heard in any case in which he is counsel of record, without formal or general admission; provided, however, such privilege is not abused by frequent or regular appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law in the State of Florida; and provided further:

(1) Whenever a non-resident attorney appears as counsel by filing any pleading or paper in any case pending in this Court, he shall, within ten days thereafter, file a written designation and consent-to-act on the part of some member of the bar of this Court, resident in Florida, upon whom all notices and papers may be served; provided, however, the Court may waive such designation for good cause shown.

. . .

"(c) Any attorney who appears specially in this Court pursuant to subsections (a) or (b) of this rule shall be deemed to be familiar with, and shall be governed by, these rules in general. . .; and shall also be deemed to be familiar with and governed by the Code of Professional Responsibility and other ethical limitations or requirements then governing the professional behavior of members of The Florida Bar."

"in the discretion of the Judges of this Court," and providing further that an out-of-state attorney and his client are deemed to have consented to service of all pleadings upon a deputy clerk if resident counsel is not associated. The rule indicates that the discretion will be exercised to grant or deny admission based in part on the amount in controversy or the importance of the case.[2/]

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2/ "Rule 1. Attorneys.

B. Special Admissions. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States or the Bar of the Supreme Court of any state in the United States may, in the discretion of the judges of this court, be permitted to appear in a particular case. If such permission is granted, and if a member of the bar of this court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this court as process agent. The court encourages such out-of-state attorneys to associate a member of the bar of this court in all cases, but will not require such association where the amount in controversy or the importance of the case does not appear to justify double employment of counsel. Special admissions will be the exception and not the rule, and no out-of-state lawyer will be permitted to practice frequently or regularly in this court without association of local counsel.

"Where justice requires, the authorized deputy clerks at Asheville, Statesville and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, the further participation of out-of-state counsel shall be governed as hereinabove provided."

The Southern District of New York provides generally for the admission to its bar of any member of the bar of a United States District Court in New Jersey, Connecticut or Vermont (and of the state bar where such district court is located) provided that those District Courts extend corresponding privileges to members of the New York Bar. The applicant for admission must verify that he has read the Federal Judicial Code (Title 28 U.S.C.), the Federal Rules of Civil and Criminal Procedure, the Rules of the Southern District of New York, and the ABA Canons of Ethics. Moreover, a non-resident member of the bar may not appear as attorney of record in any cause without designating in his first pleading a resident member upon whom service of papers may be made. 3/

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3/ "Rule 3. Admission to the Bar.

> "(a) A member in good standing of the bar of the State of New York, or a member in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court on compliance with the following provisions:
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> "Each applicant for admission shall file with the clerk of this court, at least ten days prior to hearing thereon (unless, for good cause shown, the judge shall shorten the time), a verified written petition for admission stating: (1) his residence and office address; (2) the time when, and court where, admitted; (3) his legal training and experience; (4) whether he has ever been held in contempt of court, and if so the nature of the contempt and the final disposition thereof; (5) whether he has ever been censured, suspended or

(Footnote continued on next page)

From these various provisions of district court rules, certain policy concerns are readily identified. First, there is a rather common concern for the designation of counsel resident (i.e., maintaining a regular law office) within the district upon whom service may be made. Such a provision for

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(Footnote continued from previous page)

> disbarred by any court and, if so, the facts and circumstances connected therewith; and (6) that he has read and is familiar with (a) the provisions of the Judicial Code (Title 28,U.S.C.) which pertain to the jurisdiction of, and practice in, the United States district courts, (b) the Rules of Civil Procedure for the district courts; (c) the Rules of Criminal Procedure for the district courts; (d) the Rules of the United States District Court for the Southern (Eastern) District of New York; and (e) that he has read the Canons of Ethics of the American Bar Association, and will faithfully adhere thereto.
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> "The petition shall be accompanied by an affidavit of an attorney of this court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this court, how long and under what circumstances he has known the applicant, and what he knows of the applicant's character and experience at the bar. Such petition shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the petition shall personally move the admission of the applicant. If the petition is granted, the applicant shall take the oath of office and sign the roll of attorneys."
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> . . .
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> "Rule 4. Attorneys of Record and Parties Appearing pro se.
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> (a) No member of the bar of this court not having an office within the Southern District or Eastern District of New York shall appear as attorney or proctor or record in any cause without designating with his initial notice or pleading a member of the bar of either district having an office within the Southern or Eastern District of New York upon whom service of papers may be made."

the Maryland, Virginia and District of Columbia area would seem appropriate in order to provide the option of effecting service of motions, discovery, and the like by hand, and should be neither unduly burdensome nor expensive. Presumably, the main purposes of provisions requiring resident counsel to receive service are to maintain some disciplinary control and to guard against forcing multiple addressees for service, but a more persuasive reason for such a provision in these jurisdictions is logistical. The practical aspects of hand service from, say, Baltimore to the District of Columbia would seem to militate in favor of either requiring resident counsel for service or, as the Western District of North Carolina does, designating the clerk as the resident agent.

A second and more technical kind of concern is that addressed by the Southern District of New York, namely, that out-of-state counsel should at least certify that they are familiar with federal practice in general, and with the rules of that court in particular.

The following proposed rule would accommodate both of the policy concerns identified above and is suggested as a single rule that could be adopted in identical form by the United States District Courts for the District of Columbia and Maryland, and for the Eastern District of Virginia (although, of course, amendment may be desirable to conform to the language of the specific rules of each of the three courts):

Notwithstanding any other provision of these Rules as to place of residence or location of offices for the practice of law, an attorney who is a member in good standing of the bar of [the United States District Court for the Eastern District of Virginia] or [the United States District Court for the District of Maryland] or [the United States District Court for the District of Columbia] and of the bar of the State [State or District] in which such district court is located and who maintains an office for the practice of law within such judicial district, if such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court, and may enter appearances, file pleadings, and practice in this court without joining of record or associating resident counsel, provided that such attorney shall:

(1) Meet all other applicable requirements of these rules as to applications and sponsorship for admission to the bar of this court and certify that he or she has read and is familiar with the rules of this court;

(2) At the time of any entry of his or her appearance in a case pending in this court, file a

written designation of some member of the bar of this court, resident in this district, who has consented to receive service of all pleadings and notices in the case.

A third policy concern is that practice by non-resident counsel should not become a habit -- that it should continue to be pro hac or at least pro haec. In these three jurisdictions, however, limitation of the numbers of cases in which non-resident counsel may participate would undercut the spirit in which this proposal is made.

A fourth concern is that suggested by the rules of the Western District of North Carolina, namely, that the court be in a position to insist on the association of resident counsel familiar with the substantive law of the state in cases warranting such "double representation" because of the amount in controversy or the importance of the case. The rule recommended herein does not address this policy concern for three reasons.

First, given the practical realities of litigation, it may be doubted that local counsel regularly involve themselves sufficiently in the case to truly serve this policy concern. If they did, their fees would have to be much higher, and the client truly would be subject to a form of "double taxation" for having chosen non-local counsel. That is usually not the way lawyers work those arrangements out; as a practical matter, local counsel usually charge small fees at most and end up performing essentially the service-of-process and communications

role envisioned by policy concern number one.[4]

Second, the real protection (for both clients and court) of this policy interest is provided both by the Code of Disciplinary Procedure and the threat of a malpractice suit. Thus, the Code provides (D.R. 6-101(A)(1)):

> A lawyer shall not handle a legal matter which he knows or should know he is not competent to handle, without associating with him a lawyer who is competent to handle it.

A lawyer who took on a federal court case in another district requiring by its nature a local lawyer for substantively competent service to the client -- and who failed to associate local counsel -- would be in violation of this rule and probably in jeopardy of a substantial malpractice suit as well as being disciplined.

Third, a modification such as that embodied in the North Carolina rule -- according the court discretion whether or not to require local counsel in a particular case[5] -- probably poses more problems for the court then it solves. Judges rightly resist being placed in a case-by-case screening role regarding private counsel arrangements in the cases they

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[4] It should be noted that the language of the rule in the Eastern District of Virginia requires, inter alia, that the local counsel "have such authority that the court can deal with him alone in all matters connected with the case."

[5] See pp. 6-7, infra.

are ultimately responsible for deciding. Neither the appearance of justice, nor the time and energy of the court are truly served by such arrangements.[6]

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[6] As an alternative, if the bars of the three districts and the courts believe some provision must be made for this policy concern, we suggest a third paragraph to the proposed rule requiring association of resident counsel in any case where jurisdiction in the complaint rests on diversity jurisdiction and a state-created claim is asserted. While this may still implicate the court in some screening, the application of the rule would for the most part be automatic and at least the ultimate decision on the need for local counsel would not be a matter of discretion.

APPENDIX A -- TEXT OF PROPOSED RULE

Notwithstanding any other provision of these Rules as to place of residence or location of offices for the practice of law, an attorney who is a member in good standing of the bar of [the United States District Court for the Eastern District of Virginia] or [the United States District Court for the District of Maryland] or [the United States District Court for the District of Columbia] and of the bar of the State [State or District] in which such district court is located and who maintains an office for the practice of law within such judicial district, if such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court, and may enter appearances, file pleadings, and practice in this court without joining of record or associating resident counsel, provided that such attorney shall:

(1) Meet all other applicable requirements of these rules as to applications and sponsorship for admission to the bar of this court and certify that he or she has read and is familiar with the rules of this court;

(2) At the time of any entry of his or her appearance in a case pending in this court, file a written designation of some member of the bar of this court, resident in this district, who has consented to receive service of all pleadings and notices in the case.