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

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The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of the Board of Governors.

These comments were prepared by a specially appointed subcommittee, chaired by L. Neal Ellis, Jr., of Division IV's Committee on Court Rules. The comments were discussed with the membership of Division IV at a meeting of Division IV's Court Rules Committee on June 30, 1983. A majority of the members of Division IV present at that meeting, as well as the entire steering committee of Division IV, support the proposed change. The discussion on June 30, 1983, however, reflected that the members of Division IV are divided on whether to recommend approval of the proposed amendment--principally because of concerns that the proposed rule will not provide a reliable or rational way of evaluating fundamental attorney competence. In order to reflect the views of those members of Division IV who oppose the proposed change, two dissents, written by David J. Lloyd and G. Joseph King, have been included with these comments.

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Comment on Proposed Amendments To Rule 46-I(c)(3), Rules Of The District of Columbia Court of Appeals

I. The Proposed Amendments

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

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

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

On March 28, 1983, this Court gave notice proposing to amend the requirements for admission to the bar without examination and affording interested parties an opportunity to

comment. The proposed amendments call for deletion of existing Rule 46-I(c)(3) in its entirety. As published, new Rule 46-I(c)(3) would provide as follows:

> (3) Admission Requirements
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> Any person may, upon proof of his or her good moral character as it relates to the practice of law, be admitted to the Bar of this Court without examination, provided that such person:
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> (i) has been an active member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States for a period of five years immediately preceding his or her application; or
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> (ii)(A) has been awarded a Juris Doctor degree or its equivalent by a law school which, at the time of the awarding of the degree, was approved by the American Bar Association, and
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> (B) has been admitted to the practice of law in any state or territory of the United States upon the successful completion of a written bar examination and has received a scaled score of 133 or more on the Multistate Bar Examination which was taken as a part of such examination. Prior to July 1, 1988, application for admission under this subparagraph (ii) must be made within five years from the date of the Multistate Bar Examination that is being used as the basis of the application. On or after July 1, 1988, application for admission under this subparagraph (ii) must be made within twenty-five months from the date of such Multistate Bar Examination.

The proposed amendments make at least three significant changes to the present rules governing admission of attorneys "on motion". First, the proposed amendments would eliminate the five year practice of law requirement and replace it with a five year "active member in good standing" requirement. The proposed amendment does not explain further what constitutes "active" membership in another bar; for purposes of this comment, we have assumed that an "active" member of another bar pays dues or satisfies whatever requirements are imposed by that bar itself as prerequisites to "active" membership. Second, as an alternative to the five year "active member in good standing" requirement, an attorney may be admitted without examination if he or she: (1) has been admitted in any state or territory based on the successful completion of an examination; (2) has achieved a scaled score of 133 or more on the Multistate Bar Examination taken as part of such examination; and (3) has been awarded a J.D. degree by an ABA approved law school. Third, the proposed amendments eliminate the provision for reciprocal treatment.1/

1/ While the proposed rule would set a new standard governing eligibility for admission to the D.C. Bar on motion, it would have no effect on the current rules requiring membership in the D.C. Bar and/or other requirements as prerequisites to practice before certain courts. See Rule 1-4 of the Rules of the U.S. District Court for the District of Columbia; Rule 101 of the Rules of the D.C. Superior Court.

II. History Of The Rule Governing Admission To The Bar Without Examination

At first blush the proposed amendments might well be perceived as a radical change to the practice governing admissions in the District of Columbia. When viewed historically, however, the proposed amendments mark a return to the traditional practice governing admission of out-of-state attorneys "on motion".

During the post-World War II era many states refused to admit attorneys on motion unless they had practiced for five years in the jurisdiction where they were originally admitted. The District of Columbia followed a considerably more liberal admissions policy. From at least 1946, there was no prior practice of law requirement (hereafter the "practice requirement"). Attorneys seeking admission in the District of Columbia were admitted on motion if they met the educational requirement and passed the bar examination of the state where they attended law school or of the state of their domicile. The United States District Court, which at that time administered the practice of law in the District of Columbia, declined to impose reciprocity provisions because "only some seven states have reciprocity rules, and our rule has been found to present great difficulties in application."2/

2/ Report of the Committee on Admissions, United States District Court for the District of Columbia quoted in Transcript of 1976 Judicial Conference at 36.

By 1975 the rule provided for admission of attorneys from other jurisdictions if they had either graduated from an ABA approved law school and passed the bar examination in the state where they attended law school or were domiciled (the "educational requirement") or engaged in the practice of law for at least five years (the "practice requirement"). Thus, an attorney who had not practiced for five years could still be admitted on motion so long as he fulfilled the educational requirement.

Because of the disparity between the liberal D.C. admissions policy and the restrictive rules applied by neighboring jurisdictions, many members of the bar urged adoption of a more restrictive provision in the District of Columbia. A special committee of the Bar chaired by John Pickering studied a "reciprocity/practice" proposal. The proposal provided for elimination of the educational provision. It also would have added a reciprocity provision to the practice requirement such that an attorney from another jurisdiction would be admitted under such lesser standard as would be applied by that jurisdiction to a member of the District bar "seeking admission without examination to the Bar of said jurisdiction." On April 7, 1975 the Pickering committee reported against adoption of the reciprocity/practice

proposal. The committee concluded that the proposal was not based upon any perceived need to upgrade the competence of the Bar and that there was no discernible qualitative difference in the fitness of attorneys according to whether they were admitted under the educational provision or under the practice provision. The Pickering committee's recommendation was approved by the Board of Governors and forwarded to the court by letter dated April 7, 1975.

The court's Committee on Admissions, however, urged the court by letter dated November 17, 1975, to adopt the proposed revision, stating that:

> . . . the proposed change reflects the Committee's primary concern that only qualified and competent lawyers be admitted to practice law in the District of Columbia. It appears to the Committee, based upon its evaluation of bar examinations taken by applicants from other jurisdictions, that there are a substantial number of persons who have graduated from ABA approved law schools who do not possess the elementary skills and knowledge of the law required to pass our bar examination but who, nevertheless, are being admitted to the practice of law in the District of Columbia.

In June 1976, a panel debated the merits of the reciprocity/practice proposal at the first Judicial Conference for the District of Columbia. At the conclusion of the debate, a majority of the conferees voted in favor of adoption of the

reciprocity/practice proposal. The transcript of the conference reflects that support for the proposal focused primarily on economic issues. Many of the conferees believed that a more restrictive rule would elicit change in the admissions policies of the neighboring jurisdictions. A vigorous minority of the conferees contended that the bar admission rules should be used only to protect the public from incompetent attorneys and not as a lever to evoke change by Virginia or Maryland.

On March 29, 1977, the Board of Governors of the District Bar advised the Court of Appeals, by a memorandum prepared by John Pickering and Alan Morrison, of the potential constitutional and jurisdictional objections to the reciprocity/practice proposal and concluded that the proposal was open to serious legal question.

By per curiam order entered on April 12, 1977 (Nebeker, J. dissenting), this Court adopted the reciprocity/practice rule. See Rule 46-I(c)(3) (present rule). Under the present version of the Rule, "practice of law" is defined to include only "full time" practice. Rule 46-I(c)(3)(iv). In addition, an attorney practicing as an employee or partner of a law firm, clinic, professional corporation, or similar entity, or an attorney performing legal

duties as an employee of a corporation (or other entity not organized to offer legal services) must be practicing "in a jurisdiction in which the applicant is admitted to practice and in the Bar of which the applicant is an active member in good standing. . . ." Id.3/ Thus, for example, a lawyer admitted to practice in New York who is employed in Connecticut as general counsel in a corporation but who is not admitted in Connecticut, is not practicing law within the meaning of the Rule. Such a lawyer receives no "credit" for his or her employment for purposes of fulfilling the requirement that the applicant have practiced for at least five of the eight years preceding the "waive-in" application.

As adopted in 1977, the component of the Rule requiring practice within a jurisdiction in which the attorney is admitted was considerably broader. Over the years, however, various classes of attorneys have been excluded from that part of the practice requirement. See, e.g., Notice dated October 5, 1981, No. M-99-81 (administrative law judges, publicly elected officials of the United States, full time law

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3/ This language was added to the Rule by amendment. Prior to the amendment, however, the court's Committee on Admissions had interpreted the 1977 version of the Rule as requiring practice in the jurisdiction of admission.

school professors). Moreover, certain elected or appointed government officials have been excluded entirely from the practice requirement, provided that they were qualified or admitted under the Rule at the time of their appointment or election. See Order dated October 2, 1981 (judges or former judges of state and federal courts, members of Congress, cabinet officers and certain presidential appointments). Because of the need to create exceptions for certain classes of attorneys, the court apparently embarked on a course of gradual erosion of the practice requirement. The exemption of special groups also may have fostered the appearance of favoritism. To be sure, the exemption of special groups has, if anything, tended to generate additional requests for special treatment.

Because the reciprocity/practice provision was promulgated, at least in part, to induce some relaxation of the admission policies of neighboring jurisdictions, the rules governing admissions in Virginia and Maryland should be examined next.

III. Admission Without Examination In Neighboring Jurisdictions

Prior to the D.C. Court's adoption of the reciprocity/practice provision in 1977, the court's Committee on Admissions collected statistics on the number of attorneys admitted on motion in the District by jurisdiction. During the period from 1972 to 1974, 1988 attorneys waived in. Of the 1988, only 483 attorneys were admitted pursuant to the five year practice provision. The remaining 1505 attorneys were admitted pursuant to the educational provision. Of the 1505, 255 attorneys were admitted from Virginia and 232 from Maryland. Only New York, with 169 attorneys, even approached the magnitude of admissions from Virginia and Maryland.4/ More recently, the District leads all jurisdictions in the number of attorneys admitted on motion. Of the 3,350 attorneys admitted on motion nationwide in 1979, 2,396 or 71.5% were admitted in the District. Although that percentage has dropped gradually, the figures for the last three years reflect that the District continues to attract a substantial percentage of waive-ins.5/

4/ More recent statistics are available but could not be collected within the time allowed for comment on the proposed rule change.

5/ Of the 3,100 attorneys admitted on motion nationwide in 1980, 2,038 or 65.7% were admitted in the District. Of the 2,197 attorneys admitted on motion nationwide in 1981, 992 or

(Footnote continued)

With these statistics in mind, it was understandable that members of the District bar should express concern about any proposed liberalization of admissions policies. That concern is only exacerbated when the neighboring jurisdictions unabashedly erect barriers to admission of out-of-state attorneys. We now consider whether the adoption of the reciprocity/practice provision by this court in 1977 had the desired effect of inducing any relaxation of the restrictive bar admissions approach in Virginia and Maryland.

A. The Virginia Rule

Pursuant to Va. Code § 54-67, the Supreme Court of Virginia is authorized to admit attorneys from foreign jurisdictions who have practiced for at least three years. But the court has instead adhered to a considerably more restrictive policy. Rule 1A:1, Rules of the Supreme Court of Virginia, provides for admission without examination if an attorney: (1) has practiced for five years; (2) has become a

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(Footnote continued)

45.2% were admitted in the District. Of the 1,716 attorneys admitted on motion nationwide in 1982, 443 or 25.8% were admitted in the District. See 52 The Bar Examiner, Number 2 (May 1983). These statistics may be somewhat distorted by the backlog of admission applications under the prior rule when the 1977 revision was announced.

permanent resident of the State of Virginia; and (3) intends to practice full time as a member of the Virginia bar.6/

6/ Rule 1A:1 provides in pertinent part that:

> Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.
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> The applicant shall:
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> (1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.
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> (2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.
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> (3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.
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> (4) Pay a filing fee of fifty dollars.
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> Thereafter, the Supreme Court will determine whether the applicant:
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> (a) Is a proper person to practice law.
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> (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.
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> (c) Has become a permanent resident of the Commonwealth.

(Footnote continued)

The Virginia Rule has survived two attacks on constitutional grounds. In Application of Brown, 213 Va. 282, 191 S.E.2d 812 (1972), the Supreme Court of Virginia upheld the "full time" practice as a member of the Virginia bar requirement. Brown, a resident of Virginia and NLRB attorney, refused to resign his employment as a federal attorney as a condition of Virginia bar membership and consequently urged that the full time practice requirement bore no rational connection to his fitness to practice law. And in Application of Titus, 213 Va. 289, 191 S.E.2d 798 (1972), the Supreme Court of Virginia upheld the residency requirement. Titus, a native of Maryland and member of both the D.C. and Maryland bars, urged that the residency requirement bore no rational connection to his fitness to practice law. A three-judge district court rejected Brown's and Titus' constitutional attacks in Brown v. Supreme Court of Virginia, 359 F.Supp. 549, 555 (E.D. Va. 1973), aff'd, 414 U.S. 1034 (1973). Judge Hoffman wrote that:

(Footnote continued)

> (d) Intends to practice full time as a member of the Virginia bar.

> . . . we feel that practical experience dictates that attorneys admitted to practice in Virginia by reciprocity, should be required to maintain a residence therein and, in addition, devote their full time to the practice of the profession to the end that they may better serve the public and the proper administration of justice. We also feel that, with respect to Brown, his efforts to "moonlight," while continuing his full-time employment with the National Labor Relations Board, should be sufficient to deny him the right to admission by reciprocity.

Judge Merhige dissented on the grounds that the court had failed to articulate any basis for the different treatment accorded reciprocity applicants vis-a-vis those admitted by taking the bar examination.

Neither the Supreme Court of Virginia, the Virginia General Assembly, nor the Virginia State Bar appear inclined to take any action which would liberalize Virginia's admission requirement. Indeed, a bill which would have permitted non-resident attorneys to take the bar examination died last year in the General Assembly Courts and Justice Committee. Virginia has also considered the transferability of Multistate examination scores. However, due to perceived differences in the way the examination is administered from state to state, the Bar Examiners declined to honor Multistate scores from other jurisdictions.

In short, it is safe to say that the promulgation of the District's reciprocity/practice provision had no impact whatever on the position adhered to by the Virginia court.

B. The Maryland Rule

Maryland Code Ann. Art. 10, § 7 permits a foreign attorney to take an examination administered by the State Board of Law Examiners "after becoming an actual resident of the State of Maryland" and if he has practiced law for five of the preceding seven years.

Prior to 1980, Rule 14 of the Rules governing Admission to the Bar of Maryland required out-of-state applicants to file a petition addressed to the Court of Appeals stating in part that: (1) he intended to practice law or teach full-time at an ABA approved law school in Maryland; and (2) he had been regularly engaged in the practice of law for at least five of the preceding seven years in a jurisdiction in which he was admitted to practice.7/ Pursuant to Rule 14i any foreign

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7/ Rule 14d defined practice of law in the following manner:

> For purposes of this Rule a practitioner of the law is defined as a member of the Bar of another State, District or Territory of the United States including Puerto Rico who throughout the period specified in the petition has regularly engaged in the practice of law in such jurisdiction as the principal means of

(Footnote continued)

attorney desiring admission was required to pass "an out-of-state attorney examination." No out-of-state attorney was eligible for admission under Rule 14 "unless at the time of admission he [was] a domiciliary of Maryland."

Maryland's eligibility requirements for its out-of-state attorney examination were challenged successfully

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(Footnote continued)

> earning his livelihood and whose entire professional experience and responsibilities have been sufficient to satisfy the Board that the petitioner should be admitted under this Rule. The Board may consider, among other things,
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> (i) the extent of the petitioner's experience in general practice;
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> (ii) if the petitioner is or has been a specialist, the extent of his experience and reputation for competence in such specialty;
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> (iii) if the petitioner is or has been an employee of a law firm, government or a corporation or other employer, the nature and extent of his professional duties and responsibilities as such employee, the extent of his contacts with and responsibility to clients or other beneficiaries of his professional skills, the extent of his professional contacts with practicing lawyers and judges and his professional reputation among them and
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> (iv) any professional articles or treatises of which the petitioner has been the author. (4-10-78)

in Jensen v. Murphy, 49 LW 2338 (D. Md., Nov. 13, 1980). In Jensen, an administrative law judge with the Federal Energy Regulatory Commission admitted in Nebraska sought admission in Maryland. Because he had not practiced the requisite time in his state of admission, he failed to qualify for the three-hour special examination and was forced under Maryland rules to take a longer examination than those attorneys who had practiced in the state of their admission. The United States District Court for the District of Maryland sustained equal protection, commerce clause and privileges and immunities challenges to the Maryland rule. The district court's order was vacated on June 4, 1982 after the Court of Appeals of Maryland revised Rule 14a(iii) and deleted the requirement that the five years of practice must have been in a jurisdiction where the applicant was admitted. Various aspects of Maryland's residency requirement were challenged in Golden v. State Board of Law Examiners, 452 F.Supp. 1082 (D.Md. 1978), and Hayes v. Court of Appeals of Maryland, Civil Action No. M81-223 (D.Md.), and on January 22, 1982, the Court of Appeals of Maryland withdrew its "domicile on admission" requirement. Thus, in spite of Maryland Code Ann. Art. 10, § 7, the rule in Maryland is that an out-of-state attorney need not be a resident to be admitted.

Like Virginia, then, Maryland's policy governing admission of out-of-state attorneys is restrictive and discourages entrance by foreign attorneys. Unlike Virginia, Maryland requires out-of-state attorneys to pass a special examination covering Maryland practice and procedure. But the Court of Appeals of Maryland, unlike the Virginia court, does not require permanent residency, nor does it require the applicant to demonstrate that he intends to engage in full-time practice in Maryland. In any event it appears highly unlikely that either Maryland or Virginia will relax the five year practice requirement. Thus, to the extent that the 1977 reciprocity/practice revision to the District's rule was directed at stimulating change by these neighboring jurisdictions, it has not done so.

IV. Arguments In Support Of And Against The Proposed Amendments

Numerous arguments have been made in support of as well as against the proposed amendment of Rule 46-I(c). The Court probably is familiar with and has considered many of these arguments. It might be useful, however, for us to identify the arguments that we have considered in formulating this comment.

The following arguments have been made in support of the proposed amendment:

1. The purpose of rules governing admission to the Bar is to foster competent legal representation and to protect the public from incompetence; protecting existing members of the Bar from additional competition, on the other hand, is not a legitimate purpose for bar admission rules. Therefore, it would be inappropriate to preserve barriers to bar admission for the purpose of restricting competition, unless the restrictions would serve the purpose of assuring lawyers' competence.8/ While it would be difficult, if not impossible,

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8/ In advocating a National Practice of Law Act, a past president of the American Bar Association has noted that many states "that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, Time for a National Practice of Law Act, 64 A.B.A.J. 557 (1978).

to determine from the face of an admissions rule whether it was intended to protect the public or the Bar itself, the history of the reciprocity/practice provision suggests that it was promulgated for the benefit of local lawyers. As the Pickering committee reported when the reciprocity/practice provision was under consideration, there was no evidence that out-of-state lawyers admitted on motion were less competent to practice in the District of Columbia than lawyers who gained admission by passing the District's bar examination.9/ Furthermore, the reciprocity/practice provision apparently was adopted in part to induce other jurisdictions -- primarily Maryland and Virginia -- to relax their rules for admission on motion. It would be desirable for the Court to return to its traditional admissions practice rather than continuing to use the admissions rule for arguably inappropriate purposes.

2. Admissions barriers deprive the public of the widest possible selection of competent lawyers. Except to the extent necessary to ensure competence, therefore, the public interest demands that such barriers be lowered. Moreover, clients should not be required to engage multiple lawyers to

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9/ Nor is there any evidence today that the reciprocity/practice provision has produced any qualitative changes in the composition of the District Bar.

handle matters in the District and neighboring jurisdictions that could be equally well handled by a competent lawyer in one jurisdiction.

3. Since legal practice is becoming increasingly specialized, federal, and interstate, there is a greater need for lawyers to be able to practice in more than one jurisdiction and to move from one jurisdiction to another. This is particularly true in the District of Columbia, given the largely federal nature of the practice and the concentration here of government agencies. In addition, the largely federal nature of the practice makes it less important that lawyers be familiar with the kinds of local rules and laws that may dominate the practice of law in other jurisdictions.

4. The current rule has proved unworkable insofar as it allows admission on motion based on a required period of "practice of law." It is difficult to apply the "practice of law" requirement to substantial segments of the legal community who work as corporate attorneys, judges, teachers and government lawyers. Moreover, because of a perceived need to exempt certain individuals and categories of lawyers from the "practice" requirement, this Court has been petitioned for and has allowed piecemeal amendment of the practice definitions set forth in Rule 46-I(c)(3), thereby undermining the integrity of

the Rule. Since the proposed amendment would eliminate the practice requirement, administration of the rule would be greatly simplified.

5. It has not been shown that the existing reciprocity/practice rule assures a minimum level of competence. Basing admission on attaining a minimum score on the Multistate Bar Examination, as would the proposed rule, at least would provide a meaningful standard for judging educational qualifications. And since the Multistate probably is as reliable an indicator of general competence as the local exam, relying on Multistate scores would obviate the need for attorneys to take more than one exam, without any material sacrifice in the reliability of the test results. As for the substitution of membership in another Bar for the practice requirement (as an alternative to admission based on the educational requirement), it is speculative, at best, whether the requirement of five years' practice provides any greater assurance of competence than the proposed requirement of five years membership in good standing in another Bar.

6. The reciprocity/practice provision has its greatest impact on young lawyers who have not completed five years of practice. Before 1977 the admissions rule did not treat lawyers differently according to age and instead

permitted attorneys who fulfilled the "educational" requirement to waive in. There is no reason why a young lawyer who meets the educational standards should be denied admission while another attorney, who may not meet the educational standards, is admitted simply because he has "practiced" in another jurisdiction for five years.

7. The reciprocity/practice provision is misplaced in the District, which is not just another local jurisdiction with a need to erect barriers to protect its Bar. It is instead a truly national jurisdiction which attracts and should attract talented attorneys to engage in a national, federally-oriented practice.

8. At least part of the motivation behind the adoption of the reciprocity/practice rule was to attempt to provoke some relaxation of the admission requirements in Maryland and Virginia. It is now time to admit that the attempt was unsuccessful, and to return to an admissions policy in keeping with the legitimate goals of the unified Bar.10/

10/ It has also been suggested that a more liberal admissions policy may have the collateral benefit of increasing the Bar's dues base and providing additional support for the Bar's voluntary programs.

9. Finally, we understand that, at least to some degree, recruiting of young lawyers for the U.S. Attorneys Office, Public Defender Service, and the Legal Aid Society is impeded by the need for such lawyers to become members of the bar -- by taking the D.C. Bar examination -- to be able to practice regularly in the District of Columbia courts. See D.C. Ct. App. Rule 46II(c)(1) & (2).

The following arguments, on the other hand, have been made against the proposed amendment and in favor of retaining the existing rule or enacting an even more restrictive rule:

1. Liberalizing the admission rule would be diametrically opposed to the recent trend in other jurisdictions, including California and Connecticut, which have been adopting increasingly more restrictive rules for admission on motion of out-of-state attorneys. Furthermore, Maryland and Virginia have indicated that they will not change their restrictive rules. It would be unfortunate for District lawyers to find it considerably more difficult to practice in other states at the very time that lawyers from other jurisdictions will have a much easier time gaining admission to this Bar. Moreover, this difference in standards would encourage lawyers to take a bar examination in a jurisdiction other than the District of Columbia, thereby encouraging

admission to the D.C. Bar by the method over which this Bar has the least supervision.

2. The existing rule prescribes at least some minimum level of competence for admission on motion. While not perfect, it does require practice in another jurisdiction for a five year period, during which time the admitting jurisdiction presumably would exercise some supervision over the lawyer's activities. The proposed rule, on the other hand, would allow admission as long as the attorney has been a member "in good standing" for five years. There is no requirement that the attorney have practiced for any period of time or achieved any minimum level of education. Even an attorney who had withdrawn from the active practice of law for fifty years would be eligible for admission in the District as long as he had continued to pay dues in the state of his admission. It is virtually impossible to conceive of a more liberal rule governing admissions of out-of-state attorneys. If adopted, the rule will attract incompetent attorneys from other jurisdictions to the District of Columbia, contrary to the purpose of protecting the public.

3. The proposed amendment disserves the economic interests of lawyers currently admitted and practicing in the District. Lowering the barriers to admission of out-of-state

attorneys would invite attorneys from neighboring jurisdictions to assume a greater share of a stable or decreasing client base in the District of Columbia. It is likely, if the proposed rule is adopted, that clients will use Maryland and Virginia lawyers for local law matters in the District of Columbia rather than using two or more sets of lawyers in the various jurisdictions. This will deprive D.C. lawyers of business, while those lawyers generally will be unable to offer clients the same kind of service across jurisdictional lines because of the restrictive admissions rules existing in the neighboring jurisdictions.

4. There is no need for the proposed rule. The District of Columbia Bar is large and diversified, providing prospective clients with all the legal services they need in an already highly competitive environment. The problem is not an inadequate supply of lawyers but a lack of funding in certain areas. There is no need, therefore, to use a more liberal admissions rule to increase either the absolute number of lawyers in the District or the level of competition.

V. Recommendation

We believe the proposed amendment to Rule 46-I(c) should be adopted. We have reached this conclusion primarily on the grounds, as mentioned above, (1) that the old rule is a barrier to entry and is anti-competitive, contrary to the public interest, and inappropriate for the nation's Capital, while not significantly contributing to the assurance of minimum competence of lawyers; (2) that the "practice of law" requirement in the existing rule is unworkable and difficult to administer; and (3) that whether the District of Columbia has a more or less liberal rule for admission on motion of out-of-state attorneys will not affect liberalization of the admission rules in neighboring jurisdictions. Moreover, we appreciate the difficulties that the existing rule has created for the Court and for the Committee on Admissions, and therefore endorse a change that will simplify the rule and make its application more streamlined, in view of the fact that the change does not seem likely to reduce the over-all quality of the composition of the Bar.

In terms of assuring a minimum level of competence on the part of out-of-state lawyers admitted to practice in the District, the educational requirement contained in the proposed rule seems satisfactory. Requiring that an attorney have

received a degree from an ABA-approved law school, have passed a written bar examination, and have attained a scaled score of 133 on the Multistate Bar Examination would seem to be a sufficient assurance of minimum competence. While the Multistate examination does not test knowledge of local law or even the Federal Rules of Civil Procedure, it does seem to be an acceptable and uniform test of basic legal competence.

We are more concerned with the provision allowing admission on motion of attorneys who may not meet the educational requirement of the proposed rule, but who have been members in good standing of another Bar for five years or more. This provision does not require a minimum level of education or of actual experience in practice, but rather that an attorney have been admitted to another state's Bar, by whatever means that state deemed adequate, and have paid dues for at least five years preceding the application for admission in the District. Apart from the educational requirement, however, the only alternative to this means of admission would seem to be the practice requirement, which has proved cumbersome and unworkable. We therefore endorse the requirement of five years membership in good standing as an alternative to the educational requirement, to provide a means of admission to attorneys who were admitted in another state at a time when it

was not possible for the attorney to satisfy the educational requirement. The five-year membership alternative of the proposed rule would provide the exclusive avenue for admission by motion to the many attorneys who were not required to take the Multistate exam at the time of their original admission to the Bar.

It would not seem appropriate, however, to allow an attorney to be admitted to the D.C. Bar on motion by means of the five-year membership route, without satisfying the educational requirement, if that attorney had the opportunity to satisfy the educational requirement. The five-year membership option should not be offered to attorneys who took the Multistate exam but failed to achieve a minimum score of 133. If an applicant's Multistate score is considered to be a valid indicator of an attorney's competence, it seems unlikely that a period of bar membership, without more, provides a basis for altering the original judgment.

Accordingly, we recommend that the proposed five-year membership alternative contained in proposed Rule 46-I(c)(3)(iv) be available to all persons except those who took the Multistate exam on one or more occasions but failed to receive a scaled score of 133 on at lest one administration of that exam. Thus, under this proposed revision, such persons could be admitted to the D.C. Bar only by examination.11/

11/ The Committee recommends that subsection (i) of the proposed Rule be admended to read as follows:

(Footnote continued)

With the one revision just suggested, we endorse adoption of the amendment to Rule 46-I(c) proposed by the Court.

(Footnote continued)

(3) Admission Requirements

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

(i) has been an active member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States for a period of five years immediately preceding his or her application, except that no person shall be eligible for admission without examination under this subsection who has taken the Multistate Bar Examination on one or more occasions, but has failed to receive a scaled score of 133 on at least one administration of that examination; or . . .

DISSENT FROM THE RECOMMENDATION BY DAVID J. LLOYD

At the present time, the D.C. Court of Appeals has suggested changing its admission rules to more relaxed standards reflective of its earlier policy favoring easy admission to local practice. The special committee created by Division 4 of the Bar to examine this proposal will recommend its approval. There is a dissenting view.

The present version of the Rule is criticized as being both unworkable and ineffective. Both claims are unjustified. The Rule was never unworkable; the Court simply refused to enforce it with the same stringency other jurisdictions enforce their entrance requirements. Instead of rejecting applications from those who sought to avoid a bar exam but who could not meet the waiver rule's requirements, the Court enacted a series of exceptions to the rule to accomodate "exceptional" applicants (federal officials, judges, elected officials, etc.) who, by and large, sought to establish a national practice or to join a firm that already had one. This obviously led to complaints that the Rule was unfairly biased in favor of the politically powerful while overlooking those without such power. Admissions was becoming a matter of influence rather than professional competence. But, the essential point here is that this is not a "workability"

problem. The Rule is not defective; it can effectively be used if only there is a will to do so. The charges of arbitrariness and favoritism that are made now arise, not from any defect in the Rule, but from a reluctance to enforce it as it was originally drafted. The cure for this is not the destruction of admission standards; rather it is a return to a rule with a will to enforce it without exception.

It was hoped that the neighboring jurisdictions would consider lowering their standards once the District raised its admission standards. This has not happened. Therefore, it is argued that the Rule, as it is now, must be abandoned. But, after years of a profligate admissions policy, one could hardly expect either jurisdiction to even notice the effect of the Rule. It will take at least twenty years before a substantial number of the attorneys who were admitted under the old liberal policy begin to leave the active practice of law. Only then will there be any significant effort to accomodate the District because only then will the present Rule finally have had any economic impact on the neighboring bar associations. Complaints that the Rule has not brought about any change in other jurisdictions are simply premature.

Furthermore, since this Rule has already had so many exceptions made to it to favor many politically powerful

groups, one can claim that the exceptions work against the avowed goal of reduced barriers. After all, those who are most likely to be able to effect changes in the rules of other jurisdictions (judges, elected officials) have already obtained special accomodations here. They have no incentive to pressure their own jurisdictions for a more liberal policy for District lawyers. They have nothing to gain and they could lose the economic benefits the restrictive standards of their own jurisdictions have gained for them and their constituents. A liberalized Rule will not gain reciprocity. It did not in the past and there is no reason to believe it will in the future. The present Rule, without its numerous exceptions, should be tried over a period of several more years before it can be properly evaluated.

It is also unfairly suggested that opposition to this Rule change is based upon an "improper" economic motivation. One must note that proponents of the change are also similarly motivated. Members of this Bar who are licensed in other jurisdictions favor it because it will enable other members of their firms to easily join the Bar without economic disruption of firm activities, and without disturbing the economic monopolies they enjoy in their home jurisdictions. Firms with a national practice favor it because it will give them a

competitive advantage; they will be more capable of attracting national officials to their firms thereby bolstering their claims to a special expertise in the federal matters they handle. Thus, the choice is between competing economic interests. Lowered standards for the federal practitioners versus higher standards for the local practitioners. Since attorneys licensed anywhere can lobby and appear before federal agencies, why change the Rule to accomodate them when the change will have a relatively small impact upon their activities and when it will have a drastic effect upon the practice and available client base for the local practitioner? Economic considerations are at the heart of all licensing questions whether they involve barbers, hospitals, airplanes, or lawyers. Many of the proponents of this Rule change have, themselves, argued in favor of economic considerations for clients opposed to licensing proposals in other arenas. Economics should not be disparaged here. If there is a choice to be made here, it should be made to favor those who are locally based, who have a stake in the local community, and who regularly practice before our courts and serve the local community. A relaxation of the Rule will only damage those local practitioners while rewarding out-of-jurisdiction efforts to skim off profitable cases from the District thereby

undermining the economic viability of any locally based firm. The local economic loss and the loss of locally based legal services cannot be measured, now; but it will be incurred. The Rule should not be relaxed to achieve this.

A relaxation of the Rule will not enhance the competence of the local Bar. In fact, it will significantly lower its standards. It will encourage people to take the Multistate elsewhere (that test does not test one's knowledge of local law) and to avoid all tests that require knowledge of local law. It delegates control over who will be allowed to practice in this jurisdiction to all other jurisdictions in the country. The local community is entitled to have the protection of higher standards than this. It should be able to rely upon a belief that the attorney has been able to show a knowledge of local law or that his competence in active practice has been supervised and vouched for by his local bar. Why should the public settle for anything less? This Rule change asks it to by forwarding the argument that there is no reason to believe that the present reciprocity rules are, in fact, a higher standard. This is an argument that must be taken on faith; competence is difficult to measure; and there has been no testing of the competence of those admitted and those rejected under the present Rule to determine the validity

of the claim. One must ask why our local Bar Exam requires knowledge of local law if it is to be easily disregarded when applicants seek admission from out of state. The proposed change reduces its competence criteria to next to nothing. One need only to have been admitted to another bar and paid dues. Familiarity with local law or any law is not required. One need not even have practiced actively for years. This proposed change does not address the competence question so much as it avoids it by admitting many who might be rejected for lack of it.

Will a high standard for the Multistate and a requirement of admission elsewhere guarantee competence? One hopes so, but why? This jurisdiction has long been opposed to having others set its laws for it. It has long held that it has local needs that only it can articulate; why is that any different for lawyer licensing? It is not. There is no reason to subjugate the District's present high standards to the standards of any other jurisdiction. There is no need to encourage prospective bar members to take an examination elsewhere so that they can get two admissions for the price of one, with the District getting short shrift. If every other jurisdiction can see this need for local protection, surely the District can act to insure it as well. Other jurisdictions say

that the District's laws are too foreign to enable its lawyers to readily practice elsewhere. Is not the reverse true? The proposed change should be rejected.

In doing so,
the Brd will permit ~~those Divisions~~
~~interested in submitting a statement~~
Divisions to ~~comment~~ ~~resp~~ comment
on this issue, provided that ~~the~~
Division obtains an extension on the
deadline of July 21,

In doing so, the Brd will permit
Divisions to comment on this issue,
provided that ~~the Division obt~~
an extension of Div 4'o July 21
deadline for submission of its comments
to the Ct of Appeals has been
obtained.