

Perspective

Admission by Motion Rule Distorted
By ABA's Interest in Monopoly

BY KENNETH L. GARTNER

Each state sets its own standards for the admission of attorneys. Most states, including New York, outsource one aspect of this governmental function to the American Bar Association, a private voluntary organization. The aspect that states outsource is the determination of which institution's graduates are eligible to sit for the state's bar exam, and thus attempt to obtain entry into the profession.

George Leef, the director of Research at the John W. Pope Center for Higher Education Policy, has stated that "[u]ntil the 1920s, most lawyers learned what they needed to know as apprentices working in firms. But then the American Bar Association stepped in and lobbied for laws making a degree from an ABA-accredited law school a prerequisite for taking state bar examinations."

Forty-five state supreme courts have made graduation from an ABA-accredited law school a prerequisite for admission to the bar. Only five states continue to act independently to some degree.

The ABA, through the law school accreditation process, therefore holds virtual monopoly control over entry into the legal profession.

What has not been recognized (or, at least, has been less recognized), is the extent to which the ABA has structured its promulgated Model Rule on Admission by Motion as a mechanism to further leverage its monopoly interest.

The model rule addresses one of the methods by which a lawyer licensed in one state or jurisdiction can gain admission to practice law in a second state or jurisdiction without sitting for the other state's bar examination. The ABA, when drafting the model rule, concluded that the availability of admission to practice in other jurisdictions by a lawyer who (1) is already admitted in a "home" jurisdiction, and (2) meets certain other baseline criteria, principally years of experience practicing law, and character, was a desirable policy goal. A model rule was required because barriers to admission erected by individual states "had become problematic in light of lawyers' increasing mobility and the increasingly interstate character of law practice."

The rule was promulgated by the ABA in August 2002, and was most recently amended in February 2011. According to the ABA, of the 50 states plus the District of

Columbia, approximately 10 have adopted an admission by motion procedure "nearly identical to the Model Rule"; approximately 30 have adopted some aspects of the rule but have retained distinctions (such as a reciprocity requirement); and approximately 11 have not adopted the model rule in any form. According to the ABA, more than 65,000 lawyers have obtained admission by motion in the last 10 years.

However, two provisions of the model rule undermine the ABA's own stated policy goal. Under these provisions, even if a lawyer takes a state's bar examination, passes

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it, is admitted to practice before the bar of that state, practices successfully for years, and maintains good standing in the profession, the attorney can never be eligible for admission in another state if (1) the attorney received his or her degree from a non-ABA approved law school, or (2) the attorney's practice consists of being a professor at a non-ABA approved law school.

The ABA Model Rule, after specifying years-of-practice and "good standing" requirements, provides that the only lawyers eligible for admission on motion under the recommended procedure are those who graduated from or teach at "a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association."

For instance, Massachusetts School of Law, which reportedly offers tuition approximately half of what is charged at most New England law schools, is accredited by the State of Massachusetts and the New England Association of Schools and Colleges, but not by the ABA. According to the Wikipedia entry on the school, graduates now practice in New England and California, and they include members of state legislatures in New England. Many of the graduates go into public service. But the ABA

rule would bar them from admission elsewhere even after having established a satisfactory track record of years of competent practice and disciplinary compliance.

Southern New England College of Law, which held the same status,

was merged into the University of Massachusetts, and is now UMass-Dartmouth Law School, a public institution (like Buffalo Law School, Michigan, or UC/Berkeley). It hopes to gain accreditation, but even if it does, under the model rule the graduates from prior to that time will be forever precluded from admission elsewhere.

The ABA's own journal, reporting on the House of Delegates debate prior to the ABA's original adoption of the rule, reports that some of those present "took issue with the requirement that a candidate for admission by motion be a graduate

of an ABA-accredited law school, which they said would be unfair to thousands of otherwise capable lawyers who graduated from unaccredited law schools." 88-OCT A.B.A. J. 69 (2002).

"[T]hat opposition never seriously threatened the measure, which was approved by a comfortable margin," the journal reported. Nevertheless, even within the organization whose institutional interests were at stake, there were those who recognized a problem.

An ABA commission, recommending that the rule's years of practice requirement be reduced from five to three years, recognized that three years of actual practice may be more valuable to a lawyer than graduation from even an ABA-approved law school, and passage of a bar examination. In addition, even a reduced three year practice requirement would be a sufficient disincentive to lawyers using admission by motion procedures simply to evade local state admission requirements when beginning their careers.

A state can outsource to the ABA the oversight of its own initial bar admission criteria, without seeking to legislatively bar the door to experienced lawyers from a sister state simply because the sister state has chosen not to outsource this governmental function to the ABA. The subject provisions are barriers to cross-jurisdictional admission embedded within an ABA model rule meant to remedy the problem of barriers to cross-jurisdictional admission.

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