STATE OF MINNESOTA
IN SUPREME COURT

ADM10-8008

HEARING TO CONSIDER PROPOSED AMENDMENTS
TO THE RULES FOR ADMISSION TO THE BAR

STATEMENT OF MINNESOTA STATE BAR ASSOCIATION RULES OF PROFESSIONAL CONDUCT COMMITTEE AND REQUEST FOR ORAL PRESENTATION

I. INTRODUCTION

Pursuant to the Court's October 26, 2010, Order, the Minnesota State Bar Association's Rules of Professional Conduct (RPC) Committee submits this written statement to comment on the proposals from the Board of Law Examiners to amend the Rules for Admission to the Bar. Specifically, the RPC committee presents comments regarding proposed Rule 20, permitting graduates of non-ABA approved law schools to sit for the Minnesota Bar Examination, and regarding the amendments to existing Rule 7A, amending the definition of the practice of law as an applicant's "principal occupation" during the years prior to an applicant's request for admission on motion.

With this statement, the undersigned also requests the opportunity to appear on behalf of the RPC committee to address the Court at its January 26, 2010 hearing.

A. Background of the RPC Committee's Consideration of the Admission Rules for Graduates of non-ABA accredited law schools.

In April 2009, four individuals petitioned the Minnesota Supreme Court for an amendment to the Minnesota Rules for Admission to the Bar to permit the admission to the Minnesota bar of a candidate who has not graduated from a law school accredited by the American Bar Association (ABA) but who has taken and passed the bar examination in another jurisdiction. The Minnesota Supreme Court directed the Minnesota Board of Law Examiners (MBLE) to study the issue and make a

recommendation to the Court. After a lengthy and thorough review process, MBLE recommended against permitting a graduate of a non-ABA accredited law school, who is admitted in another jurisdiction, to gain admission to the Minnesota bar solely by written examination. MBLE asked the Court to consider whether the additional requirement of successfully practicing law in another jurisdiction "for a substantial number of years" would be sufficient to offset the lack of a law degree from an ABA-accredited school.

The MSBA Rules of Professional Conduct Committee has considered this issue on multiple occasions since 2008, when the issue was directly presented to our committee by the proponents of the proposed rule. The committee also had an opportunity to meet with MBLE's executive director and representatives of the four ABA-accredited law schools in Minnesota. Following study of the issue, our Committee suggested to MBLE that the Admission Rules be amended to permit a graduate of a non-ABA accredited law school to apply for a law license in Minnesota by combining two of the current paths for admission to the bar, i.e. by combining the procedures for admission on examination and admission on motion, such that an applicant who has successfully practiced law in another jurisdiction for five of the last seven years would be allowed to sit for the Minnesota bar examination, and if successful, to be admitted to practice in Minnesota. Our committee recommended that the petition be otherwise denied.

In August, 2010, the Supreme Court considered the MBLE report and directed the Board of Law Examiners to submit a proposed rule to the Court that would permit a lawyer who is a graduate of a non-ABA accredited law school, but who has successfully practiced law in another American jurisdiction for a substantial number of years and is otherwise qualified, to sit for the Minnesota Bar Examination and, if successful, to be admitted to practice in Minnesota.

In response to the Supreme Court's order, the Board of Law Examiners has prepared an additional report and a proposed a new Rule 20. The rule would, as requested, permit a lawyer licensed in another jurisdiction who is not a graduate of an ABA-accredited law school to apply for and, if successful, sit for the Minnesota bar examination.

B. Summary of Proposed Rule 20

The following are the material provisions of the Board's proposed Rule 20, which would require an applicant to meet the following requirements:

1. The applicant must possess a bachelor's degree from an educational institution accredited by an agency recognized by the United States Department of Education. *See* Proposed Rule 20(A)(1).
2. The applicant must have received a Juris Doctor degree from a law school located within the United States or its territories. *See* Proposed Rule 20(A)(2).

3. The applicant must have received a scaled score of 85 or higher on the Multistate Professional Responsibility Examination. *See* Proposed Rule 20(A)(3).

4. The applicant must possess license in good standing to practice law in a state or territory of the United States or the District of Columbia. *See* Proposed Rule 20(A)(4); Rule 2(A)(7).

5. The applicant must provide evidence showing that the applicant has been engaged full-time and as a principal occupation in the lawful practice of law in a United States jurisdiction for at least ten of the thirteen years immediately preceding the application. *See* Proposed Rule 20(B)(1).

6. The applicant must submit examples of legal work prepared by the applicant during at least ten of the thirteen years immediately preceding the application. *See* Proposed Rule 20(B)(2). The work must include:

    a. documents such as pleadings, briefs, legal memoranda, contracts, or other legal documents drafted by the applicant and used in the applicant's practice.

    b. detailed narrative statement describing the type of practice or the positions the applicant held during the period when the work product was created; and the extent to which persons other than the applicant drafted or edited any of the submitted work product.

7. The applicant must submit a fee of $1,500. *See* Proposed Rule 12(O).

The rule provides that the applicant shall have the burden of proving that she or he possesses sufficient legal practice and other experience to sit for the Minnesota Bar Examination. *See* Proposed Rule 20(C). Following receipt of the application, the Board would undertake a review of the applicant's legal work product, practice, and experience. The rule provides that the Board be given "broad discretion" to determine whether the evidence submitted by the applicant establishes that the applicant has "sufficient legal proficiency" to sit for the bar examination. *See* Proposed Rule 20(D). The rule permits the Board to obtain "expert review" of the applicant's work product at the applicant's expense (presumably in addition to the $1,500 fee). *Id.*

If the Board determines that the applicant meets its standards for legal proficiency, the applicant will be authorized to sit for the Minnesota bar examination within eighteen months following the date of authorization. *See* Proposed Rule 20(E). If the applicant achieves a passing score on the examination, the Board shall make a determination about the applicant's character and fitness to practice law. If the board determines that the applicant possesses good character and fitness it will recommend the applicant to the Minnesota Supreme Court for admission to the bar.

II. DISCUSSION

The proposed rule raises significant questions about what the appropriate substitute is in the bar admission process for graduation from an ABA-accredited law school. The MBLE proposed rule suggests that the proper substitute is to double the

number of years of practice required (as compared to applications for admission by motion (without examination) under Rule 7), specify that the law practice experience must be full time, and review a sample of the lawyer's work product. The MSBA Rules of Professional Conduct Committee writes to express its concern with each of these provisions in the proposed rule.

A. The Requirement that the Applicant Have Practiced Law in Ten of the Previous Thirteen Years is Unnecessarily Onerous.

Under the current Rules for Admission to the Bar, a lawyer licensed in a jurisdiction other than Minnesota, who graduated from an ABA-accredited law school, may apply for admission to the Minnesota bar if the lawyer has "engaged, as principal occupation, in the active lawful practice of law" for at least five of the past seven years. *See* Rule 7(A), Minnesota Rules for Admission to the Bar. Proposed Rule 20 would require a graduate of an unaccredited law school to demonstrate that he or she had engaged in the practice of law for ten of the last thirteen years. The RPC Committee believes that this requirement is more onerous than is necessary to establish competency to sit for the Minnesota bar examination.

The reports that MBLE has submitted to the Court do not explain why imposing a practice requirement of ten of the last thirteen years is more likely to ensure competency to practice than the existing five of seven years requirement for admissions on motion. According to MBLE's June 30, 2010 Report and Recommendation, of the fifteen states permitting graduates of non-ABA-accredited

schools to sit for examination if they meet an additional practice requirement; only one state sets that requirement at ten-of-twelve years. *See* MBLE Report and Recommendation, Exh. B. The next longest practice requirement is five-of-seven years; six states impose only a three-of-five years practice requirement. *Id.* It appears that most other states that have considered this issue have not felt compelled to impose as lengthy a practice requirement as MBLE recommends.

MBLE's Response to the Court's Order (dated September 30, 2010) (hereafter "MBLE Response") explains that the practice requirement must be sufficiently "substantial" to stand in place of ABA accreditation. It is not clear, however, how MBLE concluded that ten years of practice is qualitatively different than five years of practice, or how the lengthier period of practice is related to the type of legal education the lawyer received. Indeed, MBLE's very thorough Report and Recommendation does not cite any data analyzing the correlation between the source of a law degree, bar exam passage, and competency to practice law. Our committee recognizes that this may be because such data does not exist.

The Committee is also concerned that the ten-of-thirteen years of practice requirement would disqualify many applicants who take leaves of absence for childrearing or military service, not to mention placing at a disadvantage lawyers who have been laid off from law firms, corporate legal departments or government positions because of lack of work, budgetary restrictions, or other factors unrelated to

their competency to practice law. In addition, the rule may have an adverse affect on the mobility of lawyers who pursue law as a second career later in life.

MBLE asserts that the proposed rule would not disqualify an applicant who has taken a leave of up to three years during the relevant practice period. MBLE Response, at ¶20. The penalty for a longer practice hiatus is severe: a lawyer who has not practiced for more than three years during the thirteen-year period must essentially start over and accumulate ten years of experience from the date the lawyer returned to practice. In other words, a lawyer who practiced for eight years and then left practice for four years, would have to practice another ten years before becoming eligible for admission under this rule, despite having practiced for eighteen of the previous twenty-two years. The RPC Committee finds the years of practice requirement unnecessarily burdensome on the applicants that the proposed rule is meant to serve.

B. The Amendment from "Principal Occupation" to the "Full-Time Practice" of Law is Too Restrictive.

In conjunction with proposed Rule 20, the Court is also considering MBLE's September 15, 2010 Petition to amend the language in Rule 7(A)(3) that describes the type of law practice that allows a lawyer licensed in another jurisdiction to move for admission in Minnesota without examination. This amendment would affect all lawyers licensed in other jurisdictions who seek admission to the bar in Minnesota, including lawyers who graduated from ABA-accredited law schools.

The current rule allows out-of-state lawyers to qualify for admission in Minnesota if they have been "engaged, as principal occupation, in the active and lawful practice of law" for five of the past seven years. *See* Rule 7(A)(3); Petition, at ¶3. MBLE states in its Petition that it has determined that this provision should be interpreted as meaning the full-time practice of law, which MBLE asks the Court to codify as 130 hours a month. Petition, at ¶5. This translates into 30 hours per week.

The RPC Committee cannot comment on the manner in which the practice requirement has been interpreted by MBLE in the past because admissions decisions are private matters that are not publicly reported. Nevertheless, it seems likely to our Committee that there are many attorneys who work less than full-time without any impact on their competency. Many government attorneys, in-house corporate attorneys, law firm associates and partners, legal services attorneys, and other attorneys work fewer than 30 hours per week without sacrificing their competency to practice law.

Indeed, such flexibility in working hours and schedules has been the focus of past and on going bar association efforts to improve the experience of women in the practice of law. The Self-Audit for Gender Equality (SAGE)(2003), compiled by the MSBA's Women in the Legal Profession Committee, identifies offering "equitable and viable alternative part time and flexible work schedules" as a best practices goal

for Minnesota law firms.[1] In 1993, the Hennepin County Bar Association Glass Ceiling Task Force Report recommended that legal employers "provide flexible benefit programs and flexible work schedules for lawyers," and noted that

> Further, to the extent such programs are used, the organization must support the employee against unfair charges of special treatment or lack of commitment. It does no good to have such programs if people are fearful that their careers will be damaged by participation. . . . What [women] may need most is a workplace that recognizes and respects the need for such flexibility.

HCBA Task Force Report, at 42 (emphasis added).[2] At least in Minnesota, such flexible work schedules, including part-time schedules, have become commonplace. *See* MSBA, Self-Audit for Gender and Minority Equity, at 52-53 (Sept. 2006).[3] While we have not researched the progress made in other states in gender fairness, it is unlikely that Minnesota is alone in this trend. The RPC Committee believes that the MBLE amendments to this rule may undermine efforts over nearly twenty years to encourage legal employers to address gender disparity by offering lawyers flexible work schedules while potentially penalizing lawyers who have taken advantage of those alternatives.

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[1] Available at www.mnbar.org/committees/women-in-profession/sage-best-practices.pdf (last viewed Dec. 20, 2010).

[2] Available at www.hcba.org/UserFiles/File/pdfs/Programs/Diversity/GlassCeilingReport1993pdf.pdf (last viewed Dec. 20, 2010).

[3] Available at www.mnbar.org/committees/DiversityTaskForce/Diversity%20Report%20Final.pdf (last viewed Dec. 20, 2010).

In addition, the proposed amendment to Rule 7(A)(3) speaks only to lawyers who work in an employment setting that is measured by the number of hours they report to an employer each week. The proposed rule provides little assistance for evaluating the work of solo and small firm practitioners, who comprise the majority of practicing lawyers in the United States. *See* American Bar Association, Lawyer Demographics (2009).[4] It is not clear whether the amended rule would require that the lawyers record 30 hours a week of billable time, whether the administrative and marketing requirements of operating a law firm would be included in the 30 hours a week, or whether attendance at Continuing Legal Education courses and other practice-related tasks would be included in the calculation. Lawyers whose practices operate predominately on a contingent or flat fee basis often eschew time-keeping. Similarly, the ups and downs of a law practice may not fit neatly into an hours-per-month model, despite the lawyer being actively engaged in the practice of law as a principal occupation.

The proposed amendment too strictly construes the concept that a lawyer licensed in another jurisdiction (whether the lawyer attended an ABA-accredited or an unaccredited law school) may demonstrate competency only through the "full-time" prior practice of law in another jurisdiction. The Committee recommends that the

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[4] Available at http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf (last viewed Dec. 19, 2010).

Court reject the proposed amendment to Rule 7(A)(3) and retain the requirement that an applicant engage in the practice of law as a "principal occupation" for purposes of admission on motion.

C. The Review of Applicants' Work Product is Not Likely to Further the Court's Interest in Assuring Competency to Practice.

Proposed Rule 20 requires that graduates of non-ABA-accredited law schools submit "a representative compilation of the applicant's legal work product" produced during each of ten of the thirteen years immediately preceding the application. Petition, at ¶¶15, 22. The MBLE's stated rationale is reasonable: to devise some substitute for the rigorous standards imposed upon ABA-accredited law schools, so as to assure the Court, the bar, and the public that lawyers being considered for admission to the bar in Minnesota will be competent. Although the goal is laudable, the RPC Committee has identified several concerns with this proposal.

The proposal relies on a basic assumption that the "practice of law" can be defined in a way that makes it possible to reduce to a verifiable common denominator whether an applicant has successfully engaged in that practice in another jurisdiction for the requisite period. The problem is, of course, that the "practice of law" is as protean a concept as can be imagined. It embraces the traditional private practice of law (and its own infinite variety) as well as public sector practice, which can include service as a public prosecutor, handling civil suits, advising an agency as an "embedded" lawyer, drafting legislation, counseling a legislative body, or serving as a

neutral. Work as an in-house corporate lawyer may include a variety of roles including handling civil litigation, providing compliance advice, conducting internal investigations, and managing external litigation. A lawyer's practice could be devoted solely to processing claims or supervising other lawyers. A rule that turns on a lawyer's ability to provide written evidence of her work may be impossible to apply fairly to all types of law practices.

Furthermore, in many practice settings, much of a lawyer's work product is a collaborative effort. Some examples include preparing a securities registration statement, a bond indenture, a negotiated contract, an appellate brief, or an estate plan. More often than not, an individual lawyer's work product consists of contributing to a written document that is a modification of a prior work –perhaps of that same lawyer but also of the lawyer's predecessors– that is edited, supplemented, and revised by others before it is put into final form. It seems unlikely that MBLE could discern what portion of the work product could be attributed to the particular lawyer-applicant.

Similarly, the nature of a lawyer's work product itself may make it difficult for a third party to evaluate. Most states' confidentiality rules, including Minnesota, do not provide any exception for disclosing client confidential information for the purpose of a bar application to another state. *See* Minnesota Rules of Professional Conduct (MRPC), Rule 1.6. Setting aside obvious problems of attorney-client privilege and confidentiality, it is not clear how MBLE could determine that a marital termination

agreement represented the best outcome for a particular client, that all the appropriate provisions were included in a commercial lease, or that an estate plan properly carried out the testator's wishes.

Indeed, there are some practice settings where a competent, in fact, outstanding lawyer might generate little or no meaningful written work product. A trial lawyer, civil or criminal, frequently depends on her or his ability to "think on her/his feet," depending on others to do the preparatory work, such as drafting the jury instructions, trial briefs, and verdict forms necessary to try a case. Is that person unqualified to practice law if she or he rarely prepares a brief or other submission longer than 3-4 pages?

In addition, if the object is to determine if an applicant is *presently* qualified for admission to practice, it is not clear what the justification would be for requiring the submission of work product that is up to thirteen years old. Such work product would show the level of the applicant's skill and analysis thirteen years ago, at a time when the applicant would not have been eligible to apply for admission on motion even if she had graduated from an ABA-accredited school. Moreover, the requirement that the applicant produce work product from each year of practice for ten years, perhaps designed to be comprehensive or to test the depth of the applicant's experience, places a disproportionate emphasis on what the lawyer did many years ago rather than the work the lawyer is capable of producing at the time of admission. Further, lawyers frequently do not take their work product with them when they leave an employer

and many files more than six years old may be destroyed in the ordinary course of business.

From the perspective of the lawyer discipline system, competency is less often a concern than the ability to manage a law practice, which deficiencies are a frequent cause of lawyer discipline. The admissions process for graduates of unaccredited law schools would be better served by requiring additional references and devoting available MBLE resources to interviewing those references regarding a lawyer's competency and ethical conduct rather than attempting to evaluate written work product.

In the RPC Committee's assessment, the written work product requirement is cumbersome, unnecessary, and in many cases unrealistic. It places a substantial burden on the applicant and on the MBLE's staff. If the assessment is to be done by MBLE Board members themselves, it is even more onerous. If a "written work product" requirement is to be imposed, it should be limited to a relatively small number of recent examples. Perhaps a requirement of a number of total pages could be imposed, with the applicant able to supply work with a series of short pieces instead of one or two magnum opuses.

MBLE, in making its character and fitness determinations, relies on evidence from others. The applicant for admission is required to list references, people with a knowledge of the applicant's character and fitness. In the RPC Committee's assessment, the same process should be used to measure whether an applicant who

has graduated from a non-ABA accredited law school has demonstrated the ability to successfully practice law in another jurisdiction.

Toward this end, an applicant should be required to list a meaningful number of other people who have been in a position to observe the work of the applicant and assess and describe whether the applicant has the knowledge, analytical skills and character to successfully practice law. The application form should specify that the observers identified by the applicant can be supervisors, adversaries, subordinates, judges, administrators, court clerks or even law partners. If the applicant has been in private practice, the applicant's legal malpractice insurer should be a source of information. Since the bar disciplinary authority in the jurisdiction where the applicant has practiced will be contacted to determine whether the applicant has experienced disciplinary problems, an inquiry can be made as to whether issues have been raised as to the applicant's competence. The important criterion is that references be able to provide information about the applicant's legal work. MBLE staff, it its vetting of the applicant, should communicate directly with each person designated, both in writing and by telephone or in person to obtain a confidential assessment of the applicant's work and character.

III. CONCLUSION

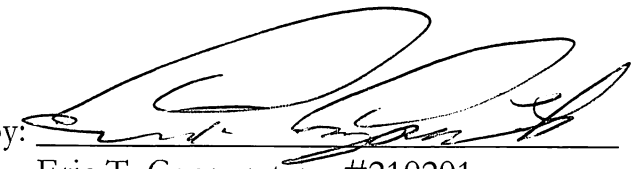
In reviewing proposed Rule 20 and the amendments to Rule 7(A), the RPC Committee has not taken lightly the gravity of the task assigned to MBLE: to devise a method of admission to the bar for lawyers lacking a qualification that, until now, has

been immutable and still carry out MBLE's mission to ensure that the public is protected from incompetent lawyers. Nevertheless, the RPC Committee believes that the present proposals are so restrictive that they risk preventing most or all such potential applicants from successfully applying for admission to the bar in Minnesota. The RPC Committee recommends to this Court that the years of practice requirement be reduced to five of seven years, that the work product requirement be curtailed or eliminated, and that the Court deny MBLE's request to amend the language of Rule 7(A)(3).

Respectfully submitted

MINNESOTA STATE BAR ASSOCIATION
RULES OF PROFESSIONAL CONDUCT
COMMITTEE

Dated: Dec. 23, 2010

By: 

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