SUMMARY

The District of Columbia Court of Appeals has proposed amending its rules on unauthorized practice of law and appearances pro hac vice in the following ways:

1. Lawyers who are licensed in another jurisdiction, but who are not members of the D.C. Bar, would be allowed to represent clients pro hac vice before District of Columbia agencies.

2. Notwithstanding that provision, a lawyer could not appear pro hac vice before District courts or agencies if he or she maintains a law office in the District of Columbia, unless he or she qualifies for admission to the D.C. Bar on waiver and has a membership application pending.

3. A lawyer seeking leave to appear pro hac vice in any court or agency proceeding would be required to pay a $30 fee.

4. The rules governing proceedings before the Committee on Unauthorized Practice of Law would specify that agreements or consent orders terminating a case can require restitution of the clients' fees and that the Committee may refer cases to the U.S. Attorney for investigation and possible prosecution. The rule dealing with pro se appearances before the Court would clarify that a respondent's right to appear pro se in court proceedings does not include the right to appear on behalf of other parties.

The Section on Courts, Lawyers and the Administration of Justice is filing comments in support of these provisions, with the exception of the proposed fee, which it believes should be lowered generally and waived entirely in the case of lawyers from public agencies who have not yet been admitted to the D.C. Bar.

BEFORE THE
DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR REGARDING PROPOSED AMENDMENTS TO RULES 47 AND 49 (PROCEEDING NO. M-161-87)

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31 August 1987

* Not participating in the preparation of these comments.

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."

BEFORE THE
DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS,
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OF THE DISTRICT OF COLUMBIA BAR REGARDING
PROPOSED AMENDMENTS TO RULES 47 AND 49
(PROCEEDING NO. M-161-87)

By an Order filed 14 July 1987, the Court invited public comment on proposed revisions of its Rules 47 and 49, which deal with pro hac vice practice and procedures in unauthorized practice of law cases. In response to that Order, the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar is pleased to submit the following comments.

The proposed amendments would change existing rules in the following ways:

1. Rule 49(c)(1) would be amended to state that lawyers who are licensed in another jurisdiction, but who are not members of the D.C. Bar, may nonetheless represent clients pro hac vice before District of Columbia agencies.

2. Notwithstanding that provision, a lawyer could not appear pro hac vice in District courts or before District agencies if he or she maintained an office for the practice of law in the District of Columbia, unless he or she qualifies for admission to the D.C. Bar on waiver and has a membership application pending.

3. Rule 49(c)(1) would be further amended to state that a lawyer seeking to appear pro hac vice in any court proceeding would be required to pay a $30 fee.

4. Rule 49(e)(5), which governs proceedings before the Committee on the Unauthorized Practice of Law would be amended to

specify that agreements or consent orders terminating a case can require restitution of the clients' fees and that the Committee may refer cases to the U.S. Attorney for investigation and possible prosecution. Rule 47(c), which deals with pro se appearances before the Court, would clarify that the right of a respondent to appear pro se in proceedings before the Court does not include the right to appear on behalf of other parties.

We respond to each proposal in turn, using the numbering set forth above.

1. We support amending Rule 49 to specify that lawyers who are not admitted to the D.C. Bar and who seek to represent clients before District agencies may be admitted pro hac vice for that purpose. The Court's Rules are silent on this point, and the rules of practice at District agencies vary. In preparing these comments, we surveyed those rules and identified only two agencies which have addressed this issue explicitly. The Contract Appeals Board allows parties from another jurisdiction to be represented by a lawyer licensed in that jurisdiction, 27 D.C.M.R. § 112.2, and the Public Service Commission allows a party to be represented by a member of the D.C. Bar or an attorney admitted to another jurisdiction if that attorney does not have a District of Columbia office, 15 D.C.M.R. § 110.3. A number of other agencies have rules which allow parties to be represented by counsel (as well as lay advocates), but say nothing about whether counsel must be a member of the D.C. Bar (though we note that under Rule 49(b)(2), the Court has defined "counsel" as an active member of the D.C. Bar).

We understand that the proposed amendment attempts to remedy a situation by which lawyers who practice in other states are denied an opportunity to represent clients before District agencies because they are not members of the D.C. Bar. This amendment would make it clear that they may seek to appear pro hac vice in agency cases without encountering unauthorized practice of law problems.

2. We also support the proposal to bar pro hac vice appearances by lawyers who maintain a law office in the District of Columbia, but who are not members of the D.C. Bar. Particularly when one considers that the requirements for admission to the D.C. Bar are less burdensome than the requirements in other jurisdictions, it is not unreasonable to require people who have opened a law office in the District and who wish to act as lawyers for clients in District courts or agencies to be members of the D.C. Bar. In addition, the pro hac vice rule is designed for the exceptional case and should not be used as a means to circumvent bar membership requirements.

One aspect of the proposal requires clarification. A number of law firms in the District also have offices in other cities, and there are times when a lawyer from an out-of-town office may be asked to handle a particular case for a particular client -- the classic pro hac vice situation. The proposed rule is not clear on whether such lawyers would be regarded as "maintain[ing] an office for the practice of law in the District of Columbia," thus rendering them ineligible to appear pro hac vice unless they have filed an application for admission to the D.C. Bar. We

believe that the rule should be clarified to permit those types of appearances.

Finally, we would note that in making these comments, we are aware of pending proposals to amend the requirements for admission to the D.C. Bar without examination. If the Court should adopt a proposal which significantly restricts current requirements, we believe it would be necessary to re-evaluate this proposal as well.

3. We are less certain of the desirability of a $30 fee for pro hac vice motions in court cases as well as agency proceedings. We understand that the fee is designed to cover the costs that will be incurred by Bar Counsel in investigating and processing complaints against individuals appearing pro hac vice, but we question whether it should be as high as the Court has proposed.

It is possible that the other reforms being made in these Rules will limit the number of lawyers appearing pro hac vice and thus the number of complaints filed by citizens who employ unlicensed individuals. We believe that a better approach would be to set the cost initially at $10 and request the Board of Governors or Bar Counsel to make a recommendation about a more appropriate fee level once experience has been gained with the new rules.

We understand that the bulk of the citizen complaints involve individuals who are not members of the D.C. Bar, but who regularly practice here nonetheless on a pro hac vice basis. As drafted, the proposed fee would apply to them as well as many

other attorneys who appear on a one-time basis and who may generate no complaints to Bar Counsel. Also, there may be a difference in whether the complaints arise from people appearing before agencies, as opposed to people seeking leave to appear in court cases which may warrant a different fee structure. For these reasons, we urge the Court to reconsider the matter before issuing the rules in final form.

On a related subject, the proposal contemplates that the fee must be paid even when a lawyer has filed an application for admission to the D.C. Bar and is waiting to be admitted. It would seem desirable to waive whatever fee is assessed in a narrow category of situations, namely, those cases where an appearance is entered by lawyers from a public agency, such as the Corporation Counsel, the Public Defender Service or a legal aid organization. Such organizations have a heavy case load, and new lawyers may be assigned to handle a number of matters while awaiting their admission to the Bar. Particularly in civil cases involving the rights of indigents, we believe that such a fee would be inappropriate.

4. We support the proposal to make restitution an explicit remedy that is available in unauthorized practice of law cases, along with the language specifying that the Committee may refer to the U.S. Attorney any cases where the conduct at issue may constitute a violation of criminal law, such as fraud or theft. These appear to be useful additions to the current rules.

Section Guidelines

B. Filing Amicus Curiae Briefs

A Section steering committee is authorized to express the views of a Section by filing amicus curiae briefs with any federal or local court on matters which either (1) relate closely and directly to the administration of justice or (2) come within the Section's special expertise and jurisdiction, subject to compliance with the procedural requirements of subsections (a)(i)-(vii) above, or, in an emergency, with subsections (a)(viii)-(ix) above.

C. Filing Comments on Proposed Court Rules Changes

A Section steering committee is authorized to express the views of a Section or, if adopted by the Board of Governors, the views of the D.C. Bar, by filing comments on proposed local court rules changes in the two local and two federal courts in the District of Columbia, on the federal rules in any federal court, and on any proposed change in any of the federal rules of procedure with the Administrative Office of the United States Courts or any other of its advisory committees, subject to compliance with the procedural requirements of subsections (a)(i)-(vii) above, or in an emergency, with subsection a)(viii)-(ix) above, provided, however, that:

i. If a Section or Bar committee desires to formulate comments, one of its members shall contact the Section IV Committee on Court Rules, which acts as a clearinghouse for D.C. Bar comment on particular proposed changes. Sections and Bar committees may participate in the comment process of the Section IV Committee on Court Rules, or may initiate their own in the event that differing opinions evolve, or Section IV indicates that it may not file comments. If the Board and the Section differ on a proposal, each may submit its own views.

ii. The Board of Governors may request, pursuant to subsection (a)(iv), that the Section comments on proposed court rules changes be placed on the Board agenda only if (a) the proposed rule is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VI, Section 1, should be called or (b) the proposed rule affects the practice of law generally, the admission of attorneys, their discipline, or the nature of the profession.

iii. If the comments of the Section on a proposed court rules change is placed on the agenda of the Board of Governors, the Board may adopt the comments as the Board's own views, in which case no mandatory disclaimer (see Guideline No. 14) need be placed on the comments. If the Board and the Section differ on the proposal, each may submit its own views.

D. Other Public Comments Falling Outside Categories "a", "b", or "c" Above

(i) A Section steering committee is authorized to express the views of a Section or, if adopted by the Board of Governors, the views of the D.C. Bar on any matter other than legislation or as amici, subject to compliance with the procedural requirements of subsections (a)(i)(viii) above. If the Board adopts the comments as the views of the Bar, no disclaimer (see Guideline No. 14) need appear thereon.

14. MANDATORY DISCLAIMER REQUIRED FOR DIVISION REPORTS AND PUBLIC STATEMENTS

All reports, recommendations, comments (including comments on legislation), and public statements prepared and issued by Sections must display the names of all committee members contributing to the report and the following disclaimer on the cover page:

> "The views expressed herein represent only those of the Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."

Where a Section is expressing its views through a public statement or letter, in addition to the standard disclaimer, the names of the committee members responsible for such statement or letter must appear at the end of the statement or letter.

In the case where the Board has disapproved comments of the Section on legislation or as amici, the following "disapproval disclaimer" must be displayed in the first paragraph and on the cover page of each report, recommendation, public statement, and comment as prescribed by Guideline 13(a)(ix):

> "These views are being presented only on behalf of the Section of the District of Columbia Bar. The Board disapproved the taking of a position on this matter at its . . . meeting because these views do not relate closely and directly to the administration of justice or [involve matters which are primarily political] or [as to which evaluation by lawyers would not have particular relevance]."

The District of Columbia Bar

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November 12, 1985

Honorable Aubrey E. Robinson, Jr.
Chief Judge
United States District Court
for the District of Columbia
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Chief Judge Robinson:

Two Divisions of The District of Columbia Bar -- the Division on Courts, Lawyers and the Administration of Justice and the Litigation Division -- have submitted comments on proposed changes to the Local Rules of the District Court. Both Divisions oppose Proposed Rule 104 governing practice by attorneys in the District Court but for different reasons.

The Courts, Lawyers and the Administration of Justice Division opposes the proposed Rule and urges maintenance of the status quo, which it interprets as permitting, without the joining of local counsel, practice in our District Court by Virginia and Maryland lawyers who have an office in a contiguous area, even if the federal district court in the contiguous area does not provide that same degree of reciprocity to our attorneys.

The Litigation Division supports the existing rule "and its consideration of reciprocity." It believes Proposed Rule 104 would both encourage the continuation of restrictive rules the federal courts in some contiguous areas now have and denigrate the standards and practices of our own federal district court.

The Litigation Division suggests establishment (by agreement) of a reciprocal practice under which members of The District of Columbia Bar who are members of the bar of the District Court be permitted to practice in federal court in Maryland or Virginia without local counsel, while practitioners in Maryland or Virginia who are members of the bar of the federal court there be permitted to practice here on the same basis.

The Board of Governors of The District of Columbia Bar discussed this entire matter at length at its meeting of October 8, 1985. While the Board ended up taking no position on Proposed Rule 104 or the current rule governing the practice of attorneys in the District Court, the Board did ask me to write you to express its concern about the serious problem highlighted by our two Divisions. The Board asked me also to convey its view in favor of an expansive rather than a restrictive standard as to which lawyers should be permitted to practice before the United States District Court for the District of Columbia and in favor of reciprocity of practice between our District Court and the corresponding courts of our neighboring jurisdictions. The Board also believes, as do I, that the most productive approach would be for you representing your Court to initiate discussion with your counterparts in Virginia and Maryland toward this end.

It is clear that the courts in the District of Columbia historically have had a much more tolerant and generous policy regarding practice before them than have our neighbors. To the extent that the Board of Governors speaks for the Bar, the Bar would like the District Court to continue that policy, and, at the same time, to encourage the courts of our contiguous jurisdiction to ease their policies governing the practice of attorneys before them. While we have suggested that a dialogue seeking to reach that objective be initiated by the Court, if you think the Bar can be of service in the effort, we stand ready to help.

Sincerely,

Frederick B. Abramson

Frederick B. Abramson
President

cc: The Honorable Harold H. Greene
Jacob A. Stein, Esq.
Paul L. Friedman, Esq.
Members of the Board of Governors
Ellen Bass, Esq.
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