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Another Tile in the “Jurisdictional Mosaic” of Lawyer Regulation: Modifying Admission by Motion Rules to Meet the Needs of the 21st Century Lawyer

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Another Tile in the “Jurisdictional Mosaic”¹ of Lawyer Regulation: Modifying Admission by Motion Rules to Meet the Needs of the 21st Century Lawyer

ABIGAIL L. DEBLASIS²

Can practicing law on a less than "full-time" basis hinder a lawyer's future mobility? The answer depends on which jurisdiction you ask. A parent who is considering a reduced hours schedule for family reasons or a recent graduate whose only option is part-time work should know that these choices may impact future mobility.

This Article provides an in-depth exploration of the current admission by motion rules, which are the rules that allow a lawyer who is already licensed and practicing in one jurisdiction to be admitted in another jurisdiction without having to take that jurisdiction's bar exam. These rules are of great necessity in the modern world given the need for mobility. The rules require that an applicant have been practicing law for some stated period of time in the original jurisdiction, assuming that these years in practice will ensure the applicant has minimum competence to practice in the same way that passing a bar exam ensures minimum competence. For example, a rule may require that the applicant have been actively engaging in the practice of law for five of the seven years immediately preceding her application for admission by motion. A troubling aspect of some jurisdictions' rules is the requirement of "full-time" prior practice.

The Article started out with a concern that lawyers, especially female lawyers, who work less than full-time for family or other reasons were significantly disadvantaged by the requirement of "full-time" prior practice. Of particular concern was that while some rules required full-time prior practice, they also allowed the applicant some “grace period” during which the applicant need not have practiced law at all. Even though the rules provided this grace period, they did not provide a part-time equivalent, thereby essentially preferring that a working parent drop out of practice entirely (during the grace period) rather than return to work on a less than full-time basis.

1. Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91, 95 (2003) (“The United States is a jurisdictional mosaic of fifty-three states and territories with fifty-three systems of practice regulation.”).

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Although the Article started there, it does not end there. In addition to providing an Appendix with the specific requirements of each of the 42 jurisdictions that currently allow admission by motion, it also draws upon recent trends in other admission rules to question not only those jurisdictions that require “full-time” prior practice experience, but to raise questions about whether a lengthy prior practice is the appropriate proxy to ensure an applicant’s minimum competence to practice in another jurisdiction.

In the end, the Article hopes to persuade for immediate, incremental improvements in the admission by motion rules that account for modern law practice and ensure working parents and more recent generations of lawyers who work less than full-time are not made immobile as a result.

I. HISTORY, PURPOSES, AND RECENT TRENDS IN ADMISSION BY MOTION RULES	214
A. HISTORY	214
B. PURPOSES	218
C. RECENT TREND IN ADMISSION BY MOTION FOR MILITARY SPOUSES	221
II. THE “JURISDICTIONAL MOSAIC” OF TODAY’S ACTIVE PRACTICE REQUIREMENTS	226
A. DURATIONAL COMPONENT	228
B. EXTENT OF PRACTICE REQUIREMENTS.....	230
III. PROBLEMS WITH TODAY’S ACTIVE PRACTICE REQUIREMENTS	242
A. INCONSISTENCY AND LACK OF CLARITY IN CURRENT ACTIVE PRACTICE REQUIREMENTS	243
i. Inconsistency	243
ii. Lack of Clarity.....	245
a. Rules That Expressly Require “Full-Time” Practice and Include Hourly Requirement.....	245
b. Rules that Expressly Require “Full-Time” Practice without Hourly Requirement.....	246
c. Rules that do not Expressly Require “Full-Time” Practice but Include Hourly Requirement.....	247
d. Rules that Rely on a Different Qualifier	247
B. HARSH CONSEQUENCES ON PARTICULAR CATEGORIES OF LAWYERS	250
i. Impact on Female Lawyers	250
ii. Structural Shifts in the Legal Employment Market	253
a. Part-Time Legal Employment	254
b. Choosing Jurisdiction Before Job	257
IV. A PATH FORWARD	261
A. ADDRESSING THE “FULL-TIME” REQUIREMENT	262

i. Eliminate the "Full-Time" Prior Practice Requirement	262
ii. Add Clarifying Language that "Full-Time" is Not Required...	263
iii. Alternative: Provide Part-Time Equivalent.....	263
B. MEASUREMENT ISSUES	264
i. Specific Hourly Requirement	264
ii. Regular Practice Requirement and Evidence of Law Practice as Principal Occupation.....	265
C. FINAL THOUGHTS ON DURATIONAL PERIOD	267
D. PROPOSED REVISIONS TO THE ACTIVE PRACTICE REQUIREMENT OF THE ABA MODEL RULE.	267
CONCLUSION	268
APPENDIX A: ADMISSION BY MOTION RULES	269

No two states have an identical approach to lawyer admission rules. This "jurisdictional mosaic"³ of lawyer regulation is nothing new. However, with the increasing need for geographic mobility and recent structural changes in the legal employment market showing an increased likelihood that a lawyer will work a reduced hours schedule during her career,⁴ navigation of this mosaic is becoming more important than ever. This Article will address one piece or tile of this "jurisdictional mosaic" that demands attention: the admission by motion rules of certain jurisdictions that require a lawyer who is licensed in one jurisdiction to have practiced on a "full-time" basis for a stated period of time in order to become licensed in another jurisdiction without taking an additional bar exam.⁵ The requirement of prior "full-time" practice likely disproportionately disadvantages not only female lawyers, who are more likely than their male counterparts to work a reduced hours schedule, but also, recent law school graduates who are more likely than prior generations of lawyers to work on a part-time basis.⁶ Therefore, this Article will provide a path forward to improve the American Bar Association's *Model Rule on Admission by Motion* and meet the needs of these 21st Century lawyers.⁷

First, meet hypothetical Jim and Marcella. Both graduated Order of the Coif from an ABA-approved law school five years ago. Both took the Tennessee bar exam, passed, and started working at the same Tennessee law firm. Jim worked full-time as an employment lawyer for the first three years after getting his license, but then decided to take nearly two years off to travel the

3. Munneke, *supra* note 1, at 95.

4. See *infra* Part III.B and accompanying notes.

5. See *infra* Part II.B and accompanying notes.

6. See *infra* Part III.B and accompanying notes.

7. See *infra* Part IV.

world. He recently returned and landed his dream job at a private law firm in Virginia. Meanwhile, Marcella worked full-time as a litigator for the first year of her practice but, after her daughter was born, she decided to exchange her partnership-track associate position for an of counsel role that allowed her to work part-time (approximately 20 hours per week). She has been in her of counsel role for the past four years. However, she recently learned that the firm wants her to re-locate to one of its offices in Virginia.⁸ Both of these attorneys need to move to Virginia and obtain a permanent license to practice law from Virginia. What paths to admission for a permanent license are available to Jim and Marcella?

A lawyer who is already licensed in one United States jurisdiction can generally obtain a permanent license to practice law in another jurisdiction in the following three ways:⁹ (1) by taking and passing that jurisdiction's bar exam, (2) through bar exam reciprocity¹⁰ (i.e., by transferring one's bar exam score to an accepting jurisdiction), including by transferring one's Uniform Bar Examination ("UBE") score to another UBE jurisdiction,¹¹ or (3) by seeking admission by motion (i.e., admission without having to take the bar exam) if offered by the new jurisdiction and if the lawyer meets the requirements of the applicable rule, including the requirement that she have engaged in the practice of law for some stated period of time (the "active practice" requirement). Although jurisdictions are not required to offer admission by

8. See Mike Mosedale, *Spare the Bar Exam, Spoil the Lawyer?*, MINN. LAW. (Apr. 12, 2017), <http://minnlawyer.com/2017/04/12/spare-the-bar-exam-spoil-the-lawyer/> (describing the case of Kathleen Jane Reilly whose admission by motion application was denied by the Minnesota Board of Law Examiners on the basis that her prior practice experience did not include enough "full-time, or substantially full-time, work experience"). The Minnesota Supreme Court denied her petition for review but did order the Minnesota Board of Law Examiners to study its admission by practice rules, which the court directed should "consider how part-time work and parental leave should be treated." See Lisa Buck, *Is a Part-Time Attorney Competent?*, HENNEPIN LAW. 26 (Sept./Oct. 2017), https://www.stinson.com/Resources/PDF_Files/Is_a_Part-Time_Attorney_Compentent.aspx.

9. This, of course, is a simplified overview. All methods also require applicants to be of a certain age, to have graduated from a certain type of school, to meet the jurisdiction's character and fitness requirements, etc. Another much more-rare opportunity for obtaining a permanent license in a jurisdiction is through the "diploma privilege" pursuant to which graduation from a particular law school, among other things, qualifies the applicant for licensure in that state. See, e.g., WIS. SUP. CT. R. 40.03 (1979), <https://www.wicourts.gov/sc/rules/chap40.pdf>.

10. *Taking the Bar Exam*, HARV. L. SCH., <http://hls.harvard.edu/dept/dos/taking-the-bar-exam/#hlsnav-which-states-bar-should-i-take> (last visited July 31, 2017).

11. The applicant's UBE score can only be transferred subject to certain limitations. See *infra* Part III.B.ii.b and accompanying notes.

motion procedures¹² (and some still do not),¹³ problems exist in the current model, in part because no two admission by motion rules are alike.¹⁴

Let's return to Jim and Marcella and the paths available to them. Tennessee does not yet offer the UBE¹⁵ so Jim and Marcella cannot seek transfer of a UBE score as a method of admission without examination. Taking the bar exam in Virginia is a possible path to licensure, but one that offers significant obstacles in the form of time and expense. Virginia does offer admission by motion to attorneys who have been licensed in Tennessee,¹⁶ so

12. Jurisdictions could require every applicant to take and pass a bar exam prior to being admitted in that state. *See, e.g.,* *Attwell v. Nichols*, 466 F. Supp. 206 (N.D. Ga. 1979), *aff'd*, 608 F.2d 228 (5th Cir. 1979). "The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy; in fact, it is a power in the exercise of which the state has 'a substantial interest.'" *Morrison v. Bd. of Law Exam'rs of State of N.C.*, 453 F.3d 190, 193 (4th Cir. 2006) (citing *Hawkins v. Moss*, 503 F.2d 1171, 1175 (4th Cir. 1974) (citation omitted)).

13. The jurisdictions that do not have admission by motion rules are the following: California, Delaware, Florida, Hawaii, Louisiana, Maryland, Nevada, Rhode Island, South Carolina, Guam, Northern Mariana Islands, Palau, Puerto Rico, and the U.S. Virgin Islands. NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2017 36 (Erica Moeser & Claire J. Guback eds., 2017) [hereinafter COMPREHENSIVE GUIDE] (the Comprehensive Guide indicates that for Hawaii, South Carolina, Guam, Palau, and the U.S. Virgin Islands while "admission on motion is generally unavailable, it is permitted on a limited basis" in these jurisdictions).

14. *See* Appendix A for detailed coverage of each jurisdiction's admission by motion rules in effect as of the preparation of this Article. Note that Appendix A is limited to the 50 states and the District of Columbia. Appendix A also does not cover all aspects of admission by motion rules. For example, the Appendix does not specify or elaborate on whether each jurisdiction requires reciprocity nor does it go into great detail on what activities constitute the "practice of law" for each jurisdiction's admission by motion rules. The Appendix provides detailed information with respect to the aspects of each jurisdiction's admission by motion rules that are most relevant to the arguments made in this Article: the durational component and the extent of practice component. *See infra* pp. 6-7 and accompanying notes for elaboration on the meaning of these terms as used in this Article.

15. On October 18, 2017, the Tennessee Board of Law Examiners petitioned the Tennessee Supreme Court to adopt the UBE beginning in the July 2018 administration of the bar exam. Order, In Re: Amendment of Rule 7, Rules of the Tennessee Supreme Court, No. ADM2017-02083 (Oct. 18, 2017), http://www.tnble.org/sites/default/files/order_soliciting_comments_to_proposed_amendments_of_sct_rule_7_-_adm2017-02083.pdf (deadline for accepting written comments is January 5, 2018). On April 18, 2018, the Tennessee Supreme Court announced that Tennessee has adopted the UBE, effective in the February 2019 administration. Order, In Re: Amendment of Rule 7, Rules of the Tennessee Supreme Court, No. ADM2017-02083 (Apr. 18, 2018), https://www.tncourts.gov/sites/default/files/order_amending_supreme_court_rule_7_2018april18.pdf.

16. Many jurisdictions' admission by motion rules require reciprocity. In other words, jurisdiction A will only offer admission by motion to an attorney who is licensed in jurisdiction B if jurisdiction B offers a similar admission by motion procedure to attorneys licensed in jurisdiction A. Virginia's rule requires reciprocity but Tennessee is a reciprocal

long as the Virginia Board of Bar Examiners determines, “in accordance with the regulations issued by the [Virginia] Supreme Court” that the attorney has established, among other things, that the attorney “has practiced law for at least three of the immediately preceding five years and has made such progress in the practice of law that it would be unreasonable to require the applicant to take an examination.”¹⁷ The regulations that accompany the rule elaborate that the “applicant may apply for admission without examination only if the applicant has been engaged in the *full-time practice of law* for at least three (3) of the last five (5) years immediately preceding his or her application for admission to the Virginia Bar.”¹⁸ The regulation does not further define “full-time practice;” rather, it specifies that the “Supreme Court of Virginia has assigned to the Virginia Board of Bar Examiners . . . the responsibility to assess the information furnished by an applicant . . . and to determine . . . whether the applicant’s experience in the practice of law is sufficient to demonstrate his or her current competence.”¹⁹

Let’s assume Jim billed 2,000 hours per year (40 billable hours per week for 50 weeks) during his three years with the firm (a total of 6,000 hours). Since Jim worked full-time for three of the last five years, even though he has been traveling the world for the past nearly two years, his prior practice experience would likely satisfy the active practice requirement of Virginia’s rule. Marcella, on the other hand, worked full-time for only the first year of her practice in Tennessee, which we will assume was a 2,000 hour year. However, she has also been working part-time for the past four years. Assuming that she billed 20 hours per week for 50 weeks of each of her four “part-time” years, she accumulated another 4,000 hours in her part-time work. She, like Jim, worked a total of 6,000 hours, although her hours were gained over the full five-year period rather than Jim’s three-year period. It is possible that Marcella could demonstrate to the satisfaction of the Board that her prior practice, even though a majority of it was part-time, shows she has “made such progress in the practice of law that it would be unreasonable to require” her to take another bar examination, but the “full-time” prior practice requirement of the regulations at least raises a question as to whether her experience meets the requirements of the rule. She would have to apply and wait and see. It should be noted that this Article’s inquiry is focused on the language of the rules and any accompanying regulations or policy statements

jurisdiction. *Reciprocal Jurisdictions*, VA. BOARD B. EXAMINERS (Nov. 18, 2017), <http://barexam.virginia.gov/motion/motionreciprocal.html>.

17. SUP. CT. VA. R. 1A:1(C)(3), <http://barexam.virginia.gov/motion/motionrules.html>.

18. *Regulations Governing Applications for Admission to Virginia Bar Pursuant to Rule of the Supreme Court of Virginia 1A:1*, VA. BOARD B. EXAMINERS (Aug. 1, 2017) (emphasis added), <http://barexam.virginia.gov/motion/motionrules.html>.

19. *Id.*

from the governing authorities. An empirical analysis of the rule as applied by the boards in their discretion is saved for another day.

The possibility that Jim and Marcella could obtain different results raises questions about whether the contours of some states' active practice requirements have struck the proper balance between protecting the public from incompetent lawyers, on the one hand, and ensuring lawyers have sufficient mobility and are treated equitably, on the other. The questions, however, go beyond a single jurisdiction's borders, because a similar fact pattern could produce different results depending on which jurisdiction's rules applied. For example, the result could be different if Jim and Marcella were moving to Arizona instead of Virginia,²⁰ or if Marcella had taken the UBE,²¹ or if Marcella was married to a military serviceperson who was transferred to a jurisdiction where Marcella was not licensed.²² We have now entered the "jurisdictional mosaic"²³ of admission by motion rules.

Let's pause for a bit of vocabulary that frames this mosaic. First, all jurisdictions that offer admission by motion have an "active practice requirement" (sometimes referred to as a "previous practice" or "prior practice" requirement) and will only consider an application if the attorney has been engaged in the practice of law in another jurisdiction or jurisdictions *for some stated period of time*. That period of time may be five out of the seven years immediately preceding the date of the application for admission by motion, or it may be five out of the prior ten years, or it may be something else.²⁴ For purposes of this Article, that time period will be referred to as the "durational component" or the "durational period" and the period of time that the rule provides that the lawyer could be out of practice (i.e., two out of the seven year period), the "grace period."

Layered on top of the durational component is another requirement that exists explicitly in many jurisdictions' rules.²⁵ This requirement speaks to *the extent to which* an attorney must have been engaged in the practice of law during the durational period. For example, a rule may require that, during the durational period, the attorney must have been engaged in the "full-time" practice of law, have been "regularly" or "continuously" or "substantially" engaged in the practice of law, or have engaged in the practice of law as her "principal business or occupation."²⁶ This requirement will be referred to as

20. See *infra* Part II.B and accompanying notes.

21. See *infra* Part III.B.ii.b and accompanying notes.

22. See *infra* Part I.C and accompanying notes.

23. Munneke, *supra* note 1, at 95.

24. See Appendix A.

25. See *id.*

26. See *id.*

the “extent of practice component.”²⁷ Although admission by motion rules can vary in many respects,²⁸ this Article’s focus is on the durational component and extent of practice component of the active practice requirement.²⁹

This Article started out with a concern that lawyers, especially female lawyers, who work less than full-time for family or other reasons were disproportionately disadvantaged by the admission by motion rules of those jurisdictions that require an applicant to have worked “full-time” during the durational period. Of particular concern was that while some rules require full-time prior practice, they also allow the applicant some “grace period” during which the applicant need not have practiced law at all. Even though the rules provide this grace period, they do not provide a part-time equivalent, thereby essentially preferring that a working parent drop out of practice entirely (during the grace period) rather than return to work on a less than full-time basis. Although this Article started there, it does not end there. It now draws upon recent trends in other admission rules to question not only those approaches that require “full-time” prior practice experience, but to raise questions about whether a lengthy prior practice is the appropriate proxy to ensure an applicant is not a risk to the public.³⁰

27. The durational component together with the extent of practice requirement could be referred to as the “previous practice” requirement. See Jack P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 *FORDHAM L. REV.* 2635, 2640, 2644 (2014) (citing Mary B. Cranston, Am. Bar Ass’n Comm’n on Women in the Profession, Report 8 (2012), <http://lawyerist.com/lawyerist/wp-content/uploads/2012/04/ABA+108+Fn1.pdf>).

28. For example, admission by motion rules can vary in the following ways: with respect to whether the rule requires reciprocity; whether applicants are required to complete some additional state-specific CLE requirements prior to admission by motion; what activities constitute the “practice of law” for purposes of the rule; and where the “practice of law” must have occurred in order to satisfy the active practice requirement. See *infra* notes 89-92 and accompanying text.

29. Other definitional approaches exist. For example, Cindy Reams Martin and Kellie Early use the following definitional scheme: “[T]he ‘active practice’ (sometimes articulated as a ‘full-time practice’) eligibility criterion . . . typically includes three components: (i) a requirement that an applicant have engaged in the full-time practice of law for a stated number of years immediately preceding the application (the “full-time practice component”); (ii) a requirement specifying where the full-time practice must have been performed (“the location of practice component”); and in many cases (iii) a requirement that an applicant have an active license to practice in a jurisdiction that reciprocates with respect to motion admission applicants from the application jurisdiction (the “reciprocity component.”) Cindy Reams Martin & Kellie Early, *Admission on Motion in the Era of Multijurisdictional Practice: Missouri’s Experience with “Lawful Practice” vs. “Practice Where Admitted” as Fulfilling the “Active Practice” Requirement*, B. EXAMINER, Aug. 2006, at 12, 13.

30. This background explains why this Article is not a call to eliminate state-based regulation of lawyers in favor of a national system of lawyer licensure. See Munneke, *supra* note 1, at 102 (describing some of the arguments made during the time that the Commission on Multijurisdictional Practice was conducting investigations, including arguments in favor of a “free market approach to MJP, [where] a lawyer licensed in any state should be able to practice law in every state . . . similar to a driver’s license” and another that argued for

At its base, this Article argues for uniformity with respect to the active practice requirements and it is not alone in doing so. When the ABA adopted its current Model Rule on Admission by Motion, it also adopted a resolution urging "jurisdictions that have not adopted the Model Rule . . . to do so, and urg[ing] jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule."³¹ This Article hopes to illuminate the current and disparate approaches to the active practice requirement and, in doing so, to push the conversation even further towards a uniform approach in the active practice requirement.

Part I of this Article will first discuss the history and purposes of the admission by motion rule, focusing on its active practice requirement. It will then draw upon a recent trend in lawyer admission rules related to military spouses to question whether the active practice requirement should be required at all. Part II will provide a view of the "jurisdictional mosaic" formed by the active practice requirements within current admission by motion rules. Part III will lay out the problems that exist today in light of the current rules, including the disproportionate impact some jurisdictions' active practice requirements can have on particular populations of lawyers, including working parents and recent law school graduates. Finally, Part IV will provide a path forward with a proposed revision to the ABA Model Rule.

"nationalization of the practice of law, replacing state licensing with some form of national regulation."); Eric Williams, *A National Bar – Carpe Diem*, 5 KAN. J.L. & PUB. POL'Y 201 (1996). *But see* Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 538-43 (2011) (proposing revisions to Model Rule of Professional Conduct Rule 5.5 that would present an "intermediary" approach by allowing national law practice while maintaining "significant state involvement in admissions, licensing, and disciplinary enforcement"). It explains why the Article also does not argue for radical reform to the current approach taken in the active practice requirement of admission by motion rules. I am not the first to save a challenge to the overall system of lawyer regulation for another day in favor of a more "modest" approach today. *See* Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1014 (2010) ("My goal here, however, is not directly to challenge the framework of lawyer regulation. Instead, I write to suggest an adjustment to the existing regulatory regime, setting aside, at least for the moment, any challenge to the merits of the system itself. My proposal is quite modest: In order to inform the choice implicit in rulemaking, regulation ought to be based upon sound empirical evidence").

31. MODEL RULE ON ADMISSION BY MOTION (AM. BAR ASS'N 2012) [hereinafter ABA MODEL RULE], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_admission_motion.authcheckdam.pdf.

I. HISTORY, PURPOSES, AND RECENT TRENDS IN ADMISSION BY MOTION RULES

A. HISTORY

The number of jurisdictions that allow admission by motion has fluctuated over the years. In 1930-31, 44 out of 49 licensing jurisdictions had some admission procedure that allowed lawyers to enter on motion "as long as they had practiced for a specified period in a state that granted reciprocity."³² By 1986, only 25 jurisdictions had admission by motion rules and the durational requirement, which had previously ranged from three years, to five years, to ten years, was mostly settled at five years.³³ As will be discussed in Part II below, today, 42³⁴ of 56 licensing jurisdictions³⁵ offer some form of admission by motion.³⁶

Although the practice had been around for some time, the ABA's Young Lawyers Division proposed a model rule (the "Uniform Standard for Admission of Attorneys by Reciprocity")³⁷ "calling for nation-wide reciprocal state licensing of lawyers"³⁸ to the ABA's House of Delegates in August of 1981.³⁹ The proposed rule read as follows:

Any attorney who has been admitted to practice and has been in good standing in one or more states or the District of Columbia, for not fewer than three years out of the past preceding five years shall be admitted to practice in any state without examination, provided that such attorney has complied with all other requirements for admission.⁴⁰

32. RICHARD L. ABEL, *AMERICAN LAWYERS* 116 (1989).

33. *Id.* at 116-17.

34. COMPREHENSIVE GUIDE, *supra* note 13, at 36 (indicating that the U.S. Virgin Islands does have an admission by motion rule but including a footnote that "although admission on motion is generally unavailable, it is permitted on a limited basis," which is the same footnote included for Hawaii, South Carolina, Guam, and Palau, each of which are included in the "do not have admission by motion" column. As a result, this Article will discuss the 42 jurisdictions that have admission by motion rules that are generally available).

35. Includes each of the 50 states, the District of Columbia, and the following additional jurisdictions: Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. COMPREHENSIVE GUIDE, *supra* note 13, at 36.

36. *See infra* Part II and accompanying notes.

37. Jerome C. Hafter, *Toward the Multistate Practice of Law through Admission by Reciprocity*, 53 *MISS. L.J.* 1, 16 (1983).

38. Bill Winter, *Reciprocal Licensing Defeated by House*, 67 *AM. BAR ASS'N J.* 1100, 1100 (1981).

39. Jane H. Barrett, *Breaking the Barrier to Relocation Through Reciprocal Admission to the Bar*, 8 *BARRISTER* 1, 1 (1981); *see also* Hafter, *supra* note 37, at 16.

40. Hafter, *supra* note 37, at 16.

The proposal was defeated.⁴¹

Nearly twenty years later, in 2000, recognizing the significant changes that were occurring in legal practice as a result of technology and transportation,⁴² then-ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice to "[r]esearch, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law;" and to "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest."⁴³ The needs of clients, who were becoming increasingly multijurisdictional and even international, were changing and lawyers needed to become practice-area specialists rather than generalists in matters of state law.⁴⁴ As a result, the then-current "unauthorized practice of law" rules were in need of evaluation and revision.⁴⁵

One of the Commission's recommendations included a proposed *Model Rule on Admission by Motion*.⁴⁶ Recognizing that "some lawyers would exceed a host state's tolerance for temporary practice" under the multijurisdictional practice proposals,⁴⁷ the Commission proposed this Model Rule, which addressed two situations: first, the attorney who is licensed in one state and plans to move to another state, where she is not licensed, to establish a permanent law practice and second, the attorney who plans to practice on a regular basis in at least two jurisdictions.⁴⁸ The Model Rule provided that an attorney who met certain enumerated requirements could be admitted by motion into another jurisdiction without having to take that jurisdiction's bar examination.⁴⁹

One of the enumerated requirements was that the lawyer must "have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the [applicant filed an application to be admitted by motion in another jurisdiction]."⁵⁰ While the rule defined the

41. Winter, *supra* note 38, at 1100.

42. A.B.A. CTR. PROF. RESP., CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 3 (2002), https://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf [<https://perma.cc/V8QP-9PQZ>] [hereinafter CLIENT REPRESENTATION].

43. *Id.* at 1; see also Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 138 (2004) [hereinafter *Bar Against Competition*].

44. CLIENT REPRESENTATION, *supra* note 42, at 3.

45. *Id.*

46. *Id.* at 49-52.

47. Munneke, *supra* note 1, at 118-19.

48. CLIENT REPRESENTATION, *supra* note 42, at 5, 52.

49. *Id.*

50. *Id.* at 49. As stated, the rule provided that the attorney need not have been engaged in the active practice of law for the entire seven-year durational component. Rather, so long

activities that would constitute the “active practice of law,”⁵¹ the Model Rule did not state whether a lawyer was required to be engaged in the practice of law on a full-time basis during that time period.⁵² It also did not appear to prohibit such a reading. Rather, it required only that the lawyer “have been *primarily* engaged in the active practice of law.”⁵³

Two of the other enumerated requirements ensured that the applicant had not been the subject of disciplinary action while licensed in the other jurisdiction by requiring that the applicant “establish that the applicant is currently a member in good standing in all jurisdictions where admitted, [and that] the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction.”⁵⁴ The House of Delegates approved the adoption of the Model Rule on August 12, 2002.⁵⁵

Ten years later,⁵⁶ the House of Delegates, at the behest of the ABA Commission on Ethics 20/20,⁵⁷ adopted an amendment to the Model Rule that reduced the durational component in order to “allow lawyers to qualify for admission by motion at an earlier point in their careers.”⁵⁸ Under the

as he was primarily engaged in the active practice of law for five of those seven years, he could be admitted. *Id.*

51. Those activities include the following: “[r]epresentation of one or more clients in the practice of law; service as a lawyer with a local, state, territorial or federal agency, including military service; teaching at a law school [approved by the ABA]; service as a judge in a federal, state, territorial or local court of record; service as a judicial law clerk; or service as corporate counsel[.]” *Id.* at 49-50.

52. CLIENT REPRESENTATION, *supra* note 42, at 49.

53. *Id.* (emphasis added).

54. *Id.*

55. *Id.* at ii; *see also* Munneke, *supra* note 1, at 118-19 (stating that this Model Rule (Resolution 201G as proposed by the Commission) was “the only controversial resolution” discussed at the House of Delegates meeting on August 12, 2002 because of the argument by the ABA’s Section of Legal Education and Admission to the Bar that the rule would be used “as a vehicle for graduates of non-ABA approved law schools to gain admission to practice.”). The final rule as proposed to the House included a requirement that lawyers could only be admitted by motion if they had graduated from an ABA-approved law school. Munneke, *supra* note 1, at 118-19. An amendment to strike that language failed and a divided House adopted the Resolution by vote of 277-150. *Id.*

56. The ABA Model Rule was also amended in 2011, but those amendments are not relevant to the active practice requirement. For the curious, the amendment eliminated provisions that prohibited corporate counsel and judicial clerks from “counting” practice performed in the jurisdiction where admission by motion was sought. *See* MODEL RULE ON ADMISSION BY MOTION (2011) (AM. BAR ASS’N, amended 2012), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20120201_legealed_model_rule_on_aom.authcheckdam.pdf [<https://perma.cc/XJ87-9LZU>].

57. Debra Cassens Weiss & James Podgers, *Clean Sweep: House of Delegates Approves Ethics 20/20’s Full Slate*, Am. Bar Ass’n J., Sept. 2012, 59.

58. ABA Comm’n on Ethics 20/20, et al., *Report to the House of Delegates*, 2012 A.B.A.

https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.authcheckdam.pdf [<https://perma.cc/ZQH8-UXMB>] [hereinafter *Ethics 20/20 Report*]. The full text of the ABA Model Rule of Admission on Motion is as follows:

ABA Model Rule on Admission by Motion (as amended August 6, 2012):

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

(a) have been admitted to practice law in another state, territory, or the District of Columbia;

(b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;

(c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for three of the five years immediately preceding the date upon which the application is filed;

(d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

(e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;

(f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and

(g) designate the Clerk of the jurisdiction's highest court for service of process.

2. For purposes of this Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational component:

(a) Representation of one or more clients in the private practice of law;

(b) Service as a lawyer with a local, state, territorial or federal agency, including military service;

(c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judge in a federal, state, territorial or local court of record;

(e) Service as a judicial law clerk; or

(f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

revised Model Rule, which is the current version of the Rule, a lawyer can be admitted by motion in another jurisdiction if she has “been primarily engaged in the active practice of law . . . for three of the five years immediately preceding” her application, instead of the prior rule’s requirement of five years of the last seven.⁵⁹

As of 2012, the ABA Commission on Ethics 20/20 reported that “there [was] no evidence that lawyers admitted by motion . . . [were] more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted through more traditional procedures.”⁶⁰

B. PURPOSES

In order to determine whether the admission by motion rules are in need of clarification or revision, the first question that must be asked is the following: Why do the admission by motion rules exist at all? This section will highlight the main purpose of the rules, which is to protect the public from incompetent lawyers, and it will also suggest a new paradigm for understanding the approach taken by the ABA in its Model Rule. When the admission by motion rules are analyzed through this paradigm, the extent of practice components of many current admission by motion rules come into question.

A lawyer is generally prohibited from providing legal services (other than on a temporary basis subject to certain restrictions)⁶¹ in a jurisdiction in which the lawyer is not licensed to practice.⁶² If she provides legal services in violation of these rules, she has engaged in the unauthorized practice of law (“UPL”), and the sanctions imposed could range from professional discipline to criminal penalties.⁶³ The admission by motion rules, where

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this Rule shall not be eligible for admission on motion.

ABA MODEL RULE, *supra* note 31.

59. *Id.* (emphasis added); see also *Ethics 20/20 Report*, *supra* note 58, at 1.

60. *Ethics 20/20 Report*, *supra* note 58, at 2.

61. See MODEL RULES OF PROF'L CONDUCT r. 5.5(c) (AM. BAR ASS'N 2016) (regarding the ability of a lawyer who is admitted in one United States jurisdiction to provide services on a temporary basis in another jurisdiction).

62. MODEL RULES OF PROF'L CONDUCT r. 5.5(a) (AM. BAR ASS'N 2016) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”).

63. James W. Jones et al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 135-39 (2017). Although it has been sixteen years since the ABA adopted the revised version of Model Rule 5.5, which included the multijurisdictional practice provisions, Model Rule 5.5 has not been uniformly adopted; forty-three

adopted, are intended to provide a means by which a lawyer can become licensed in another jurisdiction and avoid engaging in the unauthorized practice of law without having to sit for another bar exam.

That answer begets another question: Why do the UPL restrictions exist? According to the comments to ABA Model Rule of Professional Conduct 5.5, the UPL restrictions are intended to "protect[] the public against rendition of legal services by unqualified persons;"⁶⁴ and to "preserve [one of] the 'core values' of the profession—i.e., that clients should receive ethically competent legal services from their attorneys."⁶⁵

A similar purpose could be assigned to the active practice requirement. Courts have described the requirement as one of "protect[ing] the state's 'valid interest in admitting individuals to the bar who have an acceptable level of professional ethics and knowledge,'"⁶⁶ "ensur[ing] that [licensed

states have adopted some form of the rule, but their versions differ and in some significant ways. *Id.* at 131, 140; *see also* Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 *FORDHAM L. REV.* 2761, 2788 (2014) ("Penalties for UPL violations . . . vary from state to state, some with overlapping sanctions: civil injunctions in thirty-two states; criminal fines in twenty-four; prison sentences in twenty; civil contempt in twenty-two; restitution in sixteen; and civil fines in thirteen.").

64. MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2016); *see also* SUP. CT. VA. R. 1A:1 (Regulations Governing Applications for Admission to Virginia Bar Pursuant to Rule of the Supreme Court of Virginia) (stating that the "primary purpose of the Virginia Bar Examination is to determine whether an applicant is able to demonstrate his or her current minimum competency to engage in the general practice of law in Virginia," and that the admission by motion rules exist so that "an applicant's experience in the practice of law may, at the discretion of the Court, be accepted as adequate evidence of current minimum competency in lieu of the bar examination.").

65. Nicholson, *supra* note 63, at 2789. For a lengthy elaboration on how courts explain the states' interest in regulating attorney admission, *see generally* Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 *KAN. L. REV.* 453, 465-67, 466 n.65 (1997). According to others, however, the UPL restrictions and other "structural regulations" that relate to the ways in which lawyers "conduct the business aspects of their practices" exist for other "unsatisfactory" reasons, like "protect[ing] the bar's economic well-being." Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 *FLA. L. REV.* 977, 980-81, 1010 (2003) (arguing that "although lawyers tend to lump their self-regulatory efforts under the rubric of professional responsibility, one can discern two distinct categories within the rubric . . . representational rules, such as conflict of interest and confidentiality provisions, that govern attorney conduct in the context of law practice . . . and structural regulations . . . such as the thirty day solicitation rule and limitations on non-lawyer practice [that] affect the contours of the legal profession itself and the ways in which lawyers conduct the business aspects of their practices.") (internal citations omitted). *But see In re Yanni*, 697 N.W.2d 394, 398 (S.D. 2005) ("Our court rules [relating to attorney admission] were adopted to protect the public from those unfit to practice the law, not to create a monopolistic property interest in the practice of law.") (citing *State ex rel. Rice v. Cozad*, 16 N.W.2d 484, 486 (S.D. 1944)).

66. *Spencer v. Utah State Bar*, 293 P.3d 360, 369 n.48 (Utah 2012) (citing *In re Stormont*, 712 P.2d 1279, 1281 (Kan. 1986)).

attorneys] have *current* and *substantial* legal experience;”⁶⁷ and “protect[ing] the public from incompetent and dishonest lawyers.”⁶⁸ In essence, if the lawyer “has regularly engaged in the practice of law, as a chief means of earning the lawyer’s living over a period of years, [she] has sufficient legal knowledge to demonstrate at least minimum competence; hence, it is not necessary to apply the rigors of the full [bar] examination to make that determination.”⁶⁹

Assuming the rules exist to protect the public from incompetent lawyers, what characteristics make a lawyer sufficiently competent so that the public does not need protection from her? The ABA Model Rule on Admission by Motion answers this question, at least with respect to lawyers who have already been admitted in another jurisdiction,⁷⁰ by seeming to establish two principal criteria. First, the ABA Model Rule ensures that the lawyer has *already* demonstrated minimum competence in the jurisdiction(s) of her original licensure. It does so by requiring that she establish that she (1) obtained an appropriate degree from an appropriate law school, (2) was admitted to practice in at least one other jurisdiction, (3) is in good standing wherever admitted, (4) is not subject to disciplinary action in any jurisdiction, and (5) possess the “character and fitness to practice law” in the new jurisdiction.⁷¹

Second, once the lawyer has demonstrated such minimum competence, the ABA Model Rule, though its active practice requirement, imposes a time period during which the lawyer can establish a track record, essentially requiring a body of work from the lawyer that provides reasonable evidence that disciplinary action is not likely in the future. The track record requires that the lawyer “primarily engage[] in the active practice of law” for three years and that those three years are within the five years⁷² immediately

67. *Id.* at 369 (emphasis added).

68. *In re Green*, 464 A.2d 881, 885 (Del. 1983).

69. *Attorney Grievance Comm’n of Md. v. Keehan*, 533 A.2d 278, 281 (Md. 1987); see also Hafter, *supra* note 37, at 4 (the admission by motion rules “recognize[] that original admission in the other jurisdiction, coupled with actual experience as a practitioner, is ‘at least as meaningful for assurance of general competence as the typical examination.’”) (quoting Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1713 (1967)). On the other hand, some point out that although the active practice requirement was “designed to prevent circumvention of a state’s high admission standards by obtaining a license in a jurisdiction with lower standards and petitioning for reciprocal admission[,] [a]rguably, its chief accomplishment has been to limit the mobility of attorneys with fewer than five years of experience.” Williams, *supra* note 30, at 203.

70. The answer appears to be a different one, at least with respect to some jurisdictions, as it relates to lawyers who have taken the Uniform Bar Exam. This question will be addressed in Part III.B.ii.b below.

71. ABA MODEL RULE, *supra* note 31, at (a), (b), (d), (e), & (f).

72. ABA MODEL RULE, *supra* note 31, at (c). The genesis of the two-year period is not clear. The original ABA Model Rule required five of the seven years immediately preceding the date of the application. The revised Model Rule adopted in 2012 kept the two-year

preceding the lawyer's application for admission by motion. If, during those three years, the lawyer has managed to remain in good standing and not subject herself to disciplinary action, then presumably under the Rule, she has not lost the minimum competence she initially demonstrated through original licensure, and is, therefore, not "unqualified" to render legal services in another jurisdiction.

Conceptualizing the ABA Model Rule using this two-criterion approach (hereinafter referred to as the "track record paradigm") helps highlight an important aspect of these rules: the track record. The track record requirement ensures that the lawyer has engaged in the practice of law "enough" to subject her to disciplinary action, should any be warranted. The relevant question now is this: can a lawyer establish a sufficient track record without having to work "full-time" during the durational period? The answer from many jurisdictions whose rules mandate a specific minimum hourly requirement seem to answer this question in the affirmative, but others do not. It is time that *those* jurisdictions revise their rules to make clear that something less than full-time is "enough." How much less than full-time is "enough" will be discussed in Part IV below.

C. RECENT TREND IN ADMISSION BY MOTION FOR MILITARY SPOUSES

One recent trend in admission by motion rules for military spouses at least suggests that the active practice requirement may not be necessary at all.⁷³ Approximately twenty-five jurisdictions⁷⁴ have recently adopted some form of licensing accommodation for lawyer-spouses of military personnel,⁷⁵ giving recognition to the difficulty that lawyer-spouses of military personnel have in satisfying the active practice requirement given their frequent moves,

grace period but shortened the period to three of the five years immediately preceding the date of application.

73. Another argument along these lines is that the existence of the "diploma privilege," which allows graduates of certain law schools to become licensed in a jurisdiction without sitting for the bar exam, "undermines the argument for reciprocity and admission on motion across all state bars and U.S. district courts." John Okray, *Attorney Admission Practices in the U.S. Federal Courts*, FED. LAW., Sept. 2016, at 40, 46.

74. A state-by-state analysis of the current licensing accommodations that have been provided to military spouses is beyond the scope of this Article. An overview of the variety of approaches that had been taken as of 2014 is provided by Jacquelyn Loyd in her article. Jacquelyn Loyd, Comment, *Barred from Service: Support Our Troops by Supporting Their Attorney Spouses with Uniform License Portability*, 46 MCGEORGE L. REV. 573 (2014); see Bridget A. Findley, *Operation Amendment: Military Spouse Attorneys for Legal Licensing Accommodations*, FED. LAW., Sept. 2016, at 34.

75. For a current list of the jurisdictions and a history of the efforts of the Military Spouse JD Network ("MSJDN") to advocate for licensing jurisdictions to provide licensing accommodations for military spouses, see *State Licensing Efforts*, MIL. SPOUSE J.D. NETWORK, <https://www.msjdn.org/rule-change> [<https://perma.cc/XL8T-MKV2>].

breaks in employment, or part-time prior practice experience.⁷⁶ For example, Ohio recently amended its rule to allow an

applicant [to] apply for temporary admission to the practice of law in Ohio . . . if all of the following concerning the applicant apply: (1) Is present in Ohio as the spouse of an active service member of the United States armed forces assigned to a military installation within the state; . . . (8) Has taken and passed a bar examination and has been admitted as an attorney at law in the highest court of another state or in the District of Columbia; (9) Is in good standing in all jurisdictions in which the applicant is admitted to the practice of law; (10) Is not currently subject to discipline or the subject of a pending disciplinary matter in any jurisdiction in which the applicant is admitted to the practice of law; (11) Has not resigned from the practice of law with discipline pending in any jurisdiction; (12) Has not voluntarily or involuntarily relinquished a license to practice law in any jurisdiction in order to avoid discipline or as a result of discipline imposed by a relevant authority; (13) Has not been disciplined for professional misconduct within the past ten years or been disbarred by any jurisdiction.⁷⁷

Kentucky has a similar rule, which allows a military spouse to be provisionally admitted to practice in Kentucky if, among other things, the lawyer has already been admitted by examination to practice in another jurisdiction and

is currently an active member in good standing in the bar of at least one state or territory of the United States, or the District of Columbia, where the applicant is admitted to the unrestricted practice of law, and is a member in good standing

76. Their difficulties with the active practice requirement include the following: “[being] recently admitted; their military spouse has been assigned overseas; they have breaks in employment between duty stations; they have held non-attorney or part-time positions; or have been unable to find legal work at a duty station.” Sahl, *supra* note 27, at 2640. The MSJDN estimated that “less than one-third of its members are employed in full-time legal positions and that approximately half are underemployed in paralegal positions or part-time work.” *Id.*

77. SUP. CT. R. FOR THE GOV'T OF THE BAR OF OHIO I § 16(A), <https://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1> [<https://perma.cc/9WGR-GH5R>] (the rule includes a few additional requirements, including a bachelor's degree, a J.D. or L.L.B. from an ABA-approved law school, etc.); see also *Ohio Becomes Milestone 25th State to Adopt Military Spouse Attorney Licensing*, MIL. SPOUSE J.D. NETWORK, <https://www.msjudn.org/2017/06/ohio-adopts-milspouse-licensing/> [<https://perma.cc/J8D7-WL5G>].

in all jurisdictions where the applicant has been admitted; . . . is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdictions. . . [and] has completed 12 hours of instruction approved by the Kentucky Continuing Legal Education Board on Kentucky substantive and/or procedural law, including 4 hours of ethics.⁷⁸

These rules differ from the ABA Model Rule on Admission by Motion because they eliminate the durational period and the extent of practice requirement.⁷⁹ In other words, they do not dictate how long the lawyer must have been practicing elsewhere or the extent to which she must have been practicing there. Rather, they require only that the lawyer have been practicing elsewhere and that no evidence exists from that time period to suggest that future disciplinary action is likely.

78. KY. SUP. CT. R. 2.113(2)(d), (e), (k).

79. Not all jurisdictions that have adopted licensing accommodations for military spouses have eliminated the durational component. *See* N.C. STATE BAR RULES §.0503(1)(a), <https://ncble.org/wp-content/uploads/2015/09/rules.pdf> (requiring four of the last eight years).

Even before the states began to adopt these rules, both the American Bar Association⁸⁰ and the Conference of Chief Justices (CCJ)⁸¹ adopted

80. Debra Cassens Weiss, *ABA Urges Easier Bar Admission for Lawyers Who Are Military Spouses*, ABA J. (Feb. 6, 2012, 9:12 PM CST), http://www.abajournal.com/news/article/aba_urges_easier_bar_admission_for_lawyers_who_are_military_spouses/ [<https://perma.cc/EH68-GMKP>]. ABA Resolution 108 provides as follows:

RESOLVED, That the American Bar Association urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense, including but not limited to:

1. Enacting "admission by endorsement" for military spouse attorneys, whereby a military spouse attorney holding an active license to practice law in at least one state, territory or the District of Columbia, in good standing in all jurisdictions where admitted, and who possesses the requisite character and fitness and meets the educational standards required for admission would be admitted without examination to the practice of law in another jurisdiction, while the applicant:

a. demonstrates presence in that jurisdiction due to a spouse's military service;

b. establishes that he or she is not currently subject to a lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;

c. pays any applicable annual client protection fund assessment; and

d. complies with all other ethical, legal and continuing legal education obligations;

2. Reviewing current bar application and admission procedures to ensure that they are not unduly burdensome to military spouse attorneys and that those applications are handled promptly;

3. Encouraging mentorship programs to connect military spouse attorneys with local members of the bar; and

4. Offering reduced bar application and membership fees to military spouse attorneys who are new to the jurisdiction or who no longer reside in the jurisdiction but wish to retain bar membership.

AM. BAR ASS'N, Resolution 108 (Feb. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_108.doc [<https://perma.cc/N4YW-AFDT>] [hereinafter *Resolution 108 Report*].

81. CCJ PROFESSIONALISM & COMPETENCE OF THE BAR COMM., Resolution 15: Encouraging Adoption of Rules Regarding Admission of Attorneys Who are Dependents of Service Members, Conf. Chief Justices (July 25, 2012), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-Encouraging-Adoption-of-Rules.ashx> [<https://perma.cc/V2W8-Z2PT>]. Resolution 15 reads as follows:

WHEREAS, the states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and

WHEREAS, the Department of Defense has recognized that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense; and

resolutions addressing this issue. The CCJ's Resolution 15 "urge[d] the bar admission authorities . . . to consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members of the United States Uniformed Services,"⁸² and, in doing so, one commentator argues that the CCJ provided official "de facto recognition that written examinations that serve as territorial barriers to entry in the legal services market are unnecessary to protect the public's interest from unqualified or unethical lawyers."⁸³

In essence, it seems that a jurisdiction that is willing to grant a temporary license to a military spouse so long as that individual (a) has passed a bar exam and become licensed, and (b) has maintained a clean track record, however short, with the disciplinary authorities in another jurisdiction, indicates its belief that the military spouse is not incompetent or a risk to the public, even in the absence of a lengthy prior practice. While these accommodations for military personnel are a meaningful recognition of the unique requirement that military families face given that "United States Uniformed Services is not an optional assignment-based system" and that "servicemembers may face criminal penalties if they fail to report to a duty station as ordered,"⁸⁴ when analyzing these rule accommodations in light of the underlying purposes of the admission by motion rules, it raises questions as to whether the same approach should be taken with all lawyers, even those whose need for mobility falls well short of that of military personnel.⁸⁵

WHEREAS, the American Bar Association adopted a policy in February 2012 recognizing that these short-term, compulsory moves for attorneys married to military service members result in unique problems that should be addressed by amending traditional bar admission rules; and
WHEREAS, state bar admission authorities and state supreme courts remain responsible for making admission decisions and enforcing their own rules for admission; and
WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component;
NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges the bar admission authorities in each state and territory to consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members of the United States Uniformed Services and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory.

Id.

82. *Id.*

83. Sahl, *supra* note 27, at 2648.

84. *Resolution 108 Report, supra* note 80, at 4.

85. See Sahl, *supra* note 27, at 2647 (arguing that "Resolution 15's mandate should be extended to all lawyers to eliminate the need for a written examination for lawyers who cannot meet the 'practice requirements' for admission by motion.").

Even though this argument for elimination of the active practice requirement exists, I will assume, for the moment, that the active practice requirement is here to stay and that it is the appropriate proxy to ensure licensed lawyers have not lost their minimum competence to practice.⁸⁶ Now the question arises as to how that proxy should be measured. As the next Part will describe, the current answer depends on which jurisdiction you ask.

II. THE “JURISDICTIONAL MOSAIC” OF TODAY’S ACTIVE PRACTICE REQUIREMENTS

Today, the overwhelming majority of jurisdictions offer some admission by motion procedure. Of the 56 jurisdictions that license attorneys,⁸⁷ 42 have an admission by motion procedure.⁸⁸ Among those 42 jurisdictions, however, the rules vary widely based on whether reciprocity is required,⁸⁹

86. There is a good deal of disagreement on this point. Many argue that better proxies exist for ensuring a lawyer is qualified and competent to provide services. For example, Professor Stephen Gillers proposes eleven recommendations for revamping the system of lawyer regulation that protects clients, the justice system, and the profession’s core value. Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 999-1025 (2012). Some of his suggestions include the following: national adoption of admission by motion rules; permitting a lawyer who is admitted in one jurisdiction to practice “virtually” in “any other jurisdiction within the scope of her competence;” requiring lawyers to carry malpractice insurance; and permitting non-lawyers “to have equity interests and management authority in for-profit law firms.” *Id.* at 1001, 1007.

87. This includes each of the 50 states, the District of Columbia, and the following additional jurisdictions: Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. COMPREHENSIVE GUIDE, *supra* note 13, at 36. This number does not include the federal courts, which constitutes an additional layer to the mosaic. *See generally* Okray, *supra* note 73, at 40-42.

88. COMPREHENSIVE GUIDE, *supra* note 13, at 36. The jurisdictions that do not have admission by motion rules are the following: California, Delaware, Florida, Hawaii, Louisiana, Maryland, Nevada, Rhode Island, South Carolina, Guam, Northern Mariana Islands, Palau, Puerto Rico, and the U.S. Virgin Islands. *Id.* at 36 (the COMPREHENSIVE GUIDE indicates that for Hawaii, South Carolina, Guam, Palau, and the U.S. Virgin Islands while “admission on motion is generally unavailable, it is permitted on a limited basis” in these jurisdictions). Florida recently considered the issue but again rejected adopting any admission by motion rule. *See* Gary Blankenship, *Board Rejects Admission by Motion*, FL. B. NEWS, Nov. 15, 2015, <https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.ns%2F8c9f13012b96736985256aa900624829%2F03a3e88bb3317c385257ef300662c8d>.

89. *See* COMPREHENSIVE GUIDE, *supra* note 13, at 39. Of the 42 jurisdictions that offer admission by motion, 26 of those jurisdictions have admission rules based on reciprocity. *Id.* In other words, the receiving jurisdiction will only admit applicants who otherwise meet the requirements of the rule if the applicant’s original jurisdiction would admit applicants on motion from the receiving jurisdiction. For example, New Jersey’s Admission by Motion rule reads as follows:

whether certain activities constitute the practice of law for purposes of the durational component of the rule;⁹⁰ whether the applicant must have graduated from an ABA-approved law school;⁹¹ whether the applicant must declare an intent to practice in the jurisdiction in which the applicant seeks admission;⁹² whether the applicant's law license must have been in "active" status in the applicant's original jurisdiction;⁹³ and, most importantly for

Applicants may apply for admission to the bar of this State by motion to the Supreme Court. To qualify for application by motion, applicants must:

(a) have practiced law for five of the last seven years in another United States jurisdiction;

(b) have previously sat for and passed the bar examination in another United States jurisdiction;

(c) be admitted in a United States jurisdiction that would extend a reciprocal license by motion to New Jersey lawyers;

(d) have completed a course on New Jersey ethics and professionalism; and

(e) meet all other application requirements in Rule 1:24-1 above.

R. GOVERNING THE CTS. OF THE ST. OF N.J. 1:24-4 (emphasis added), <http://njcourts.gov/attorneys/assets/rules/r1-24.pdf> [<https://perma.cc/7TLK-9UGF>]. West Virginia's reciprocity requirement is a bit different in that it does not require the other jurisdiction to accept West Virginia lawyers; rather, it requires that the standards for admission in the other jurisdiction be at least as rigorous as the standards in West Virginia. W. VA. R. FOR ADMISS'N TO THE PRAC. OF L. 4.0(b), <http://www.courtswv.gov/legal-community/rules-for-admission.html#rule4> [<https://perma.cc/K598-A9UY>]. The rule in its entirety reads as follows:

To be eligible for admission to practice in the State of West Virginia upon the basis of admission in any other state, an applicant must have been lawfully engaged in the active practice of law for five (5) of the seven (7) years next preceding his or her application and must have held a valid license to practice law from some state throughout such five year period; and, *must demonstrate to the Board that the standards of admission in at least one of the states where he or she was previously admitted were, at the time of the applicant's admission in that state, and are now, substantially equivalent to the standards for admission in West Virginia.*

W. VA. R. FOR ADMISS'N TO THE PRAC. OF L. 4.0(b), <http://www.courtswv.gov/legal-community/rules-for-admission.html#rule4> [<https://perma.cc/K598-A9UY>] (emphasis added). The ABA Model Rule does not include a reciprocity requirement. See ABA MODEL RULE, *supra* note 31.

90. See COMPREHENSIVE GUIDE, *supra* note 13, at 36.

91. See *id.*

92. See, e.g., W. VA. R. FOR ADMISS'N TO THE PRAC. OF L. 4.0(a), <http://www.courtswv.gov/legal-community/rules-for-admission.html#rule4> [<https://perma.cc/K598-A9UY>] ("In order to be eligible for admission to practice in the State of West Virginia, without examination, upon the basis of admission in any other state, an applicant must demonstrate to the satisfaction of the Board that he or she intends to practice law in the State of West Virginia on at least a minimal basis.")

93. See, e.g., ARIZ. SUP. CT. R. 34(f)(3), https://www.azcourts.gov/Portals/26/AOM/Rule34_EffectiveJanuary2016.pdf [<https://perma.cc/FFE3-RQ7N>] ("The

purposes of this Article, how the durational and extent of practice components work.

The next sections of this Article will analyze the following characteristics of the rules of the 42 jurisdictions⁹⁴ that permit admission by motion: (A) the length of the durational component of the rule and (B) the following components of the rule's extent of practice requirement: (1) whether the rule requires the applicant to have been engaged in the "full-time" practice of law in order to satisfy the durational component; (2) if so, how the term "full-time" is defined by the rules or applicable regulations; and (3) if "full-time" prior practice is not explicitly required by the rule or its applicable regulations, what other extent of practice requirement is included.

A. DURATIONAL COMPONENT

As indicated below in Table 1, the overwhelming majority of licensing jurisdictions require an applicant to have engaged in the practice of law for five of the seven years immediately preceding the date of application, which corresponds to the time period suggested by the ABA in its adoption of the Model Rule in 2002.⁹⁵ Only 10 jurisdictions have adopted the durational period of three of the prior five years, which was proposed by the ABA in its 2012 revision to the Model Rule.

However, one of the questions that arises when reading each jurisdiction's statement of the durational period is this: how is a "year" calculated for purposes of the rule? Is it measured in consecutive 12 month periods? If the rule requires three of the last five years, does the licensing board require a consistent law practice for three full years without any breaks in employment or, so long as the applicant engaged in the practice of law for an *aggregate* of three years' worth of work across the previous five-year period, is the requirement satisfied? If what the rule is concerned about is ensuring a lawyer has three years' worth of practice experience, should it matter whether those years of experience are consecutive or gathered from across the full durational period? Oregon's rule seems to at least require that one year's worth of work, which it defines as at least 1,000 hours, must have been consecutive given its requirement that the applicant have "lawfully engaged in the active, substantial and *continuous* practice" of law for "at least 1,000

'active practice of law' is further defined to require that at all times in the durational period the applicant has held a law license in 'active' status.').

94. See Appendix A. Appendix A does not include rules for Guam, Northern Mariana Islands, Palau, Puerto Rico, or the U.S. Virgin Islands.

95. See *Ethics 20/20 Report*, *supra* note 58.

hours of work per annum in law-related professional activities . . . *uninterrupted by periods of other employment or unemployment.*"⁹⁶

Table 1: Length of Durational Period	
Length of Durational Period	Number of Licensing Jurisdictions⁹⁷
3 out of 5 years	10 ⁹⁸
5 out of 7 years	20 ⁹⁹
5 out of 10 years	5 ¹⁰⁰
Not less than 5 years	1 ¹⁰¹
Others	<ul style="list-style-type: none"> • 5 of the 6 years immediately preceding (Alabama)¹⁰² • 60 of the 84 months immediately preceding (Minnesota and Utah)¹⁰³ • 4 out of the last 6 years (North Carolina)¹⁰⁴ • 4 of the last 5 years (North Dakota)¹⁰⁵

96. OR. R. FOR ADMISSION OF ATTORNEYS 1.05(8), 15.05(1), (3)(a)(v) (emphasis added), http://www.osbar.org/_docs/rulesregs/admissions.pdf [<https://perma.cc/44GE-7PWK>].

97. This chart does not include the jurisdiction-specific rules that some states have (i.e., New Hampshire and Vermont have different durational requirements for each other than they do for lawyers from other states). The chart also does not include the District of Columbia.

98. See Appendix A and accompanying notes (includes the following: Arizona, Colorado, Idaho, Illinois, Maine, Michigan, Nebraska, Virginia, Washington, and Wisconsin). Wisconsin is the only state that, rather than requiring "at least x out of the last y years" requires "3 years within the last 5 years." WIS. SUP. CT. R. 40.05(b), <https://docs.legis.wisconsin.gov/misc/scr/40.pdf> [<https://perma.cc/YJ88-AR8C>].

99. See Appendix A and accompanying notes (includes the following: Alaska, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, West Virginia, and Wyoming). Some jurisdictions' rules require at least 5 of the immediately preceding 7 while others require 5 of the immediately preceding 7. This column has not distinguished between these approaches but, if that information is helpful, it can be located in Appendix A.

100. See Appendix A and accompanying notes (includes the following: Connecticut, Missouri, Ohio, Rhode Island, and Vermont).

101. See *infra* note 301. This rule (from Mississippi) differs from South Dakota's rule in that it allows any lawyer who has practiced not less than 5 years to apply as compared to South Dakota's rule, which requires that the five years be those immediately preceding the date of application.

102. See *infra* note 265.

103. See *infra* notes 299 and 343, respectively.

104. See *infra* note 318.

105. See *infra* note 321.

	<ul style="list-style-type: none"> • For the last 5 years immediately preceding the application (South Dakota)¹⁰⁶
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B. EXTENT OF PRACTICE REQUIREMENTS

The 10 jurisdictions listed below in Table 2 currently have rules (or regulations or policy statements) that specifically require that the applicant have engaged in the “full-time” practice of law during the durational period. Of those 10 jurisdictions, only 3 of the jurisdictions’ rules define “full-time” as a particular number of hours required within a given timeframe. Interestingly, quite a bit of variety exists even among the 3 jurisdictions that set forth a specific hourly requirement, with “full-time” ranging from 960 hours per year (required as 80 hours per month in Utah’s rule)¹⁰⁷ to 1,440 hours per year (required as 120 hours per month in Minnesota’s rule).¹⁰⁸

The other seven jurisdictions that require “full-time” prior practice do not set forth a specific hourly requirement, which begs the question, what does “full-time” prior practice mean to those jurisdictions? In looking outside the lawyer admission rules to define “full-time” employment, one is faced with another “mosaic” – the answer depends on who you ask and ranges from 30 hours per week to 40 or more hours per week.

For example, Standard 509(b)(7) of the ABA Standards and Rules of Procedure for Approval of Law Schools requires ABA-approved law schools to publish employment outcomes for their graduates on their websites.¹⁰⁹ The ABA Section of Legal Education and Admissions to the Bar’s 2017 Employment Questionnaire, which provides instructions for purposes of reporting the employment outcomes, defines a “full-time” position as “one in which the graduate works a minimum of 35 hours per week” and a “part-time” position as “one in which the graduate works less than 35 hours per week.”¹¹⁰ Similarly, the National Association for Law Placement (“NALP”) defines a “full-time” position for a recent law school graduate as “occupying five work days and/or at least 35 hours of work per week, regardless of the term of employment. That is, full-time positions may be either long-term or short-

106. See *infra* notes 343-44.

107. See *infra* note 336.

108. See *infra* notes 299-300.

109. ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017 36, (2016). https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

110. Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, 2017 *Employment Questionnaire (For 2016 Graduates) Definitions & Instructions 2* (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2017_eq_definitions_and_instructions.authcheckdam.pdf.

term. 'Part-time' refers to employment not meeting the above criteria."¹¹¹ A "full-time" associate in a "Big Law" firm has a billable hour requirement "in the range of 2000 to 2300 hours per year,"¹¹² which would constitute between 38 and 44 *billable* hours per week across a 52-week year. In the 1960s, however, "a full-time attorney typically billed 1300 hours per year."¹¹³

Under the Affordable Care Act, an employee is a "full-time" employee for purposes of determining whether the employer is subject to the employer-shared responsibility payments when the employee "is, for a calendar month, . . . employed on average at least 30 hours of service per week, or 130 hours of service per month."¹¹⁴ Finally, the overtime provisions of the Fair Labor Standards Act require employers to pay non-exempt employees "one and one-half times an employee's regular rate of pay after 40 hours of work in a workweek."¹¹⁵

In the absence of further guidance from the licensing authority, a rule's requirement of "full-time" prior practice could conceivably range from 30 hours per week to "Big Firm" hours, which exceed 40 billable hours per week.

Table 2: Jurisdictions With Admission by Motion Rules (or applicable regulations or policy statements) that Explicitly Require "Full-Time" Practice		
Jurisdiction ¹¹⁶	If the rule defines "full-time" practice, how it is defined:	Length of Durational Period
Maine	"Primarily engaged"; "active practice" defined as being "on a full time basis." ¹¹⁷	3 of 5 years
Minnesota	"Engaged as principal occupation," according to a policy statement, means "one's practice of law must be full-time or substantially full-time (at least 120 hours or more per month)." ¹¹⁸	60 of 84 months
Mississippi	Active practice; a comment to the rule	Not less than 5

116. This chart does not include jurisdictions that require "full-time" only with respect to professors of law.

	requires that one's practice must have been "a full-time or regular undertaking and not have been only an occasional or haphazard basis." ¹¹⁹	
Missouri	Full-time required ("such that applicant's professional experience and responsibilities are sufficient to satisfy the board that the application should be admitted"). ¹²⁰	5 of 10 years
New Mexico	"Actively and continuously engaged in full-time, gainful employment" (which is defined as at least 1,000 hours per year and constituting at least 50% of the applicant's non-investment income). ¹²¹	5 of 7 years
North Carolina	"Actively and substantially engaged in the full-time practice of law;" however, North Carolina has recently	4 of 6 years

112. Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1, 12-13 (2015) [hereinafter *Disruptive Innovation*].

113. *Id.* at 12.

114. Internal Revenue Serv., *Identifying Full-Time Employees*, <https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees> (last visited July 31, 2017).

115. U.S. Dep't of Labor, Wage and Hour Div., *Questions and Answers About the Fair Labor Standards Act*, <https://www.dol.gov/whd/flsa/faq.htm> (last visited July 31, 2017).

116. This chart does not include jurisdictions that require "full-time" only with respect to professors of law.

117. *See infra* notes 293-94.

118. *See infra* notes 299-300.

119. *See infra* notes 301-03.

120. *See infra* notes 304-05.

121. *See infra* notes 312-14.

	adopted amendments to its rules, which go into effect on June 30, 2018, that remove the word "full-time" from the rule. ¹²²	
Ohio	"Was engaged in on a fulltime basis" which is defined to mean "actively and substantially engaged as a principal business or occupation." ¹²³	5 of 10 years
Tennessee	Full-time required (for private or public practice and teaching). ¹²⁴	5 of 7 years
Utah	"Actively licensed and lawfully engaged in the Full-Time practice"; defined to mean no fewer than 80 hours per month (excluding time spent on administrative or managerial duties, CLE, or client development and marketing). ¹²⁵	60 of 84 months
Virginia	Rule requires that applicant "has practiced law for least 3 of the immediately preceding 5 years and has made such progress in the practice of law that it would be unreasonable to require the applicant to take an examination." ¹²⁶ However, the	3 of 5 years

122. See *infra* notes 318-20.

123. See *infra* notes 323-26.

124. See *infra* notes 338-39.

125. See *infra* notes 343-44.

126. See *infra* note 348.

	applicable regulations require that an applicant “may apply for admission without examination only if the applicant has been engaged in the full-time practice of law for at least three (3) of the last five (5) years immediately preceding his or her application for admission to the Virginia Bar.” ¹²⁷	
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Table 3 (included below) sets forth the extent of practice component for jurisdictions whose rules or policy statements do not explicitly require “full-time” prior practice experience. A significant majority of these jurisdictions require “active practice” of law and many follow the ABA Model Rule in requiring that the applicant have “*primarily* engaged in the active practice of law.” Illinois, Iowa, and Oklahoma each add a requirement of consistency: Illinois and Oklahoma both require “continuous” engagement in the practice of law while Iowa requires “regular” engagement.

Table 3: Jurisdictions With Admission by Motion Rules that Do Not Explicitly Require “Full-Time” Practice		
Jurisdiction	What term used? How defined?	Length of Durational Period
Alabama	Primarily engaged in the active practice ¹²⁸	5 of 6 years
Arizona	Primarily engaged in the active practice ¹²⁹	3 of 5 years
Arkansas	Primarily engaged in the active practice ¹³⁰	5 of 7 years

127. See *infra* note 349.

128. See *infra* note 265.

129. See *infra* note 269.

130. See *infra* note 272.

Colorado	Primarily engaged in the active practice ¹³¹	3 of 5 years
Georgia	Primarily engaged in the active practice ¹³²	5 of 7 years
Idaho	Substantially engaged in the Active Practice ¹³³	3 of 5 years
Illinois	Active, continuous, and lawful (with accompanying hourly requirement – see below) ¹³⁴	3 of 5 years
Iowa	Regularly ¹³⁵	5 of 7 years
Kansas	Lawfully ¹³⁶	5 of 7 years
Kentucky	Engaged in the active practice ¹³⁷	5 of 7 years
Massachusetts	Engaged in the active practice ¹³⁸	5 of 7 years
Nebraska	Actively and substantially engaged ¹³⁹	3 of 5 years
New Hampshire	Primarily engaged ¹⁴⁰	5 of 7 years
New Jersey	Have practiced ¹⁴¹	5 of 7 years
New York	Has actually practiced ¹⁴²	5 of 7 years
North Dakota	Actively engaged, to an extent deemed by the Board to demonstrate competency in the practice ¹⁴³	4 of 5 years
Oklahoma	Actual and continuous ¹⁴⁴	5 of 7 years
Texas	Actively and substantially engaged in the lawful practice ¹⁴⁵	5 of 7 years

131. See *infra* note 273.

132. See *infra* note 277.

133. See *infra* note 278.

134. See *infra* notes 281-83.

135. See *infra* notes 288-90.

136. See *infra* note 291.

137. See *infra* note 292.

138. See *infra* note 295.

139. See *infra* note 309.

140. See *infra* note 310.

141. See *infra* note 311.

142. See *infra* note 316.

143. See *infra* note 321.

144. See *infra* note 327.

145. See *infra* notes 340-42.

Washing- ton	Active legal experience ¹⁴⁶	3 of 5 years
Wiscon- sin	Substantially engaged ¹⁴⁷	3 of 5 years

Table 4 below lists the jurisdictions whose rules or policy statements set forth the minimum number of hours an applicant must have practiced law for a stated period of time in order to satisfy the active practice requirement. Of these 11 jurisdictions (which represent 25% of all licensing jurisdictions that permit admission by motion), only 3 specifically state that “full-time” practice is required (Minnesota, New Mexico, and Utah), yet, when calculating these jurisdictions’ hourly requirements on a weekly (rather than monthly or annual basis), each requires something less than a 40-hour work week.¹⁴⁸

The other 8 jurisdictions’ rules do not refer to “full-time” practice; rather, they simply set forth the specific number of hours required. Some rules look at hours on a weekly basis, some on a monthly basis, and some on an annual basis. With respect to those jurisdictions that look at hours on a weekly basis, the requirements range from 20 hours per week (Pennsylvania) to 25 hours per week (Vermont), neither of which would rise to the level of *any* of the definitions of “full-time” employment provided in Part II.B. above.¹⁴⁹ With respect to those jurisdictions that look at hours on a monthly basis, the requirements range from 80 hours per month (Illinois and Utah) to 120 hours per month (Minnesota), which constitute 20 hours per week and 30 hours per week, respectively. Again, when calculated on a weekly basis, both are below a 40-hour “full-time” work week and a “full-time” position as defined by the ABA and NALP. Only Minnesota could be said to require “full-time” employment if the Affordable Care Act definition applied since it requires 30 hours per week.

Finally, with respect to those jurisdictions that look at hours on an annual basis, the requirements range from 300 hours per year (25 hours per month or 5.7 hours per week assuming a 52 week year) (Wyoming), to 750 hours per year (62.5 hours per month or 14.4 hours per week assuming a 52 week year) (Alaska) to 1,000 hours per year (approximately 83 hours per month or 19.2 hours per week assuming a 52 week year) (Illinois, Indiana, Montana, New Mexico, and Oregon).

146. See *infra* note 350.

147. See *infra* note 354.

148. See the “Hours Calculated on a Weekly Basis” column. Minnesota requires 120 hours per month, which constitutes 30 hours per week. New Mexico requires 1,000 hours per year, which constitutes 19.2 hours per week assuming a 52-week year. Utah requires 80 hours per month, which constitutes 20 hours per week.

149. See *supra* Part II.B., Table 4.

In sum, as reflected in the "Hours Calculated on a Weekly Basis" column of Table 4 set forth below, of the 11 jurisdictions that have a specific hourly requirement, none meets any of the definitions of a "full-time" position when the hourly requirements are calculated on a weekly basis other than Minnesota if the Affordable Care Act definition is applied.¹⁵⁰

The most interesting discovery appears in the column entitled "Aggregate Hours Required," which appears on the far right of Table 4 and sets forth the aggregate number of hours required by each licensing jurisdiction during such jurisdiction's stated durational period. That column demonstrates that the aggregate number of hours required to prove that an attorney has maintained her minimum original competence range from a minimum of 1,500 hours (Wyoming) to a maximum of 7,200 hours (Minnesota). In other words, to meet the active practice requirement in Minnesota, a lawyer needs to have practiced nearly five times as many hours over the same period of time than she would need to have practiced in order to be admitted by motion in Wyoming.

Table 4: Jurisdictions With Stated Minimum Hour Requirement for Active Practice Requirement				
Jurisdiction	Hourly requirement	Hours Calculated on a Weekly Basis¹⁵¹	Length of Durational Period	Aggregate Hours Required¹⁵²
Alaska	At least 750 hours per year ¹⁵³	14.4 hours	5 of 7 years	3,750 hours over 7 years
Illinois	Minimum of 80 hours per month and no fewer than 1000 hours per year during 36 of the 60 months immediately preceding application ¹⁵⁴	20 hours	Stated in 2 ways: 3 of 5 years and 36 of 60 months	2,880 hours over 5 years

150. See the "Hours Calculated on a Weekly Basis" column in Table 4.

151. Assumes a 52-week year.

152. This calculation assumes the hour requirement applies *only* to the required active practice time and not to the entire durational period. For example, if a jurisdiction requires the applicant to have primarily engaged in the active practice of law for 5 out of the last 7 years, this column multiplies the number of required hours by 5, not 7.

153. See *infra* notes 267-68.

154. See *infra* notes 281-83.

Indiana	“Actively engaged” defined to require at least 1,000 hours per year for law practice or full-time time law professor/judge/federal employee ¹⁵⁵	19.2 hours	5 out of 7 years	5,000 hours over 7 years
Minnesota	“Engaged as principal occupation,” according to a policy statement, means “one’s practice must be full-time or substantially full-time (at least 120 hours or more per month).” ¹⁵⁶	30 hours	60 of 84 months	7,200 hours over 7 years
Montana	Active and continuous; “during each of the required 5 years . . . spent at least 1,000 hours per year.” ¹⁵⁷	19.2 hours	5 of 7 years	5,000 hours over 7 years
New Mexico	“Actively and continuously engaged in full-time, gainful employment” (which is defined as at least 1,000 hours per year (for each of the required 5 years during the durational period) and constituting at least 50% of the applicant’s	19.2 hours	5 of 7 years	5,000 hours over 7 years

155. See *infra* notes 284-87.

156. See *infra* notes 299-300.

157. See *infra* notes 312-15.

	non-investment income) ¹⁵⁸			
Oregon	“Lawfully engaged in the active, substantial and continuous practice” defined to mean “at least 1,000 hours of work per annum, uninterrupted by periods of other employment or unemployment” ¹⁵⁹	19.2 hours	5 of 7 years	5,000 hours over 7 years
Pennsylvania	“devoted a major portion of time and energy to the practice of law,” meaning more than 50% of her time engaged in the practice of law; must demonstrate five years’ worth of work where she worked 20 hours per week in law practice ¹⁶⁰	20 hours	5 of 7 years	Approximately 5,200 hours over 7 years ¹⁶¹
Utah	“Actively licensed and lawfully engaged in the Full-Time practice”; defined to mean no fewer than 80 hours per month (excludes time spent on administrative or	20 hours	60 of 84 months	4,800 hours over 7 years

158. See *infra* notes 312-15.

159. See *infra* notes 329-30.

160. See *infra* notes 331-34.

161. Assumes 20 hours per week for 52 weeks.

	managerial duties, CLE, or client development and marketing) ¹⁶²			
Vermont	Actively Engaged defined to mean at least 25 hours per week ¹⁶³	25 hours	5 of 10 years ¹⁶⁴	6,500 hours over 10 years
Wyoming	Active, authorized practice for minimum of 300 hours per year ¹⁶⁵	5.7 hours	5 of 7 years	1,500 hours over 7 years

162. See *infra* notes 343-44.

163. See *infra* notes 345-47.

164. Vermont's durational requirement may be shortened if the applicant was "currently licensed and practicing for not less than 6 months" in a jurisdiction that required less than five years' admission as a condition to admission on motion so long as the applicant had been "Actively Engaged in the Practice of Law for not less than 3 of the preceding 10 years." RULES OF ADMISSION TO THE BAR OF VT. SUP. CT., Part M, Rule 15(a), (a)(1)(A), (a)(1)(B).

165. See *infra* notes 355-58. The rule also lists one of the activities that constitute the "active, authorized practice of law" as the following: "as a significant and primary occupation, serving as an attorney for fees or payment from one of more clients, including individuals legal service programs, trusts, partnership, and non-governmental corporations." This seems to pair the 300 hours per year rule with a requirement that, if one is engaging in a private law practice, that such practice be her "significant and primary" occupation. WYO. RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW 303(a)(1), http://www.courts.state.wy.us/wpcontent/uploads/2017/05/RULES_AND_PROCEDURES_GOVERNING_ADMISSION_TO_THE_PRACTICE_OF_LAW.pdf. Such a "significant and primary occupation" requirement is not also applied to the remaining activities defined in the rule as constituting "active, authorized practice of law:"

- (2) Serving as an attorney in governmental employment in the law offices of the executive, legislative or judicial departments of the United States, including the independent agencies thereof, or of any state, political subdivision of the state, territory, special district or municipality of the United States, provided that graduation from an ABA-accredited law school is a required qualification of such employment; (3) Teaching, as a full-time faculty member, a law course or courses at one or more ABA-accredited law schools in the United States, its territories or districts; (4) Serving as a judge in a court of the United States, a court of a state, territory or district of the United States, provided such employment is available only to licensed attorneys who have graduated from an ABA-accredited law school.

WYO. RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW 303(a)(2) – 303(a)(4).

Finally, Table 5 sets forth below those jurisdictions that focus on the practice of law as being the applicant's "principal occupation" or some similar derivation of that requirement.

Jurisdiction	Principal Occupation Requirement
Connecticut	"has lawfully engaged in the practice of law as the applicant's principal means of livelihood" ¹⁶⁶
Michigan	Practice of law as "principal business or occupation" which is provided in a policy statement to mean "practice of law in the other jurisdiction must have been greater than 50% of the applicant's time." ¹⁶⁷
Minnesota	"Engaged as principal occupation" is provided in a policy statement to mean "one's practice must be full-time or substantially full-time (at least 120 hours or more per month)." ¹⁶⁸
New Mexico	"Actively and continuously engaged in full-time, gainful employment" (which is defined as at least 1,000 hours per year (for each of the required five years during the durational period) and constituting at least 50% of the applicant's non-investment income) ¹⁶⁹
Ohio	"Was engaged in on a fulltime basis" which is defined to mean "actively and substantially engaged as a principal business or occupation" ¹⁷⁰
South Dakota	"as principal occupation, has been actively, continuously, and lawfully engaged in the practice" ¹⁷¹
West Virginia	Lawfully engaged in the active practice of law; requires "practice on a substantial basis motivated by a desire to earn a livelihood from that practice. Practice for required period must have been active and continuous." ¹⁷²

166. See *infra* note 274.

167. See *infra* note 297.

168. See *infra* note 299.

169. See *infra* note 314.

170. See *infra* note 325.

171. See *infra* note 336.

172. See *infra* note 352.

III. PROBLEMS WITH TODAY'S ACTIVE PRACTICE REQUIREMENTS¹⁷³

As illustrated in the above Tables, no two admission by motion rules are exactly alike. However, with the increasing need for geographic mobility and the increasing globalization of the practice of law, navigating this mosaic is becoming more important than ever.¹⁷⁴

173. It should be noted that even if all United States jurisdictions adopt the Uniform Bar Exam (and agree to accept the transfer of an applicant's UBE score from another UBE jurisdiction), at least for the next few decades or so, there will still be lawyers licensed in the United States who took a bar exam before the UBE was offered and who would benefit from an ability to obtain a license in another jurisdiction without having to take its bar exam. In addition, the UBE transfer rules also have limits on the time of transfer, so even individuals who take the UBE could, if in practice long enough, need admission by motion rules to avoid another bar exam. Therefore, even national adoption of the UBE would not eviscerate the arguments made in this Article with respect to improving the active practice requirement. The adoption of the UBE and the time periods set for transfer of its score do, however, present some interesting inconsistencies with the underlying policies of the active practice requirement. See *infra* Part III.B and accompanying text.

174. See Munneke, *supra* note 1, at 98 (arguing that the system of lawyer regulation in the United States, which was “devised for the thirteen colonies more than two centuries ago [is] ill suited for the interconnected global markets of the Twenty-First Century.”). Many in the legal field, from courts to scholars, have addressed the constitutionality of certain lawyer admission provisions. See generally Perlman, *supra* note 43. Recently, the National Association for the Advancement of Multijurisdictional Practice has been filing lawsuits all over the nation, seeking to enforce its mission of

obtain[ing] full admission on motion privileges for all attorneys in all U.S. district courts and state supreme courts that do not presently provide equal privileges and immunities, including the tit-for-tat admission rules that provide you get admission on motion in our jurisdiction if our attorneys get admission on motion in your jurisdiction.

David L. Hudson Jr., *Tear Down this Wall: Two Lawsuits that Seek to Loosen Bar Admission Rules in Federal District Courts are Dismissed, but the Issue isn't Going Away*, A.B.A. J., Oct. 2016, at 22 (quoting Professor Peter A. Joy, who explained that NAAMJP's arguments are that barriers to admission “infringe on First Amendment rights, drive up the costs of litigation, interfere with a person's right to counsel of one's choice, and are anti-competitive.”). This Article, instead, focuses on “policy, not law.” Gillers, *supra* note 86, at 958. Even within the world of policy arguments, much has already been said and written about the failure of the current model of lawyer regulation to conform to the modern practice of law, particularly in the age of advancing technology and mobility. See generally Gillers, *supra* note 86, at 961-62 (“Three forces have undermined the idea of a licensing authority coterminous with a jurisdiction's physical border. First, technology does not recognize borders. Second, physical travel is easy if not always pleasant. Third, clients' needs increasingly cross borders as they also take advantage of technology and easier travel. These changes, which will only become more prominent, mean that we require a new (or additional) governing principle beyond geography.”). Much has also been said about the current rules really being about economic protectionism rather than protecting the public from incompetent lawyers. See generally Perlman, *supra* note 43, at 147-48; Munneke, *supra* note 1, at 107; Major Adam W. Kersey, *Ticket to Ride: Standardizing Licensure Portability for Military Spouses*, 218 MIL. L. REV. 115, 161

This Part will discuss (a) the problems that arise when a jurisdiction's rules require a "full-time" prior practice experience; and (b) the harsh consequences presented to certain categories of lawyers, particularly female lawyers, who are more likely than male lawyers to be on reduced hours schedules due to family dynamics, and to young lawyers given other structural shifts in the legal employment market, if the rule is unclear or suggests it requires a "full-time" work week.¹⁷⁵

A. INCONSISTENCY AND LACK OF CLARITY IN CURRENT ACTIVE PRACTICE REQUIREMENTS

i. Inconsistency

Assuming that the active practice requirement is the appropriate proxy for measuring whether a lawyer has maintained the minimum competence she demonstrated through original licensure, then how much prior "active practice" is enough to ensure that maintenance? The range of answers from the jurisdictions on this question is wide, from requiring "full-time" prior practice experience to naming a specific number of hours per week that a lawyer must have worked. Even among jurisdictions that require a specific number of hours, one requires five times more hours than another to ensure the lawyer has maintained her original minimum competence. These inconsistencies seem too great to be convincing that the current rules are not arbitrary in their approaches.

Moreover, the inclusion of a "full-time" prior practice requirement by some jurisdictions is not only inconsistent with other jurisdictions but is overbroad in its reach. Neither the 2002 nor the 2012 versions of the ABA Model Rule required an applicant to work "full-time" during the durational period in order to satisfy the active practice requirement. Rather, both required that

(2013) ("There is a well-established argument that interstate variability among licensure requirements is often less a function of the state exercise of its 'police power' to protect citizenry than a method to 'protect against competition from newcomers.'") (citations omitted). Moreover, arguments even exist as to why today's lawyers should not be subject to an active practice requirement of any sort. *See* Sahl, *supra* note 27, at 2647-48 (arguing that the Conference of Chief Justices' Resolution 15, which encourages licensing jurisdictions to eliminate admission by examination for military spouse lawyers should be extended to nonmilitary-related lawyers who cannot meet the "practice requirements" for admission by motion, which could lead to "increased competition in another state market, which theoretically should drive down the cost of legal services[.]. . . [could] increase[] consumer choice for legal services[.]. . . [and could allow] nonmilitary spouse lawyers . . . to realize a return on their investment in their legal education and contribute to society's well-being.").

175. For ease of reference, the remainder of this Article will assume a "full-time" work week of 40 hours while recognizing that definitional approaches vary. *See supra* notes 109-15 and accompanying text.

the applicant “have been *primarily engaged in the active practice of law.*”¹⁷⁶ The ABA may have assumed this implied a “full-time” prior practice because a number of courts throughout time have interpreted the phrase “active practice of law” to require a “full-time” practice.¹⁷⁷ However, what is actually meant by “full-time” practice is not entirely clear because interpretations have seemed to approach the problem by defining two opposite ends of a practice spectrum, with “full-time” on one end and “occasional” or “casual” (even “clandestine”) on the other.¹⁷⁸ Arguably, a great deal of law practices exist between these two opposites; many of which would be far greater than “occasional” and would provide a meaningful track record for measuring the likelihood of future disciplinary action.

176. See CLIENT REPRESENTATION, *supra* note 42, at 40-50; ABA MODEL RULE, *supra* note 31.

177. See, e.g., *In re Stanton*, 828 A.2d 529, 530 (R.I. 2003) (adopting a definition of “active practice” that requires “a showing that the legal activities of the applicant were pursued on a full-time basis and constituted his regular business.”) (quoting *In re Petitions of Jackson & Shields*, 187 A.2d 536, 540 (R.I. 1963)). The Supreme Court of Rhode Island went on to state that the “active practice of law” means “full-time employment as an attorney in the jurisdiction where he or she is presently admitted” and noted that

while the inquiry is fact-intensive, it would be extremely difficult to satisfy the five-year requirement when working at a different occupation for a significant number of hours in a non-attorney capacity, especially when the hours devoted to the candidate’s legal practice are substantially less than what would be customary for an active, full-time practitioner in that jurisdiction.

In re Stanton, 828 A.2d at 531. The rule in Rhode Island now specifically requires the applicant to have “engaged in the full-time active practice of law” in order to sit for only the essay portion of the Rhode Island bar exam. R.I. SUP. CT. ART. II, r. 2, §§ 2 & 3; see also *In re Application of Stormont*, 712 P.2d 1279, 1281 (Kan. 1986) (adopting the definition of the “active practice of law” set forth by the Supreme Court of Arkansas, which requires that “the legal activities of the applicant must have been pursued on a full-time basis and constituted his regular business.”) (quoting *Undem v. State Bd. of Law Exam’rs*, 587 S.W.2d 563, 569 (Ark. 1979)). Kansas has since revised the language of its rule from requiring one to “actively perform[] legal services” to requiring that the applicant have been “lawfully engaged in the active practice of law.” See KAN. RULES RELATING TO ADMISSION OF ATTORNEYS 708(7), <http://www.kscourts.org/rules/Ruleinfo.asp?r1=Rules+Relating+to+Admission+of+Attorneys&r2=425> [<https://perma.cc/F69G-XU77>].

178. See *Stormont*, 712 P.2d at 1281 (“The occasional practice of law in another jurisdiction is no assurance of competency and skills kept honed by experience.”); *State ex rel. Laughlin v. Wash. State Bar Ass’n*, 176 P.2d 301, 309 (Wash. 1947) (stating that “actual practice” means “the opposite of casual or occasional or clandestine practice, and carries with it the thought of active, open, and notorious engagement in a business, vocation, or profession. . . .”).

ii. *Lack of Clarity*

Even beyond the lack of consistency between jurisdictions is the lack of clarity within a jurisdiction as to what its rule actually requires with respect to one's prior practice experience. The current language of many rules (or their accompanying regulations or policy statements) lacks clarity as to whether full-time prior practice is required or whether something less than full-time practice will suffice. The rules can be divided into the following four categories for this purpose: (1) rules that expressly require "full-time" practice and also provide a specific minimum hour requirement; (2) rules that expressly require "full-time" practice but do not provide a specific hour requirement; (3) rules that do not expressly require "full-time" prior practice but provide a specific minimum hour requirement; and (4) rules that do not expressly require "full-time" prior practice experience or include a specific hourly requirement and rely, instead, on some other qualifier, like "primarily engaged in the active practice of law" or "substantially engaged" or "lawfully engaged" when defining the extent of prior practice required. Each of these categories and their respective weaknesses will be discussed in turn in the following sections.

a. *Rules That Expressly Require "Full-Time" Practice and Include Hourly Requirement*

Even though this first category of rules proclaims to require full-time prior practice experience and has the benefit of transparency in providing a specific hourly requirement, the rules, after doing the math, do not actually require "full-time" practice and also generally do not provide guidance on how an "hour" is calculated.

First, although perhaps not a "weakness" that these rules do not require "full-time" practice in the forty-hour sense of the word, the fact that these rules do not require a forty-hour week (or even anything close to that)¹⁷⁹ argues that jurisdictions that have a "full-time" requirement *without* a specific hourly requirement should eliminate that requirement since it appears that requiring a forty-hour week equivalent would go significantly beyond where other "full-time" prior practice jurisdictions are.

Moreover, while the additional specific hourly requirement included in these jurisdictions' rules, at first glance, appears to provide more clarity to the rule, it begs the question: what constitutes an "hour" of engaging in the

179. For example, New Mexico requires "full-time, gainful employment" but requires 19.2 hours per week when calculated on a weekly basis. Utah requires "Full-Time practice" but requires only twenty hours per week when calculated on a weekly basis. *See supra* Part II.B.

active practice of law for purposes of the rule? Of the 11 jurisdictions that have adopted specific hourly requirements, only one has specifically addressed this question in its rule. Utah's rule specifies that "time spent on administrative or managerial duties, continuing legal education, or client development and marketing does *not* qualify as part of the required 80 hours of legal work."¹⁸⁰ This exclusionary language raises a host of additional questions: should CLE hours be excluded? Should all administrative hours be excluded? What type of evidentiary burden does looking into the substance of each hour put on both the applicant and the licensing authority to parse through years of billing records to determine which hours "count" for purposes of the rule? Would this inquiry require reliance on the jurisdiction's definition of the "practice of law" for purposes of the UPL rules?

b. Rules that Expressly Require "Full-Time" Practice without Hourly Requirement

The second category of rules avoids the problem of having to calculate hours or determining which hours "count" for purposes of the rule, but these rules lack in clarity and transparency because no clear metric is provided for a lawyer to determine whether her prior practice experience satisfies the rule.

These rules can likely justify the lack of a specific hourly requirement in a few ways: the lack of a specific hourly requirement allows the licensing authority to exercise its discretion when determining whether an applicant's prior work experience is sufficiently "full-time" to meet the requirements of the rule; the ABA Model Rule does not include a specific hourly requirement; and the lack of such a requirement recognizes the varied billing structures that govern law practice (*e.g.*, contingency-fee or fixed-fee billing) that would make it difficult for an applicant to substantiate a specific number of hours worked.

In lieu of a specific hour requirement, at least one jurisdiction in this second category made an effort to further define what it meant by "active practice." Mississippi's rule provides that an applicant must have engaged in the "active practice" of law for "not less than five (5) years" in another jurisdiction.¹⁸¹ Although the rule itself does not provide any additional specifics on the extent of practice component, the comment to the rule does, stating as follows, "An attorney's five (5) years of prior practice must have constituted a *full-time or regular undertaking* and not have been on only an *occasional or haphazard* basis."¹⁸² While it could be argued that "full-time" and

180. RULES OF PROF'L PRACTICE 14-701(t) (UTAH SUP. CT. 2016) (emphasis added).

181. RULES GOVERNING ADMISSION TO THE MISS. BAR VI, §1(A), https://courts.ms.gov/rules/msrulesofcourt/rules_admission_msbar.pdf [<https://perma.cc/HG8T-BJN8>].

182. RULES GOVERNING ADMISSION TO THE MISS. BAR VI, Comment (emphasis added).

"regular" are synonymous, numerous examples of a "regular" law practice that is less than full-time and significantly more than "occasional" or "haphazard" come to mind. Remember Marcella? She was an associate in a private law firm who negotiated a reduced-hours schedule, and she worked four days per week, every week, subject to the firm's normal vacation policy. Her work is "regular" in that she engages in the same schedule every week. It could not be said to be occasional or haphazard. However, her work, according to her own contract, is not "full-time." Perhaps the use of the word "regular" in the rule was intended to close the gap in the spectrum described above between "full-time" and "occasional." Does Marcella's work experience satisfy the rule? Presumably yes because the rule requires full-time *or* regular.

c. Rules that do not Expressly Require "Full-Time" Practice but Include Hourly Requirement

The third category is comprised of eight jurisdictions whose rules do not expressly require "full-time" prior practice but do provide a specific minimum hour requirement. None requires an applicant to have engaged in the practice of law for 30 hours per week or more. Rather, the hourly requirements (calculated on a weekly basis) range from a low of 5.7 hours per week to a high of 25 hours per week.¹⁸³

d. Rules that Rely on a Different Qualifier

The final category of rules captures those 20 jurisdictions whose rules do not expressly state a "full-time" prior practice requirement or a specific hourly requirement but use other qualifying language to describe the prior practice required. Although these jurisdictions' rules and policy statements do not explicitly state that they require "full-time" practice, they also do not explicitly permit something less than "full-time" practice so an applicant is left wondering: "how much is enough?"

At least one jurisdiction in this category (Arizona) currently has a rule that tracks the ABA Model Rule language in that it requires one to "primarily engage in the active practice of law." Applying the definition of some courts that "active practice" requires "full-time" practice, it appears Arizona could require full-time practice. However, a quick study of the Arizona rule tells otherwise. Prior to January 1, 2016, Arizona had a "custom" definition of "active practice" that required that "the applicant have spent at least 1,000 hours practicing law for each of the required five years and have derived at

183. See *supra* Part II.B., Table 4.

least half of non-investment income from the practice of law.”¹⁸⁴ However, effective January 1, 2016, Arizona revised its rule to eliminate the custom definition in favor of adopting the language of the current ABA Model Rule because the committee that reviewed the rules found that the custom definition’s restrictions “could prejudice lawyers, particularly young lawyers, whose law practice opportunities and income may have been adversely affected by economic developments.”¹⁸⁵ Therefore, it seems likely that Arizona requires something less than 1,000 hours per year during the durational period now.

As a result, most of the rules lack clarity, either because they require “full-time” without a specific hourly requirement or, if they include a specific hourly requirement, they do not define how an “hour” is measured, or because they use some other qualifier that could be read to require “full-time” practice when that is not the intent of the licensing authority. When a rule does not expressly permit prior practice experience that is less than “full-time,” it is difficult to determine, without further examination, what prior experience will satisfy the rule.

The problem with this lack of clarity is two-fold. First, it prevents a prospective applicant, who has worked a reduced-hours schedule for some period of time in her past, from accurately evaluating the likelihood of success on her admission by motion application. If she cannot determine, based on the rule, whether she meets the requirement, perhaps she does not take a job prospect in that jurisdiction or, if she has no option but to move to the new jurisdiction, perhaps she drops out of the practice of law entirely rather than face the expense and burden of preparing for and taking a bar exam in the new jurisdiction. Perhaps she inquires with the licensing authority to find out how the rule has been applied in the past. Maybe she is told how the licensing authority typically approaches these situations and that she needs to apply and see what happens. Perhaps the governance of the licensing authority turns over and begins to apply the rule in a different way, perhaps in a way that is different than she is told. If she is unsuccessful in her attempt, she is not only out a significant amount of time in preparing her application and in waiting for the determination but likely a good bit of money in paying for the processing of her application and for the character and fitness investigation that accompanies it.¹⁸⁶

The argument against specificity in the rule, however, is that these determinations are fact-intensive and are best left within the discretion of the

184. Patricia A. Sallen, *Rules Accommodate Changing Nature of Law Practice*, ARIZ. ATT’Y, Jan. 2016, at 20, 20-21.

185. *Id.* at 21.

186. COMPREHENSIVE GUIDE, *supra* note 13, at 36 (listing each jurisdiction’s admission by motion fees, which range from \$400 in New York and North Dakota to \$2,500 in Montana, which is exclusive of NCBE investigation fees).

licensing jurisdiction to determine on a case-by-case basis. In addition, the rule could never possibly address all scenarios and provide absolute clarity given the fact-intensive inquiry required.¹⁸⁷ While it is agreed that room for discretion is necessary, that need for discretion should be balanced against an applicant's need to be treated consistently as other similarly-situated applicants. Furthermore, the rule should provide a predictable, objective standard that allows the applicant to direct her behavior accordingly. In other words, if an attorney is considering a reduced-hours schedule, she needs to have some general guidance as to the ramifications that choice may have on her future mobility.

Second, the lack of clarity can lead to confusion or inconsistent results when the licensing authority of one jurisdiction has occasion to apply the rule of another jurisdiction. Here is a bit of background first: some jurisdictions that require reciprocity in their admission by motion rules will impose any more stringent requirements from the applicant's original jurisdiction to the applicant's application. For example, Oklahoma's rule provides that

if the former state of the applicant permits the admission of Oklahoma judges and lawyers upon motion but the Rules are more stringent and exacting and contain other limitations, restrictions or conditions of admission and the fees required to be paid are higher, the admission of applicant shall be governed by the same Rules and shall pay the same fees which would apply to an applicant from Oklahoma seeking admission to the bar in the applicant's former state.¹⁸⁸

If, for example, the extent of practice component from the applicant's original jurisdiction is more stringent (for example, because it requires "full-time" practice rather than 750 hours per year), the admitting state's licensing authority will have to interpret the original jurisdiction's use of the term "full-time" in its rule. If the rule does not provide any elaboration on what constitutes "full-time" practice or if the rule essentially defers to the discretion of

187. See, e.g., *Office of Disciplinary Counsel v. Marcone*, 855 A.2d 654, 659 (Pa. 2004) ("The ABA Model Rules of Professional Conduct do not attempt to define the 'practice of law' leaving it to the various jurisdictions. And the states have not come to a uniform approach as to what constitutes the practice of law." (citation omitted)); see also, e.g., *Attorney Grievance Comm'n of Md. v. Hallmon*, 681 A.2d 510, 514 (Md. 1996) ("[T]his Court has always found it difficult to craft an all encompassing definition of the 'practice of law.' To determine what is the practice of law we must look at the facts of each case and determine whether they 'fall within the fair intendment of the term.'") (quoting *In re Application of Mark W.*, 491 A.2d 576, 579 (Md. 1985)).

188. SUP. CT. OKLA. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. r. 2, §4, (2017), <http://www.okbbe.com/Resources/Docs/OKBBE-Rules-Governing-Admission.pdf> [<https://perma.cc/9EH6-R8E5>].

the licensing authority, the admitting jurisdiction may have difficulty stepping into the shoes of the original jurisdiction's licensing authority and applying the rule in a way that is consistent with the approach that would have been taken by the licensing authority in the original jurisdiction.¹⁸⁹

If the active practice requirement is to be “the requirement [that] provides a *predictable, objective standard* by which the Bar may review applications for admission,”¹⁹⁰ the rules need to provide as much clarity and consistency as possible. The suggestions provided in Part IV offer some of that clarity and consistency.

B. HARSH CONSEQUENCES ON PARTICULAR CATEGORIES OF LAWYERS

i. Impact on Female Lawyers

Empirical research supports three points about female lawyers (that are relevant here): female lawyers are more likely than male lawyers (1) to work a reduced schedule;¹⁹¹ (2) to leave practice entirely for some period of time;¹⁹² and (3) at least as revealed in a recent study of over 1200 lawyers in Ohio, to move out of the jurisdiction of their original licensure.¹⁹³ In essence, this creates a trifecta of trouble when considered in light of the active practice requirement, particularly in those jurisdictions that have a “full-time” prior practice requirement (or at least suggest they do). Of additional concern is the suggestion by recent research that gender differences among more recent classes of graduates are stronger than in earlier classes,¹⁹⁴ which makes the

189. A similar argument was made with respect to the location of practice component, when one approach, the “lawful practice” approach, which counted an applicant’s prior practice not just in the jurisdiction where he was licensed but also in any other jurisdiction where his practice was “lawful,” would require boards of other states to “interpret other jurisdictions’ unfamiliar and ever-evolving definitions of ‘unauthorized practice of law,’ a task which places boards in the shoes of the disciplinary authorities of foreign states.” Reams Martin & Early, *supra* note 29, at 16.

190. *Spencer v. Utah State Bar*, 293 P.3d 360, 366 (Utah 2012) (emphasis added).

191. *See infra* notes 195-201 and accompanying text.

192. *See infra* notes 202-08 and accompanying text.

193. Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043, 1090 (2015).

194. *Id.* at 1089, 1091 (comparing the gender gaps across seven employment settings for the class of 2010 four years after graduation against the gender gaps across those same settings for the class of 2000 at 3 years, 7 years, and 12 years post-graduation and stating that “in four of the categories – including the large employment settings of private practice and government work – the gender gap was larger for the research population [of Ohio lawyers studied by Merritt] than for the Class of 2000 at any time during the latter class’s first twelve years in the workforce.”). Merritt states: “[C]omparisons with the Class of 2000 suggest that these gaps may be growing. If so, contemporary changes in the legal profession may undo decades of hard-won gains for women in the profession.” *Id.* at 1091.

time to take action on the active practice requirement now, or maybe, yesterday.

Empirical research bears out that female lawyers are significantly more likely than male lawyers to work part-time.¹⁹⁵ Although the number of lawyers who work part-time in major law firms is relatively small (6.2% in 2012),¹⁹⁶ in 2012,¹⁹⁷ NALP reported that of the associates in major law firms who were working part-time, an overwhelming number were women (89.4%) and a significant portion (65.1%) of the part-time partners were women.¹⁹⁸ This phenomenon is not limited to the law firm setting. *After the J.D.* ("AJD"), a longitudinal study conducted by The American Bar Foundation and The NALP Foundation for Law Career Research and Education, which studied "a nationally representative cohort of lawyers admitted to the bar in the year 2000 over the first 12 years of their careers,"¹⁹⁹ found that after twelve years, "[w]omen were significantly more likely to indicate they [were] part time (15%). . . . For men, the same phenomena rarely [occurred] (96% of men were working full time)."²⁰⁰ Furthermore, women, more

195. Press Release, Nat'l Ass'n for Law Placement, *Rate of Part-Time Work Among Lawyers Unchanged in 2012 — Most Working Part-time Continue to Be Women* (Feb. 21, 2013) [hereinafter *Rate of Part-Time Work*], <http://www.nalp.org/uploads/PressReleases/2013PartTimePressRelease.pdf> [<https://perma.cc/F5JJ-VTL9>]; see also Ronit Dinovitzer, *Practice Setting*, in *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 26 (2014) [hereinafter *AJD III*] (*AJD III* is the third installment in a longitudinal study conducted by the American Bar Foundation and the NALP Foundation for Law Career Research Education that followed the careers of a nationally representative group of attorneys who were admitted to the bar in 2000). Dinovitzer reports that the percentage of lawyers in the group who were working full-time fell from a high of ninety-four percent (three years after admission to the bar) to eighty-seven percent (approximately seven years after admission to the bar) to eighty-six percent (approximately twelve years after admission to the bar). *Id.* at 26 (noting that as in the first and second *AJD* studies, "most of those working part time or not working in the paid labor force continue to be women."). This phenomenon is not new. Carol Needham reported in her 1997 law review article that a then "recent study" showed that "attorneys who seek to make temporary adjustments to their work schedules for [family reasons] are more often female than male." Needham, *supra* note 65, at 483. Needham reported that the then recent study revealed that "eight large corporate law firms that were studied had instituted part-time schedules for their attorneys largely to 'accommodate the needs of mothers . . . at all firms in the sample, instances of men working part-time were rarely mentioned.'" *Id.* (quoting Colleen McMahon, *Foreword to Cynthia Fuchs Epstein, Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 409-10 (1995)).

196. *Rate of Part-Time Work*, *supra* note 195.

197. This appears to be NALP's most current study of part-time legal work. See *Part-Time Lawyers*, NALP, <https://www.nalp.org/parttime> [<https://perma.cc/E6TE-EYBY>].

198. *Rate of Part-Time Work*, *supra* note 195.

199. Robert L. Nelson & Gabriele Plickert, *Introduction*, in *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 14 (2014).

200. Joyce Sterling, Rebecca Sandefur & Gabriele Plickert, *Gender*, in *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 68 (2014).

frequently than men, take positions that are not typical partnership-track associate positions, including staff attorney positions.²⁰¹

Women are also more likely to leave their jobs. The National Association of Women Lawyers reports that “since at least 1991 women have made up just under half of law-school graduates and new associates”²⁰² yet “only about 15 percent of law firm equity partners and chief legal officers have been women.”²⁰³ While some women may merely change places of employment, some leave the practice entirely. *AJD III* found that, after twelve years, “[w]omen were significantly more likely to indicate they [were] . . . not currently working (9%) to care for children.”²⁰⁴

Much attention has been paid to this exodus of female lawyers from law firms and how to stop it. Many suggest offering structures that will “work” better for working moms,²⁰⁵ including reduced hours and flex-time arrangements.²⁰⁶ One study reported that “[i]nterest in flexible and part-time arrangements is particularly strong among women attorneys. . . . Reduced-time work options are so highly valued that women are willing to exit employment to find more flexible work arrangements.”²⁰⁷ The annual list of *Best Law Firms for Women* highlights firms that have workplace policies that “support and advance working-mom lawyers,” particularly reduced-hours schedules and other flex-time arrangements.²⁰⁸ In other words, firms are creating these

201. A recent study of Ohio lawyers found that “women were significantly more likely than men to work as staff attorneys.” Merritt, *supra* note 193, at 1090 (10.1% of women in the study were employed as staff attorneys versus 4.9% of men in the study).

202. Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, NAT’L ASS’N OF WOMEN LAW. 4 (2015), <http://www.nawl.org/d/do/343> [<https://perma.cc/ZYQ9-Q5T4>].

203. *Id.* at 1.

204. *AJD III*, *supra* note 195, at 68.

205. Debra Cassens Weiss, *What Women Lawyers Want: Flex-Time and Part-Time Options*, A.B.A. J. (Mar. 6, 2008, 4:11 PM), http://www.abajournal.com/news/article/what_women_lawyers_want_flex_time_and_part_time_options [<https://perma.cc/HH6C-45HG>] [hereinafter *What Women Lawyers Want*] (“Flexible work arrangements are key to retaining women lawyers. . . .”). The ABA Journal reported on a study by the Georgia Association of Women Lawyers which “found that only 30% of the surveyed law firms had formal policies for part-time or flexible work. Yet 86% of women lawyers surveyed [were] interested in part-time or flexible work.”) *Id.*

206. In fact, the National Association of Women Lawyers suggested in its 2008 Report, *Actions for Advancing Women Into Law Firm Leadership*, that law firms “[e]mploy a ‘balanced hours’ or reduced-hours schedule coordinator.” Linda Bray Chanow & NAT’L ASS’N OF WOMEN LAWYERS, *ACTIONS FOR ADVANCING WOMEN INTO LAW FIRM LEADERSHIP* (2008), <http://www.nawl.org/d/do/74> [<https://perma.cc/P2AU-ESPG>].

207. *What Women Lawyers Want*, *supra* note 205 (quoting a study conducted by the Georgia Association for Women Lawyers).

208. Katherine Reynolds Lewis, *Why Women Quit*, WORKING MOTHER (July 21, 2015), <http://www.workingmother.com/content/why-women-quit> [<https://perma.cc/SBF7->

policies with the hopes of retaining female lawyers yet, if one of the ramifications of a female lawyer's decision to take a reduced hours schedule is reduced mobility given the admission by motion rules that require full-time prior practice, women who go on a reduced schedule are risking future mobility, likely without being aware they are doing so.

Finally, a recent study of licensed attorneys in Ohio confirmed that female attorneys are more likely than male attorneys to move out of the state of their original licensure within the first five years of practice.²⁰⁹ Given this statistic, durational components that require at least five years of practice out of the previous seven pose a significant problem to women who are moving out of their original licensure jurisdiction prior to the five-year mark.

This trifecta of trouble (*i.e.*, higher likelihood of: working part-time, leaving work for some time, and moving away within first five years of practice) makes attention to the active practice requirement acutely necessary for female attorneys.

ii. Structural Shifts in the Legal Employment Market

The need for some jurisdictions to reconsider their current requirement of "full-time" prior practice does not end with female attorneys. Today's younger generation of lawyers and others impacted by certain structural shifts in the legal employment market are in need of attention as well. The following two areas of particular relevance will be discussed below: (a) the structural shifts in the legal employment market that have driven up the popularity for part-time legal work; and (b) the dilemma that recent graduates

UNKZ]. Many of these initiatives are centered on innovative reduced hour schedules or other flex-time arrangements. WORKING MOTHER & FLEX-TIME LAWYERS, EXECUTIVE SUMMARY FOR BEST LAW FIRMS FOR WOMEN 2016 2 (2016), http://www.workingmother.com/sites/workingmother.com/files/2016_working_mother_and_flex-time_lawyers_best_law_firms_for_women_executive_summary_final.pdf [https://perma.cc/44YR-2H4E] (stating that "[t]he winning firms lead the industry in supporting flexible work arrangements and offering general paid parental leave.").

209. Merritt, *supra* note 193, at 1090. Professor Merritt's research population included 1214 lawyers licensed in Ohio that represented the class of 2010. *Id.* at 1050-51. In addressing her study's generalizability, Merritt offers three reasons why her sample from Ohio "offers useful insights to practitioners and educators in a wide range of markets. First, Ohio . . . [is] a substantial legal market". *Id.* at 1053. Second, "Ohio offers a mix of legal employers that approximates national employment patterns". *Id.* at 1054. And, third, based on Ohio's unemployment rates, "Ohio's overall economy . . . offers an appropriate context for judging employment opportunities for junior lawyers,". *Id.* at 1055. With respect to the greater likelihood of women moving away from Ohio, her study found that 18.4% of the women moved out of state after being admitted to the Ohio bar compared to only 14.1% of the men. Merritt, *supra* note 193, at 1090.

face in having to choose a jurisdiction before they have a job, which is a relatively new phenomenon in legal employment.²¹⁰

a. Part-Time Legal Employment

More than speculation and anecdotal evidence now exists to suggest that “structural shifts” are occurring in the legal employment market,²¹¹ and some of these shifts are driving up the popularity of part-time legal employment models. One such shift, the “disaggregation of legal tasks,”²¹² has been attributed to an increased willingness in clients

to break particular matters into their constituent parts and to decide, with respect to each part, how the services needed could be provided most efficiently and cost-effectively. Sometimes this has resulted in clients moving certain functions in-house, sometimes in outsourcing certain functions to legal process outsourcers or other non-law firm vendors, and sometimes in moving certain functions to other lower-cost law firms.²¹³

As a result of this structural change and an increased desire to address lawyer unhappiness with firm life, new and innovative approaches to the business of practicing law, referred to as “New Law,” are beginning to crop up.²¹⁴ The *2015 Report on the State of the Legal Market* from the Georgetown Law Center for the Study of the Legal Profession found that “the market is now awash with new, non-traditional competitors that over time are likely to change the dynamics of the legal services sector”²¹⁵ Some of these new

210. See *infra* Part III.B.ii.a and accompanying notes.

211. See Merritt, *supra* note 193, at 1047; see also *Disruptive Innovation*, *supra* note 112, at 6 (“Since the Great Recession, the market for legal services has changed from a sellers’ to a buyers’ market.”). Professor Merritt suggests that the structural changes result from the following “disrupt[ive] forces in the legal market:” (1) deregulation of the profession; (2) adoption of labor-saving technology; (3) disaggregation of legal tasks; (4) increased reliance on non-lawyers for legal work; (5) competition from global providers; and (6) a persistent oversupply of licensed lawyers.” Merritt, *supra* note 193, at 1104; see also Gerard J. Clark, *Monopoly Power in Defense of the Status Quo: A Critique of the ABA’s Role in the Regulation of the American Legal Profession*, 45 SUFFOLK U. L. REV. 1009, 1045 (2012) (internal citations omitted).

212. Merritt, *supra* note 193, at 1104.

213. GEO. LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, 2017 REPORT ON THE STATE OF THE LEGAL MARKET 10 (2017), <http://legalexecutiveinstitute.com/wp-content/uploads/2017/01/2017-Report-on-the-State-of-the-Legal-Market.pdf> [https://perma.cc/2B8V-FASJ].

214. *Disruptive Innovation*, *supra* note 112, at 1-2.

215. GEO. LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, 2015 REPORT ON THE STATE OF THE LEGAL MARKET 1 (2015), <http://www.law.georgetown.edu/academics/centers->

forms include secondment firms, which temporarily place lawyers in-house,²¹⁶ and accordion law companies, which allow law firms to "accordion up" on a temporary basis when experiencing a period of high demand for certain legal services.²¹⁷ One of the significant benefits offered by these New Law models is access to reduced hours schedules and other flex-time arrangements.²¹⁸

The advent and increasing popularity of these New Law models may provide seasoned lawyers who have been working full-time with the sustainable part-time business model they have been waiting for. For example, commentators report that employees of law firm accordion companies are commonly "women who identify as stay-at-home mothers [who] want to keep their skills sharp and avoid a gap in their resumes by working ten to twenty hours per week."²¹⁹ Time will tell whether these part-time positions continue to thrive but, in the meantime, the availability of these New Law models continues to broaden the ranks of licensed attorneys who are practicing on a less than full-time basis and, therefore, the number of attorneys who would benefit from taking another look at the active practice requirement of admission by motion rules.

Another change in the legal employment market that implicates the active practice requirement is that recent graduates are more likely to work, for some time, on a part-time basis than were earlier generations of graduates. Research indicates that the percentage of recent graduates working part-time peaked in 2012 and has declined recently but has not yet reached pre-2008

institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf [https://perma.cc/4RXM-BYQW].

216. Secondment firms are "companies that place lawyers in-house, either on temporary assignments (the original meaning of 'secondment') or on a more permanent part-time basis." *Disruptive Innovation*, *supra* note 112, at 26. Paragon Legal is one example of a secondment firm, and it allows its clients to name how many hours of work they want from Paragon lawyers per week (between ten and forty) and how many days they want Paragon lawyers to be on-site. *Id.* at 38. For its attorney-employees, Paragon "guarantees attorneys an agreed-upon number of hours (typically between ten and forty per week) but does not guarantee that its attorneys will be working year-round, although 'the vast majority' of attorneys do." *Id.*

217. Law Firm Accordion Companies, like Counsel on Call, "provide law firms with the ability to 'accordion up' when there is a surge of work, and fold back down when that work is completed." *Disruptive Innovation*, *supra* note 112, at 47. These types of companies provide jobs to "the tranche of women who often identify as stay-at-home mothers but want to keep their skills sharp and avoid a gap in their resumes by working ten to twenty hours a week." *Id.*

218. *Id.* at 13 ("Recent scholarship concludes that the only way to eliminate the flexibility stigma is to change time norms – expectations surrounding face time and schedule – for everyone (footnote omitted). Because law firms have not done this, New Models have: working part-time is the norm in some, while in many others full-time is defined as sharply fewer than the 2000-plus-hours expectation common in Big Law.").

219. *Id.* at 47.

levels.²²⁰ Therefore, statistically speaking, compared to law school graduates from classes prior to 2008, more graduates since 2008 who experience the need for mobility will have to deal with having some part-time experience on their admission by motion applications.

In its findings for the graduating class of 2010, the NALP stated that “the employment profile for [the class of 2010] marks the interruption of employment patterns for new law school graduates that have been undisturbed for decades.”²²¹ One of the “negative trends” identified by NALP with the 2010 graduating class was that the rate of part-time employment “stood at almost 11%, comparable to 2009 [but] in contrast to 6.5% for 2008 and about 5% in the years immediately prior to that.”²²² The percentage of recent graduates working part-time has fluctuated in the years since 2010. In 2011, the number increased to nearly 12%²²³ and then began to decline in subsequent years: 9.8% in 2012,²²⁴ 8.4% in 2013,²²⁵ 7% in 2014,²²⁶ and 6.7% in 2015.²²⁷ Notwithstanding the decline, part-time employment levels as of 2015 (6.7%) have not yet reached pre-2008 level of 5%.²²⁸ These lawyers, combined with the increasing number of lawyers who are taking advantage of New Law models, could suffer under the current admission by motion rules.

220. See *infra* Part III.B.ii.a and accompanying notes.

221. Press Release, Nat'l Ass'n for Law Placement, Class of 2010 Graduates Faced Work Job Market Since Mid-1990s: Longstanding Employment Patterns Interrupted (June 1, 2011), <https://www.nalp.org/uploads/PressReleases/11SelectedFindings.pdf> [<https://perma.cc/A9BP-E3QV>].

222. *Id.*

223. *Employment for the Class of 2011 – Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2 (2012), <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf>. NALP appears to combine all categories of part-time work (i.e., Bar Passage Required, JD Advantage, Other Professional, Non-Professional, Job-Type Unknown) into this single part-time statistic. See *National Summary Chart for Class of 2011*, NAT'L ASS'N FOR L. PLACEMENT (July 2012), http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf [<https://perma.cc/9XXF-7PAN>].

224. *Employment for the Class of 2012 – Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2 (2013), <http://www.nalp.org/uploads/Classof2012SelectedFindings.pdf> [<https://perma.cc/NSK5-BQSF>].

225. *Employment for the Class of 2013 – Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2 (2014), <http://www.nalp.org/uploads/Classof2013SelectedFindings.pdf> [<https://perma.cc/PD7S-4CGF>].

226. *Employment for the Class of 2014 – Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2 (2015), http://www.nalp.org/uploads/Classof2014SelectedFindings_revJan17.pdf [<https://perma.cc/BZS2-K8L9>].

227. *Employment for the Class of 2015 – Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2 (2016), <http://www.nalp.org/uploads/Membership/EmploymentfortheClassof2015SelectedFindings.pdf> [<https://perma.cc/89JP-RYHE>].

228. See *supra* notes 222 and 227.

b. Choosing Jurisdiction Before Job

In prior generations of law school graduates, students were generally able to line up post-law school employment prior to graduation. As a result, students did not have to worry that the jurisdiction where they chose to take a bar examination would not be the same jurisdiction in which they started practice. However, times have changed. These days, many law school graduates-to-be have not obtained employment prior to graduation so they are left to choose a jurisdiction that they think holds the most future career promise.²²⁹ If they are wrong, they may be out of luck, time and money and, perhaps worse, exposed to having to take another bar exam.

The adoption of the Uniform Bar Exam (the "UBE") in 28 jurisdictions (through the July 2018 bar exam)²³⁰ has begun to reduce this burden among recent law school graduates.²³¹ The UBE is prepared by the National Conference of Bar Examiners, the same group that creates the Multistate Bar Examination ("MBE"), the Multistate Professional Responsibility Exam ("MPRE"), the Multistate Essay Examination ("MEE"), and the Multistate Performance Test ("MPT").²³² The UBE is made up of the MEE, the MPT, and the MBE.²³³ "It is uniformly graded and offers test-takers a portable score that can be transferred to any other UBE jurisdiction."²³⁴ It does not test state-specific law but UBE jurisdictions can, and many have, adopt additional measures that ensure applicants admitted to practice in that jurisdiction by

229. Fabiani Duarte, *Report in Support of Resolution 109*, 2016 A.B.A. L. STUDENT DIVISION REP. 4, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwil-PqlmuHUAhUJ3YMKHfYnDec-QFggmMAA&url=https%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Ffaba%2Fdirectories%2Fpolicy%2F2016_hod_midyear_109.authcheckdam.docx&usq=AFQjCNHCYOldbQkNI3kYe84N9LJ9xEH2VA [hereinafter A.B.A. L. STUDENT DIVISION REP.].

230. COMPREHENSIVE GUIDE, *supra* note 13, at 20-22; *see also Jurisdictions that Have Adopted the UBE*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/B23Y-MXSP>].

231. On February 8, 2016, the ABA House of Delegates adopted Resolution 109, which reads as follows: "RESOLVED, That the American Bar Association urges the bar admission authorities in each state and territory to adopt expeditiously the Uniform Bar Examination." A.B.A. L. STUDENT DIVISION REP., *supra* note 229; *see also, Report on the ABA Mid-Year Meeting 2016*, AM. BAR ASS'N HOUSE OF DELEGATES 13 (Mar. 18, 2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_midyear_meeting_select_committee_report.docx; *House of Delegates Resolutions*, AM. BAR ASS'N HOUSE OF DELEGATES, https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/109.html [<https://perma.cc/6VRN-W8PT>].

232. A.B.A. L. STUDENT DIVISION REP., *supra* note 229, at 2, 3.

233. *Id.* at 3.

234. *Id.*

transfer of a UBE score are made aware of any significant state-specific matters.²³⁵ Some states require the completion of an online course on state-specific law as an additional requirement prior to admission.²³⁶ Others require completion of an online open-book test or attendance at a live seminar focused on state-specific rules.²³⁷

One of the benefits of the UBE to test-takers is that it offers a score that is portable to other UBE jurisdictions, subject to certain limitations.²³⁸ In order for UBE Jurisdiction B to accept an applicant's score on the UBE taken in UBE Jurisdiction A, the UBE combined, scaled score (taken during a single administration of the UBE) must meet or exceed the minimum score established in UBE Jurisdiction B and the UBE must have been taken within the time period set for acceptance by UBE Jurisdiction B.²³⁹ Meeting the requirements to have one's score transferred to another UBE jurisdiction does not automatically qualify the applicant for admission in the accepting jurisdiction. The applicant must also meet the other requirements for admission, which generally include holding a J.D. from an ABA-approved law school; passing the MPRE; establishing that the applicant is in good standing if admitted elsewhere; establishing that the applicant is not subject to disciplinary action; and meeting the character and fitness requirements of the jurisdictions.²⁴⁰

For example, Alabama is a UBE jurisdiction with a minimum UBE passing score of 260.²⁴¹ It will accept UBE scores from applicants from other

235. *Id.* at 5; *see, e.g., UBE Jurisdiction-Specific Components: Seven Unique Approaches*, NAT'L CONF. B. EXAMINERS (Sept. 2016), http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-UBE-JurisdictionSpecific-850316.pdf [https://perma.cc/6RGM-67MN].

236. A.B.A. L. STUDENT DIVISION REP., *supra* note 229, at 5 & n.29. For example, Alabama requires completion of an online course. *See* RULES GOVERNING ADMISSION TO THE ALA. STATE BAR VI(B)(A)(3), <https://admissions.alabar.org/rule-6b> [https://perma.cc/FE86-QQN2].

237. A.B.A. L. STUDENT DIVISION REP., *supra* note 229, at 5 and 6 and accompanying footnotes. ("New York, for example, will require both an online course and an online examination on New York law (footnote omitted). In New Mexico, which has a significant Native American population, applicants must attend and complete a course approved by the New Mexico Supreme Court, which includes Indian law, as well as community property law and professionalism (footnote omitted). Likewise, the Washington Law Component includes Indian law and community property law, among other subjects deemed important for newly licensed lawyers to be educated about.").

238. *Id.* at 3.

239. *See, e.g.,* ARIZ. SUP. CT. R. 34(h)(1)(A); COLO. R. CIV. P. 203.3(1)(a).

240. *See, e.g.,* ARIZ. SUP. CT. R. 34(h)(1).

241. COMPREHENSIVE GUIDE, *supra* note 13, at 33; *see also* RULES GOVERNING ADMISSION TO THE ALA. STATE BAR VI(B), *supra* note 236. The particular rule in Alabama governing the transfer of the UBE score is as follows:

UBE jurisdictions for up to twenty-five months after the administration of the UBE for which the applicant seeks transfer.²⁴² As a result, an individual who takes the UBE in Missouri, for example, and scores at least a 260, can have that score transferred to Alabama within 25 months after the administration of the UBE in Missouri. There is no requirement in Alabama that the applicant who seeks to transfer his UBE score have practiced at all during that twenty-five-month period.²⁴³

Alabama is not the only state that accepts UBE scores without an active practice requirement.²⁴⁴ Some states even accept UBE scores up to five years after the date of the UBE without an accompanying active practice requirement.²⁴⁵ Interestingly, some of these jurisdictions also have admission by motion rules that have active practice requirements.²⁴⁶ As a result, from a

(6) Transfer of UBE Score. An applicant who has taken the entire UBE in a single administration in another jurisdiction and earned a total UBE scaled score of 260 or above may transfer his or her UBE score and be excused from taking the UBE in Alabama. The transferred UBE score will be valid for a period of no longer than twenty-five (25) months after the date of administration of the UBE that resulted in the transferred score.

RULES GOVERNING ADMISSION TO THE ALA. STATE BAR VI(B), *supra* note 236.

242. *Id.*

243. *See id.*

244. *See, e.g.,* KAN. RULES RELATING TO ADMISSION OF ATTORNEYS 709A(a)(1) (permitting an applicant who has taken the UBE in another jurisdiction to be “[a]dmitted to practice . . . by acceptance of a UBE score, upon showing that the applicant: (1) has achieved a minimum UBE score of 266 on a 400 point scale from an examination that occurred within 36 months of the date the application for admission to the bar of Kansas is filed”); MO. SUP. CT. RULES GOVERNING THE MO. BAR AND THE JUDICIARY 8.09(a) (“An applicant who has taken the UBE in a jurisdiction other than Missouri and earned a scaled total score of not less than 260 may be admitted to the practice of law in this state [provided that]: (a) The scaled total score was attained on a UBE administered within the twenty-four months preceding the date the application is properly submitted”); RULES GOVERNING THE CT. OF THE STATE OF N.J. 1:24-3 (“Applicants may apply for admission to the bar of this State using a UBE score transferred from another UBE jurisdiction provided that: (a) the score attained on the UBE examination meets or exceeds the minimum passing score established by the Supreme Court; (b) no more than thirty-six (36) months have passed since the applicant sat for the UBE examination for which the qualifying UBE score was attained. . . .”); W. VA. RULES FOR ADMISSION TO THE PRACTICE OF LAW 3.5(a) (“combined, scaled UBE score of no less than 270 in an administration of the UBE taken within three years immediately preceding the date upon which application is made”).

245. *See, e.g.,* ARIZ. SUP. CT. R. 34(h) (2016), https://www.azcourts.gov/Portals/26/AOM/Rule34_EffectiveJanuary2016.pdf [<https://perma.cc/36NP-LMMC>] (“The applicant shall . . . (A) have achieved a scaled score on the uniform bar examination that is equal to or greater than the minimum acceptable score established by the Committee on Examinations and that was earned within five years prior to the applicant’s taking the oath of admission and being admitted to the practice of law in Arizona. . . .”).

246. *Compare, e.g.,* ALASKA BAR RULES 2 § 2(a)(2), <https://admissions.alaska-bar.org/admission-bar-reciprocity> [<https://perma.cc/5JLW-MM4F>] (An applicant who meets

policy perspective, one could say that these jurisdictions oddly equate the competency of the following two lawyers: one who took the bar exam in a UBE jurisdiction but who has not practiced in nearly five years and one who took a non-UBE bar exam but who has five years of active practice experience.

Some jurisdictions, on the other hand, have paired the UBE transfer rule with an active practice requirement.²⁴⁷ For example, Iowa began offering the UBE in February of 2016 and it accepts UBE scores from other jurisdictions of 266 and above.²⁴⁸ Moreover, the rule provides the following specific limitations on transfer of a UBE score:

a. Any applicant may transfer a qualifying UBE score without a showing of prior legal practice if the score was from a UBE administered within two years immediately preceding the transfer application filing date.

b. An attorney applicant may transfer a qualifying UBE score up to five years after the examination was taken upon proof that the applicant regularly engaged in the practice of law for at least two years of the last three years immediately preceding the transfer application filing date. The board may require the applicant to provide a certificate of regular practice required for motion applicants under Iowa Court Rule 31.13(1)(b) that addresses the period of practice this rule requires.²⁴⁹

The adoption of the UBE and its portable score has raised new and interesting questions about the active practice requirement and its necessity in protecting the public from incompetent lawyers. For example, let's assume Sam took the UBE in July 2017. Since he took the UBE, he is now eligible

the requirements of Rule 2, §1(a)-(e) and "has engaged in the active practice of law in one or more states, territories, or the District of Columbia for five of the seven years immediately preceding the date of his or her application, may, upon motion be admitted to the Alaska Bar Association without taking the bar exam.") *with* ALASKA BAR RULES 2 § 4 ("An applicant who meets the requirements of (a) through (e) of Section 1 of this Rule and has achieved a scaled score of 280 or above on a Uniform Bar Examination (UBE) administered in another state, territory, or the District of Columbia within five years preceding the date of the application to the Alaska Bar Association may be admitted to the Alaska Bar Association.").

247. See, e.g., COLO. CIV. P. 203.3(1) & (2); IOWA CT. RULES 31.4(2); OR. RULES FOR ADMISSION OF ATTORNEYS r. 19.05(c); RULES OF PROF'L PRACTICE 14-712(c); RULES OF ADMISSION TO THE BAR OF VT. SUP. CT. 13(b).

248. IOWA CT. RULES 31.1(1)(b), 31.1(1)(d), <https://www.legis.iowa.gov/docs/ACO/CR/LINC/04-28-2017.chapter.31.pdf> (last visited June 28, 2017).

249. IOWA CT. RULES 31.4(2).

to be licensed in up to twenty-eight jurisdictions, including a few where he can get licensed even five years after taking the UBE without having practiced in the interim. Erin, on the other hand, took a state bar exam (i.e., non-UBE), which could possibly include all of the components of the UBE other than the MEE. She is now "stuck"²⁵⁰ in the state of her original licensure for some period of time merely because she took the essay exam prepared by the state's board of law examiners rather than the MEE, which is prepared by the National Conference of Bar Examiners. In order to make up for having answered state-prepared essay questions rather than MEE essay questions, she must "primarily engage in the active practice of law," perhaps even on a full-time basis depending on the jurisdiction, for somewhere between three and five years in order to move elsewhere and avoid the bar exam. While this sounds like an argument in favor of national adoption of the UBE (and perhaps it is), it also raises questions about the underlying purposes of the admission rules and whether the active practice requirement is necessary to protect the public from incompetent lawyers.

IV. A PATH FORWARD

Although the ABA's Model Rule has taken admission by motion a long way toward uniformity in both adoption and approach, room for improvement exists with respect to allowing attorneys who have proven their minimum competence in one jurisdiction to move to another even though their clear track record with disciplinary authorities has some part-time work in it. This Part provides suggestions on how to improve the ABA Model Rule by first explaining each of the proposed improvements and then by illustrating the improvements through a blackline to the current ABA Model Rule.²⁵¹

250. She is not entirely stuck; she could always take another jurisdiction's bar exam.

251. Here, I will articulate a few questions that I hope have been raised in your mind as you read this Article: is the active practice requirement the proper metric for ensuring the public is protected from incompetent lawyers? Is it necessary at all in light of increasing uniformity among bar exams and laws? At least one commentator has suggested that "maintenance of admission standards could be regulated directly and more efficiently without reference to years of practice." Williams, *supra* note 30, at 203. Could that more direct method be mandatory instruction in local law? Does the portability of the UBE score for between 2 and 5 years without an active practice requirement cut against having an active practice requirement for non-UBE test takers (or, rather, does it argue that transfer of a UBE score after a certain period of time should only be permissible if paired with active practice)? Does allowing temporary licensure for military spouses without an active practice requirement cut against the argument that years in practice are necessary to protect the public? Could a similar temporary licensure approach be offered to all lawyers? It is possible, even probable, that the answers to these questions may demand innovation greater than this Article, in the end, suggests.

A. ADDRESSING THE “FULL-TIME” REQUIREMENT

i. Eliminate the “Full-Time” Prior Practice Requirement

First, any jurisdiction whose admission by motion procedure requires a “full-time” prior practice experience should eliminate that requirement²⁵² because it is not only overbroad in its effort to ensure an applicant’s prior track record provides reasonable evidence of minimum competence, but in those jurisdictions that have a specific hourly requirement, not a single one is requiring more than thirty hours per week.²⁵³ In addition, requiring full-time practice significantly impacts the mobility of competent attorneys who have and will continue to practice law on a part-time basis. Instead, the extent of practice requirement need only ensure that the applicant engaged in the practice of law “enough” so that her work could expose her to disciplinary action, if any is warranted, and this Article’s suggestion for measuring “enough” is described in paragraph (B)(ii) below.²⁵⁴

A “full-time” requirement is overbroad because, if the purpose of the admission by motion rules is to protect the public from incompetent and dishonest lawyers, the durational component provides the time during which the applicant can establish her track record in practice.²⁵⁵ If she is incompetent or dishonest, three years should be enough time for those characteristics to

252. Since the ABA Model Rule does not include any language that requires “full-time” prior practice experience, this suggestion does not appear in the redline comparison.

253. See *supra* Part II.B. and accompanying notes.

254. See, e.g., *In re Application of R.G.S.*, 541 A.2d 977, 979 (Md. 1988) (“Our earlier cases suggest that a reason for the practice requirement was to put the applicant to the test of the reputation he or she would acquire through the practice of law in a single jurisdiction.”) (internal citations omitted).

255. The Commission on Multijurisdictional Practice seemed to recognize as much in its 2002 report, stating:

The admission on motion processes in these states recognize the reality that lawyers who have been admitted to another state’s bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state, and that, for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state. This is particularly true because, with the advent of multi-state bar examinations, most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states’ laws.

CLIENT REPRESENTATION, *supra* note 42, at 50-51; see also Needham, *supra* note 65, at 481 (“The fact that the out-of-state lawyer remains in good standing after practicing law for a number of years is deemed to be evidence of the lawyers’ competence, which otherwise would have to be demonstrated by achieving a passing grade on the state’s bar examination.”).

manifest themselves.²⁵⁶ If, during those three years, the applicant is subjected to disciplinary action or otherwise falls out of good standing in the jurisdiction of her original licensure, she will be denied admission on motion based on the ABA Model Rule's requirement that the applicant not have been subject to disciplinary action and be in good standing. If a jurisdiction determines these protections are insufficient, its rule could be revised to go even further than the ABA Model Rule with respect to an applicant's disciplinary history (as Ohio has in its Military Spouse Attorneys Admission rule) and include more protections related to an applicant's disciplinary history such as by requiring that the applicant (1) has not resigned from the practice of law with discipline pending in any jurisdiction; (2) has not voluntarily or involuntarily relinquished a license to practice law in any jurisdiction in order to avoid discipline or as a result of discipline imposed by a relevant authority; and (3) has not been disciplined for professional misconduct within the past ten years or been disbarred by any jurisdiction.²⁵⁷

ii. Add Clarifying Language that "Full-Time" is Not Required.

Not only should a jurisdiction eliminate any language requiring "full-time" prior practice from its rule (to the extent its rule includes that language) but, in order to avoid any ambiguity caused by the absence of such words,²⁵⁸ it should include clarifying language that full-time prior practice is not necessary.

iii. Alternative: Provide Part-Time Equivalent

If a jurisdiction is not willing to take the steps articulated in A.i. and A.ii. above and it prefers to require "full-time" prior practice, the licensing authority should at least consider adding a less than full-time equivalent to its rule. For example, if the rule requires full-time practice for five of the

256. *Ethics 20/20 Report*, *supra* note 58, at 3. When defending its reduction of the durational component to three of the last five years, the Commission on Ethics 20/20

considered the concern that a lawyer who has practiced for only three years may not be sufficiently competent to practice law in a new jurisdiction. The Commission, however, found no reason to believe that lawyers who have been engaged in the active practice of law for three of the last five years will be any less able to practice law in a new jurisdiction than a law school graduate who recently passed the bar examination in that jurisdiction. In fact, five jurisdictions already have a reduced duration-of-practice requirement of three years, and none of those jurisdictions have reported any resulting problems.

Id.

257. *See supra* note 77.

258. *See supra* Part III.A.i.d.

immediately preceding seven years, a new rule could be adopted that would allow for a part-time equivalent that eliminates the two-year grace period. In other words, the rule would permit an applicant who engaged in her part-time practice on a regular basis for the entire seven-year period such that, at the end of the seven-year period, both the full-time and part-time applicants had worked essentially the same amount of hours, like Marcella and Jim. Alternatively, the part-time equivalent rule could include a grace period and simply extend the durational component with respect to part-time practitioners.

B. MEASUREMENT ISSUES

Once the “full-time” requirement is deleted, the question turns to this: what measurement can the licensing jurisdiction use to determine when the applicant’s track record is “enough” to provide a body of work sufficient to determine whether the applicant has maintained her minimum competence? The first section below will discuss the pros and cons of a specific hourly requirement and the second section will set forth an alternative structure, together with its pros and cons.

i. Specific Hourly Requirement

The Pros

A specific hourly requirement provides a bright line test that could prove to be beneficial to the licensing authority in close call cases. Further, even though the authority’s discretion is somewhat limited when a specific hourly requirement is included, the specificity provides some transparency to would-be applicants and allows the rule to be applied in a more consistent way across time, even in the face of change in the licensing authority. In providing some transparency to would-be applicants, the rule would ensure individuals who meet the requirement of the rule are not dissuaded from applying and would also prevent the current situation faced in some jurisdictions that requires an applicant to essentially “wait and see,” spending the time and money to apply, only to lose out on both if the applicant later learns that her prior practice was not sufficient.

The Cons

However, there are also a few problems with including a specific hourly requirement. First, the rules that are so granular as to specify a number of hours required *per week* or *per month* may prove difficult to comply with in light of frequent job changes, maternity leave or other familial issues, and a host of other reasons (including, without limitation, illness or disability) that might see a lawyer not work for a number of weeks at a time. While it may

be important to require consistent rather than sporadic practice, requiring consistency based on hours per week seems to go too far.

Second, since law firms are increasingly offering alternative fee arrangements, including "fixed fees, contingent fees, value-added billing, mixed hourly and fixed fee models,"²⁵⁹ requiring applicants to report their work on an hourly basis may prove to be a difficult evidentiary issue for those lawyers who frequently use alternative billing structures.

There is also the issue of defining what is included in an "hour." Does it include only billable hours? Does it exclude administrative time or time spent at a CLE? While these questions may be resolved by defaulting to the jurisdiction's definition of the "practice of law," the question is a more difficult one, at least from an evidentiary perspective, for attorneys who are not in private practice. For example, for applicants who have been working as faculty at an ABA-approved law school or as a judge or judicial clerk, whose work does not require them to track billable hours, the evidentiary burden may be insurmountable if a specific hourly requirement is imposed.

Finally, assuming an hourly requirement is adopted, how many "hours" is enough to ensure an applicant maintains minimum competence? Currently, in jurisdictions that have adopted a specific hourly requirement, the aggregate number of hours required by those jurisdictions over the durational period range from 1,500 hours to 7,200 hours. In the absence of empirical support for a specific number of hours that ensures minimum competence, including a specific hourly requirement seems a relatively arbitrary measure.

ii. Regular Practice Requirement and Evidence of Law Practice as Principal Occupation

Even for its benefits, the use of a specific hourly requirement is not ideal. There may be an alternative, however, that has the benefit of a bright-line test but avoids the measurement problems discussed above with respect to a specific hourly requirement. The bright line test could require that the applicant demonstrate that for the time period during which she was engaging in the active practice of law she derived at least 50% of her non-investment income from the practice of law. This approach would reduce the evidentiary burden on all applicants whose practice is not based on billable hours. Moreover, it would avoid having the licensing authority analyze each hour to determine whether that hour "counted" for purposes of the rule. Finally, it would go a long way towards proving that the applicant actually practiced law as a principal means of her livelihood.

259. Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straight Jacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 444-45 (2012).

One nuance that the rule would need to address is the provision of legal services on a pro-bono or reduced-fee basis. The 50% test would not accurately reflect the extent of an applicant's practice if she is not given "credit" for these services.²⁶⁰

In addition, the 50% test alone might not accurately reflect the extent of an applicant's prior practice if she derived a significant amount of income from one or two cases over the years or, for example, if her only income-generating activity was teaching a law school course on an adjunct basis for a single semester in the durational period. Therefore, the bright line 50% test should be paired with a requirement that the applicant also have "regularly" engaged in the active practice of law.

"Regular" practice does not go so far as to mandate a specific number of hours per week or require that one's work be "uninterrupted by periods of other employment or unemployment"²⁶¹ but it does ensure that one's practice has been performed on a consistent rather than sporadic basis. It also provides the licensing authority with the discretion it needs in these fact-intensive inquiries. The requirement of consistency paired with evidence that the practice of law was an applicant's principal occupation provide the necessary ingredients for ensuring that an applicant's track record in practice is "enough" from which to measure maintenance of minimum competence.

260. The question of whether unremunerated services could be included in determining whether the practice of law constituted one's "principal means of livelihood" was recently addressed in Connecticut. *See, e.g., Ellis v. Conn. Bar Examining Comm.*, No. HHDCV136040778S, 2014 WL 2922638, at * 2 (Conn. Super. Ct. 2014) (unpublished) (determining that the phrase "principal means of livelihood" as used in Connecticut's admission by motion rule does not "preclude non-profit or pro bono legal services.") The court stated that there was

no basis to contend. . . that a lawyer working as a volunteer in a legal aid society or other non-profit organization is any less likely to obtain the minimum basic legal skills to practice law than someone employed in a paying legal position It would be an injustice to consider the work of a volunteer lawyer in a nonprofit setting any less worthy of preparing the lawyer for successful practice in this state than the work of a lawyer who receives remuneration. Indeed, our rules of professional conduct explicitly state that "[a] lawyer should render public legal interest legal service." Rules of Professional Conduct 6.1. The committee should not deny credit for work that our rules of professional conduct encourage. Liberally interpreting the rule in an effort to avoid injustice, the court concludes that the term "livelihood" in § 2-13(a) includes legal work without remuneration.

Id.

261. *See supra* note 96.

C. FINAL THOUGHTS ON DURATIONAL PERIOD

All jurisdictions should adopt a uniform durational period²⁶² and that durational period should make clear that the required years' worth of active practice need not have been consecutive. In addition, the rule should clarify that time can be combined from multiple activities that constitute the "active practice of law."

Taken together, the approach described above would allow applicants to demonstrate that they have at least maintained their minimum competence even though they have less than "full-time" experience. It hopes to present a more reliable measure than a measure, like "full-time" practice or 1,000 "hours" per "year," which is difficult to measure and somewhat arbitrary in its hope to measure minimum competence.

D. PROPOSED REVISIONS TO THE ACTIVE PRACTICE REQUIREMENT OF THE ABA MODEL RULE.

The aforementioned suggestions are reflected in the following redline of the applicable provisions of the ABA Model Rule.²⁶³

1. (c) have been ~~primarily~~ engaged in the active practice of law in one or more states, territories, or the District of Columbia for an aggregate of at least 36 months, whether consecutive or non-consecutive (such 36-month period, the "active practice period"), within the 60-month period immediately preceding the date upon which the application is filed;
2. For purposes of this Rule, the "active practice of law" shall include the following activities. . . .:
 - (a) Representation of one or more clients in the private practice of law;
 - (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
 - (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
 - (d) Service as a judge in a federal, state, territorial or local court of record;

262. Whether that durational period should be three of the previous five years remains a question to be answered. The ABA addressed concerns with respect to this issue in its 2012 amendment, *see supra* note 59, but perhaps the time has come for empirical work to be done to determine the extent to which this three-year period is appropriate in protecting the public or whether it presents difficulties for individuals who leave the practice entirely for some period of time due to family demands.

263. See *supra* note 58 for the full text of the current ABA Model Rule.

- (e) Service as a judicial law clerk;
- (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates; or
- (g) Any combination of the foregoing.

The "active practice of law" means that (A) the applicant has engaged in one or more of the above-listed activities on a regular basis during the active practice period and (B) the applicant has derived at least 50% of the applicant's non-investment income for the active practice period from such activity or activities; provided, that, if the applicant cannot satisfy the requirement of clause (B) because the applicant engaged in one or more of the above-listed activities on a pro-bono or reduced-fee basis, then the applicant shall bear the burden of demonstrating to the satisfaction of the Board the fair market value of such service(s) for inclusion in the calculation required by clause (B) above. Engaging in the active practice of law on a "regular basis" for purposes of this rule does not require that the applicant's engagement in one or more of the above-listed activities have been on a full-time basis.

CONCLUSION

Without admission by motion, thousands of lawyers would either be stuck in the jurisdiction of their original licensure or would be taking additional bar exams, even many years after graduating from law school. Nonetheless, the approaches currently taken in the active practice requirement across jurisdictions that offer admission by motion are inconsistent, lacking in clarity, and troublesome for particular groups of lawyers. The rules need to acknowledge that many lawyers are forced or choose to work less than "full-time," yet the extent of their practice could provide a sufficient basis from which to ensure that the public does not need to be protected from them. The time has come to remove this barrier to mobility and, in doing so, change at least one of the tiles of the jurisdictional mosaic to a single color.

APPENDIX A: ADMISSION BY MOTION RULES

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
Alabama	"Have been primarily engaged in the active practice of law . . . for 5 of the 6 years immediately preceding the date upon which the application is filed" ²⁶⁵	Only with respect to teaching law at an ABA-approved law school. ²⁶⁶	None	Not for the durational component.

264. See also *State Implementation of ABA MJP Policies*, AM. BAR ASS'N (Apr. 20, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

265. RULES GOVERNING ADMISSION TO THE ALA. STATE BAR III(A)(1)(C) (emphasis added).

266. RULES GOVERNING ADMISSION TO THE ALA. STATE BAR III(A)(4) reads as follows: "Teachers in a law school situated in this State and accredited by the American Bar Association or American Association of Law Schools, who have been *full-time teachers* at said law school for a period of not less than three consecutive calendar years prior to the date of their application and who satisfy the requirements of paragraph A(1)(a), (b), (d) – (k) may be

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
Alaska	“Has engaged in the active practice of law . . . for 5 of the 7 years immediately preceding the date of his or her application.” ²⁶⁷	No	“Active practice of law” means “at least 750 hours per year in one or more of the following activities” . . . and the rule goes on to define the activities that constitute “active practice of law.” ²⁶⁸	No
Arizona	“Have been primarily engaged in the active practice of law . . . for 3 of the 5 years immediately preceding the date upon which the application is filed.” ²⁶⁹	Only with respect to teaching law at an	“Active practice of law” requires “that at all times in the durational period the applicant has held a law	No

admitted to the practice of law in Alabama.” RULES GOVERNING ADMISSION TO THE ALA. STATE BAR III(A)(4).

267. ALASKA BAR RULES 2 § 2(a)(2), <https://public.courts.alaska.gov/web/rules/docs/bar.pdf>.

268. *Id.* at § 2(c).

269. ARIZ. SUP. CT. R. 34(f)(1)(C), https://www.azcourts.gov/Portals/26/AOM/Rule34_EffectiveJanuary2016.pdf

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
		ABA-approved law school ²⁷⁰	license in 'active' status. ²⁷¹	
Arkansas	"have been primarily engaged in the active practice of law . . . for 5 of the 7 years immediately preceding the date upon which the application is filed." ²⁷²	No	None	No
California	No Admission by Motion Rule			
Colorado	"Have been primarily engaged in the active practice of law . . . for 3 of the 5 years immediately preceding the date upon	No	None	No

270. ARIZ. SUP. CT. R. 34(f)(2) provides as follows: "For purposes of this rule, the "active practice of law" shall include the following activities . . . (A) representation of one or more clients in the practice of law; (B) service as a lawyer with a local, state, or federal agency, including military service; (C) teaching law *full-time* at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association; (D) service as a judge in a federal, state, territorial, or local court of record; (E) service as a judicial law clerk; (F) service as corporate counsel. . . ."

271. ARIZ. SUP. CT. RULES 34(f)(3).

272. ARK. RULES GOVERNING ADMISSION TO THE BAR XVI(1)(c), <https://courts.arkansas.gov/rules-and-administrative-orders/rules-governing-admission-to-the-bar>.

Juris-dic-tion ²⁶⁴	Durational com-ponent	Does the rule (or applicable regula-tion or policy state-ment) state that “full-time” practice is required? If so, is “full-time” de-fined?	What, if any, other specifica-tions are pro-vided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “prin-cipal means of liveli-hood” or similar deriva-tion?
	which the applica-tion is filed. ²⁷³			
Con-necti-cut	“has lawfully en-gaged in the prac-tice of law as the applicant’s prin-cipal means of liveli-hood for at least 5 of the 10 years im-mediate-ly preced-ing the date of the application and is in good stand-ing.” ²⁷⁴	Only with respect to teaching law or act-ing as a clinical fel-low at an accredited Connecticut law school ²⁷⁵	None	Yes
Dela-ware	No Admission by Motion Rule			
Dis-trict of Co-lumbia	“(A) Has been a member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States	No	No	No

273. COLO. R. CIV. P. 203.2(1)(c), <http://www.coloradosupremecourt.com/Future%20Lawyers/RulesGoverningAdmissions.asp>. All lawyers seeking admission by motion on Colorado are required to take a professionalism course. COLO. R. CIV. P. 203.2(6).

274. RULES OF THE CONN. SUPER. CT. REGULATING ADMISSION TO THE BAR § 2-13(a)(2)(A), <http://www.jud.ct.gov/cbec/rules.htm> [<https://perma.cc/6ZH9-8ALQ>].

275. *See id.* (“(2) has been duly licensed to practice law before the highest court of a reciprocal state . . . , or that he or she is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school and admitted in a reciprocal or nonreciprocal jurisdiction and (A) has lawfully engaged . . .”) (emphasis added).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
	for a period of at least five years immediately preceding the filing of the application; or . . . (B) (ii) [h]as 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 MBE which the state or territory deems to have been taken as a part of such examination; and" ²⁷⁶			
Florida	No Admission by Motion Rule			
Georgia	"has been primarily engaged in the active practice of law for 5 of the 7 years immediately	No	None	No

276. RULES D.C. CT. APPEALS 46(e)(3)(A)&(B)(ii), <https://www.dccourts.gov/court-of-appeals/dccarules> [<https://perma.cc/84AM-QW52>].

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	preceding the date upon which the application is filed.” ²⁷⁷			
Hawaii	No Admission by Motion Rule			
Idaho	“has been substantially engaged in the Active Practice of Law in Idaho or under the authority of another jurisdiction that grants admission to attorneys licensed in Idaho under provisions substantially similar to this rule for no less than 3 of the 5 years immediately preceding the Application” ²⁷⁸	Although “substantial engagement” is required by the plain language of the rule, the only reference to “full-time” is for attorneys who are “employed by and teaching full-time in an Approved Law School.” ²⁷⁹	“Active Practice of Law” means “[t]he practice of law following admission to practice before the highest court of any state or territory of the United States or the District of Columbia as a <i>licensed active member</i> of a jurisdiction in which	No

277. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN GA. Part C, §2(e), <https://www.gabaradmissions.org/rules-governing-admission> [<https://perma.cc/8MV8-Q532>].

278. IDAHO BAR COMM’N RULES §II 206(a)(3), <https://isb.idaho.gov/wp-content/uploads/ibcr.pdf> [<https://perma.cc/VE5F-2HM7>].

279. *Id.* (“[S]ubstantial engagement in the Active Practice of Law includes: (A) Attorneys who are licensed in Idaho as house counsel under Rule 255 . . .; (B) Judges, administrative judges or the equivalent thereof in another jurisdiction . . .; (C) Attorneys who are employed by and teaching full-time in an Approved Law School.”)

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
			the Applicant is admitted. ²⁸⁰	
Illinois	"Provides documentary evidence satisfactory to the Board that for at least 3 of the 5 years immediately preceding the application, s/he was engaged in the active, continuous, and lawful practice of law" ²⁸¹	Requires active, continuous, and lawful. ²⁸²	"Active and continuous" means "the person devoted a minimum of 80 hours per month and no fewer than 1000 hours per year to the practice of law during 36 of the 60 months immediately preceding the application." ²⁸³	

280. *Id.* at 200(a).281. ILL. SUP. CT. R. 705(e), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule705 [<https://perma.cc/N7AA-5J9K>].282. *Id.*283. *Id.* at 705(h).

Under the old Rule 705, the applicant must have been actively and continuously engaged in the qualified practice of law for at least five of the immediately preceding seven years. Historically, the Board has defined active and continuous as involving approximately forty hours per month and no fewer than five hundred hours per year. The new rule defines active and continuous as meaning a minimum of eighty hours per month and 1,000 hours per year to the practice of law during sixty of the eighty-four months immediately preceding the application. The requirement is intended to increase the likelihood that each active motion applicant has actually been engaged in practice sufficient in recentness, intensity, and duration to establish continuing minimum competence to practice law.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
Indiana	Granted a provisional license if the “applicant has actively engaged in the practice of law for a period of at least 5 of the 7 years immediately preceding the date of application” ²⁸⁴	Yes, for law professor, judge, or government attorney. ²⁸⁵ 1,000-hour rule for other activities that constitute the practice of law. ²⁸⁶	“Actively engaged in the practice of law” is defined to require at least 1,000 hours per year for law practice or full-time law professor or judge or federal employee. ²⁸⁷	
Iowa	“has practiced law 5 full years while licensed within the 7 years immediately preceding the date of the	Specifically, a “full-time instructor of law” for purposes of defining teaching in an ABA-approved law school as an	Requires delivery of a certificate attesting that the applicant was “regularly engaged in the practice of	No

Stuart Duhl, *Admission to the Bar in Illinois: A Historical Perspective for the Last Half Century and Beyond*, 36 S. ILL. U. L.J. 109, 134-35 (2011).

284. IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS 6, §1(a), http://www.in.gov/judiciary/rules/ad_dis/index.html#_Toc477259897 [<https://perma.cc/MFT2-ZJ7N>].

285. *Id.* at §1(a)(iii), §1(a)(iv), §1(a)(v).

286. *Id.* at §1(a)(i), §1(a)(ii).

287. *Id.* at §1(a) (providing that “‘Actively engaged in the practice of law’ shall mean: (i) performing legal services for the general public as a lawyer for at least 1,000 hours per year; or (ii) employment by a state or local governmental or business entity as a lawyer performing duties for which admission to the practice of law is a prerequisite for at least 1,000 hours per year; (iii) performing the duties of a teacher of law on a full-time basis in an ABA accredited law school; or (iv) serving as a judge of a court of record on a full-time basis; or (v) serving on a full-time salaried basis as an attorney with the federal government or a federal governmental agency including service as a member of the Judge Advocate General’s Department of one of the military branches of the United States; or (vi) a combination of the above.”).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
	application, and still holds a license ²⁸⁸	activity that constitutes the "practice of law." ²⁸⁹	law" for "at least 5 of the last 7 years immediately preceding the date of application." ²⁹⁰	
Kansas	"has been lawfully engaged in the active practice of law . . . for 5 of the 7 years immediately preceding the date of application," ²⁹¹	No	"lawfully engaged"	No
Kentucky	"has been engaged in the active practice of law . . . for 5 of the 7 years next preceding the filing" ²⁹²	No	None	No
Louisiana	No Admission by Motion Rule			
Maine	"Has been primarily engaged in the		None	No

288. IOWA CT. R. 31.12(3)(a), <https://www.legis.iowa.gov/docs/ACO/CR/LINC/04-28-2017.chapter.31.pdf> [<https://perma.cc/S4HR-ZGES>].

289. *Id.* at 31.12(6)(c).

290. *Id.* at 31.13(1)(b).

291. KAN. RULES RELATING TO ADMISSION OF ATTORNEYS 708(7), <http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Admission+of+Attorneys> [<https://perma.cc/RD83-ZWZG>].

292. KY. SUP. CT. R. 2.110(1), http://kyoba.boxlake.com/Views/public/Content.aspx?page_id=204 [<https://perma.cc/T5PX-JLBY>].

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	active practice of law in one or more United States jurisdictions . . . for at least three of the five years immediately preceding the date upon which the application is filed ²⁹³	Yes. “[T]he ‘active practice of law’ shall include the following activities, either separately or in the aggregate, <i>when performed on a full time basis</i> . . .” ²⁹⁴		
Maryland	No Admission by Motion Rule			
Massachusetts	“engaged in the active practice or teaching of law . . . for 5 out of the past 7 years immediately preceding the filing of the petition. . .” ²⁹⁵	“The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.” ²⁹⁶		No
Michigan	“must have, after being licensed and for 3 of the 5 years			Yes (<i>principal</i>)

293. ME. BAR ADMISSION RULES 11A(a)(2), <https://mainebarexaminers.org/wp/wp-content/uploads/2017/09/Fully-amended-MBAR-0517-TOC-amended-0917.pdf> [<https://perma.cc/7K8S-XXHL>].

294. *Id.* (emphasis added).

295. MASS. RULES SUP. JUD. CT. 3:01 § 6.1.1, <https://www.mass.gov/files/documents/2017/11/08/courts-sjc-doc-rule-change-sjc-rule-301-effective-mar-2018.pdf>.

296. *Id.* § 6.1.2.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	preceding the application, (a) actively practiced law as a principal business or occupation . . . ; (b) been employed as a full-time instructor in a reputable and qualified law school in the United States . . . ; or (c) been on active duty . . . in the United States armed forces as a judge advocate, legal specialist, or legal officers. . . . The Supreme Court may, for good cause, increase the 5-year period” ²⁹⁷	Requires practice of law as “principal business or occupation” which is defined in the Policy Statements to mean “the practice of law in the other jurisdiction must have been greater than 50% of the applicant’s time.” ²⁹⁸		<i>business or occupation</i>).
Minnesota	“provides documentary evidence showing that for at least 60 of the 84 months	Yes. The rule does not address but a policy statement on the		Yes, as “principal occupation.”

297. MICH. BD. LAW EXAM’RS R., STAT., & POL’Y STATEMENTS 5(A)(5)(a), (b), & (c), <http://courts.mi.gov/courts/michigansupremecourt/ble/pages/rules,-statutes,-and-policy-statements.aspx> [<https://perma.cc/84PW-MQKL>].

298. *Id.* at 5(A)(5)(a)-1.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	immediately preceding the application, the applicant was: . . . (c) engaged, as principal occupation, in the lawful practice of law” ²⁹⁹	website provides as follows: “The phrase ‘engaged as principal occupation’ is interpreted to mean that one’s practice of law must be full-time or substantially full-time (at least 120 hours or more per month). . . The Board determines eligibility on a case-by-case basis. . . .” 300		
Mississippi	“any lawyer . . . who has practiced not less than 5 years may be admitted. . . .” ³⁰¹	“Practice for not less than 5 years must consist of active practice.” ³⁰² The Comment to Rule VI provides as follows: “An attorney’s five (5) years of prior practice		No

299. MINN. RULES FOR ADMISSION TO THE BAR 7(A)(1)(a) & (c), <https://www.ble.mn.gov/wp-content/uploads/2017/06/BLE-Rules-7-1-17.pdf>.

300. MINN. BD. OF LAW EXAM’RS, POLICY STATEMENT ON ADMISSION WITHOUT EXAMINATION, ELIGIBILITY BY PRACTICE, <https://www.ble.mn.gov/wp-content/uploads/2016/09/Board-policy-re-Rule-7A.pdf>.

301. RULES GOVERNING ADMISSION TO THE MISS. BAR VI, §1(A), https://courts.ms.gov/rules/msrulesofcourt/rules_admission_msbar.pdf.

302. *Id.* at §7.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
		must have constituted a full-time or regular undertaking and not have been on only an occasional or haphazard basis." ³⁰³		
Missouri	"For 5 of the 10 years immediately preceding the date upon which the application . . . is filed, the person has . . . (A) [b]een engaged in the full-time practice of law . . . ; or (B) served full-time as a lawyer with the United States government or its armed forces; or (C) taught full-time in a law school approved by the ABA; or (D) been engaged in the full-time practice as in-house counsel . . . ; or (E) any	Yes. See language of rule provided. "The applicant bears the burden to prove he or she has been engaged in the full-time practice of law such that the applicant's professional experience and responsibilities are sufficient to satisfy the board that the applicant should be		No

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	combination of the foregoing. ³⁰⁴	admitted under this Rule 8.10. ³⁰⁵		
Montana	“engaged in the active practice of law for at least 5 of the 7 years preceding application to Montana. . .” ³⁰⁶	“Active practice of law” is defined by the rule to mean “ <i>active and continuous</i> engagement or employment in the performance of legal services . . .” ³⁰⁷ “Engagement or employment in the performance of legal services” is defined to mean “that during each of the required five years in the durational period, the applicant spent at least 1,000 hours per year engaged in one or more of the activities listed in Rule V.D.1.” ³⁰⁸		

304. MO. SUP. CT. R. GOVERNING THE MO. BAR AND THE JUDICIARY 8.10(a)(4), <https://www.mble.org/rules>.

305. MO. SUP. CT. R. GOVERNING THE MO. BAR AND THE JUDICIARY, *Regulations of Board of Law Examiners accompanying Rule 8.10*, ¶1.

306. RULES FOR ADMISSION TO THE BAR OF MONT. V.A.2, https://c.ycmdn.com/sites/montanabar.site-ym.com/resource/resmgr/Admissions/Rules_for_Admission_to_the_S.pdf.

307. *Id.* at V.D.1.

308. *Id.* at V.D.2.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
Nebraska	Varies; but for Class 1-B applicants: “have actively and substantially engaged in the practice of law . . . for 3 of the 5 years immediately preceding application for admission. . . .” ³⁰⁹	“actively and substantially”	None	No
Nevada	No Admission by Motion Rule			
New Hampshire	“have been primarily engaged in the active practice of law . . . for 5 of the 7 years immediately preceding the date upon which the motion is filed;” ³¹⁰	No	None	No

309. NEB. SUP. CT. RULES § 3-119(B)(1), <https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-1-admission-requirements-20>.

310. RULES OF THE SUP. CT. OF THE STATE OF N.H. 42(XI)(a)(1)(B), <https://www.courts.state.nh.us/rules/scr/scr-42.htm>. Like Vermont, New Hampshire has specific admission by motion rules for applicants licensed to practice in Maine or Vermont, including with respect to the durational component (“have been primarily engaged in the active practice of law in [Vermont/Maine] for no less than 3 years immediately preceding the date upon which the motion is filed.”). *Id.* at 42(XI)(b)(2), (c)(2).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
New Jersey	“have practiced law for 5 of the last 7 years. . .” ³¹¹	No	None	No
New Mexico	“engaged in the active practice of law as defined in Paragraph D of this rule. . . for at least 5 of the past 7 years preceding application to New Mexico;” ³¹²	Yes. The “practice of law” is defined to mean “being actively and continuously engaged in full-time, gainful employment in the performance of legal services.” ³¹³ In turn, “full-time, gainful employment in the performance of legal services” is defined “to require that during each of the required five (5) years in the durational period, the applicant spent at least 1,000 hours per year engaged in one or more of the activities listed above, and derived at least 50% of the applicant’s non-		Yes. “Derived at least 50% of the

311. RULES GOVERNING THE CT. OF THE STATE OF N.J. 1:24-4(a), <http://njcourts.gov/attorneys/assets/rules/r1-24.pdf>.

312. N.M. RULES GOVERNING ADMISSION TO THE BAR §15-107(A)(1), http://nmexam.org/wp-content/uploads/2015/11/NMRA2016_Ruleset15_unannotated.pdf.

313. *Id.* at §15-101(A)(4).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
		investment income from such activity or activities. ³¹⁴		applicant’s non-investment income from such activity or activities. ³¹⁵
New York	“has actually practiced therein, for at least 5 of the 7 years immediately preceding the application” ³¹⁶	Only reference to “full time” is for a “full-time member of the law faculty. . .” ³¹⁷	No	No
North Carolina	“prove to the satisfaction of the Board . . . that the applicant has been for at least 4 of the last 6 years, immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the full-	Yes, until June 2018. “actively and substantially engaged in the full-time practice	No	No

314. *Id.* at §15-107(D)(2).

315. *Id.*

316. N.Y. RULES OF THE CT. APP. FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW § 520.10(a)(2)(i), <https://www.nycourts.gov/ctapps/520rules10.htm#10>.

317. *Id.* at §520.10(a)(2)(c)(iv).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	time practice of law. . . ³¹⁸	of law” ³¹⁹ However, North Carolina has recently adopted amendments to its rules, which go into effect on June 30, 2018, that remove the word “full-time” from the rule. ³²⁰		
North Dakota	“has for at least 4 of the last 5 years immediately preceding the application for admission on motion been actively engaged, to an extent deemed by the Board to demonstrate competency in the practice of law, in one or more of the following:” ³²¹	No but rule requires the applicant be “actively engaged, to an extent deemed by the Board to demonstrate competency in		No

318. N.C. STATE BAR RULES §.0502(3), <https://ncble.org/wp-content/uploads/2015/09/rules.pdf>.

319. N.C. STATE BAR RULES §.0502(3), <https://ncble.org/wp-content/uploads/2015/09/rules.pdf>.

320. N.C. STATE BAR RULES §.0502(3), <http://ncble.org/wp-content/uploads/Rules-063018.pdf> (rules effective beginning on June 30, 2018).

321. N.D. ADMISSION TO PRACTICE R. 7(A)(1)(c), <https://www.ndcourts.gov/rules/Admission/frameset.htm>. The rule also requires that the applicant have been a licensed member of the bar of another state of the District of Columbia for at least 5 years. *Id.* at 7(A)(1)(b).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
		the practice of law . . . ³²²		
Ohio	“has engaged in the practice of law, provided, however, that the practice of law . . . (b) occurred for at least 5 full years out of the last 10 years prior to the applicant’s submission of an application; and (c) was engaged in on a fulltime basis,” ³²³	Yes; “was engaged in on a fulltime basis,” ³²⁴ “full-time practice of law” is defined to mean “practice in which the applicant was actively and substantially engaged as a principal business or occupation,” ³²⁵		Yes; “practice in which the applicant was actively and substantially engaged as a principal business or occupation,” ³²⁶
Oklahoma	“have engaged in the actual and continuous practice of law . . . for at least 5 of the 7 years immediately	Not full-time specifically; only “actual and continuous”	The Rule also clarifies that if an applicant has “professional experience” from a non-reciprocal state, “any professional	No

322. *Id.* at 7(A)(1)(c). The Rule also specifies that “[i]f the Board determines that the applicant’s legal experience does not demonstrate sufficient competency in the practice of law, it shall require the applicant to take an [sic] lawyer’s examination.” *Id.* at 7(A)(3).

323. SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO I § 9(A)(2)(b) & (c), <https://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1>.

324. *Id.* at §9(A)(2)(c).

325. *Id.* at §9(C)(5) (listing the documentation required to be provided, including “an affidavit from the applicant’s employer or employers verifying the applicant’s full-time practice of law . . .”).

326. *Id.*

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	preceding application for admission. .. ³²⁷		experience from a nonreciprocal state cannot be combined with the professional experience from a reciprocal state to meet the requisite 5 of 7 years of actual and continuous practice. ³²⁸	
Oregon	“have lawfully engaged in the active, substantial and continuous practice of law for no less than 5 of the 7 years immediately preceding their application for admission” ³²⁹	“[s]ubstantially and continuously engaged in the practice of law” is defined to mean “at least 1,000 hours of work per annum in law-related professional activities specified in Rule 1.05(1), uninterrupted by periods of other employment or unemployment.” ³³⁰		No
Pennsylvania	“Presentation of proof satisfactory to the Board that	“devoted a major portion of time and		Yes, Board interprets

327. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. 2 § 1, <http://www.okbbe.com/Resources/Docs/OKBBE-Rules-Governing-Admission.pdf>.

328. *Id.* at § 4.

329. OR. RULES FOR ADMISSION OF ATTORNEYS 15.05(1), (3)(a)(v), http://www.osbar.org/_docs/rulesregs/admissions.pdf.

330. *Id.* at 1.05(8).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
	the applicant has for a period of 5 years of the last 7 years immediately preceding the date of filing the application . . . devoted a major portion of time and energy to the practice of law in one or more states." ³³¹	energy to the practice of law" "The Board interprets [this to mean] . . . the applicant spent more than 50 percent of his/her time engaged in the practice of law An applicant must demonstrate at least five years' worth of work in which he/she devoted more than 20 hours of work per week to the practice of law." ³³² Rule also specifically requires "teaching law full time at an accredited law school, college or university in the United States, provided a substantial portion of such time was spent teaching at an accredited law school" and "service	"The Board will calculate an applicant's practice time by weeks. The Board will count every week in which an applicant practiced law more than 20 hours. The Board does not deduct from the counted practice time vacations and leave time earned and taken in accordance with an employer's standard policy, so long as the applicant returned to the	requirement as more than 50% of applicant's time.

331. PA. BAR ADMISSION RULES 204(4), <http://www.pabarexam.org/pdf/rules.pdf>.

332. PA. BD. OF LAW EXAM'RS, *Interpreting Rule 204 – Tips for a Successful Application*, http://www.pabarexam.org/non_bar_exam_admission/204_interpretation.htm (last visited May 9, 2018).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
		<i>full time</i> as a judicial law clerk ³³³	position after the vacation or leave. ³³⁴	
Rhode Island	Only required to take essay portion of the Rhode Island Bar Examination if admitted elsewhere for at least 5 years and “engaged in the full-time active practice of law for at least 5 years of the last 10 years immediately preceding filing . . . or engaged in the full-time teaching of law at a law school accredited by the ABA, for at least 5 of the last 10 years immediately preceding the filing of			

333. PA. BAR ADMISSION RULES 204 (iii) and (v).

334. PA. BD. OF LAW EXAM’RS, *Interpreting Rule 204 – Tips for a Successful Application*, http://www.pabarexam.org/non_bar_exam_admission/204_interpretation.htm (last visited 7/10/2017) (also providing the following hypothetical: “applicant worked 80 hours per week for 13 weeks (1040 hours), she would get credit for 13 weeks. On the other hand, if that hypothetical applicant worked 1,040 hours in a year by working 21 hours in each of 52 weeks, she would get credit for 52 weeks.”).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
	his/her application. ³³⁵			
South Carolina	No Admission by Motion Rule			
South Dakota	"provides documentary evidence showing that for the last 5 years immediately preceding the application . . . the applicant, as principal occupation, has been actively, continuously, and lawfully engaged in the practice of law. . . ." ³³⁶	"the applicant, as principal occupation, has been actively, continuously, and lawfully engaged in the practice of law" ³³⁷	None	Yes, as "principal occupation"
Tennessee	"have been primarily engaged in the active practice of law . . . for 5 of the 7 years immediately preceding the date upon which	Yes; "active practice of law" defined to include the following: "(A) <i>full-time</i> private or public practice as a licensed attorney; (B) teaching law <i>full-time</i> at a law school approved by the	None	No

335. R.I. SUP. CT. RULES Article II, R. 2, §§ 2- 3.

336. RULES AND REGULATIONS FOR ADMISSION TO PRACTICE LAW IN S.D. 16-16-12.1(c), <http://www.ajs.sd.gov/uploads/barexaminers/RReg.pdf>.

337. *Id.*

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	the application is filed ³³⁸	ABA; (C) service as a judicial law clerk or staff attorney; and (D) service as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, or duly registered In-House Counsel or Military Spouse. ³³⁹		
Texas	“has been actively and substantially engaged in the lawful practice of law as the Applicant’s principal business or occupation for at least 5 of the last 7 years immediately	“actively and substantially engaged in the lawful practice of law as the Applicant’s principal	Applicant “must furnish to the Board proof of active and substantial engagement in	Yes, as “principal business or occupation”

338. TENN. SUP. CT. RULE 7 § 5.01(a)(3), http://www.tnble.org/sites/default/files/order_amending_sct_rules_678_43_part_2_rule_7.pdf.

339. *Id.* § 5.01(c)(1) (emphasis added). The rule also states that “active practice of law” may

be construed in the Board’s discretion as being actively engaged in other full-time employment requiring interpretation of law and application of legal knowledge The Board shall consider such evaluative criteria as time devoted to legal work, the nature of the work, whether legal training or a law license was a prerequisite of employment, and other similar matters.”

Id. § 5.01(c)(2).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that "full-time" practice is required? If so, is "full-time" defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the "principal means of livelihood" or similar derivation?
	preceding the filing. . . ³⁴⁰	business or occupation . . . ³⁴¹	the practice of law. ³⁴²	
Utah	"has been Actively licensed and lawfully engaged in the Full-time Practice of Law as defined in Rule 14-704(b), (t) and (ff) in the reciprocal jurisdictions where licensed for 60 of the 84 months immediately preceding the date of the filing . . ." ³⁴³	Yes: "has been Actively licensed and lawfully engaged in the <i>Full-time</i> Practice of Law. . ." "Full-time Practice means the Active and lawful Practice of Law for no fewer than 80 hours per month. Time spent on administrative or managerial duties, continuing legal education, or client development and marketing does not qualify as part of the required 80 hours of legal work." ³⁴⁴		No
Vermont	"must have been Actively Engaged in the Practice of law for 5 of the preceding 10 years . . ."		None	No

340. RULES OF THE SUP. CT. GOVERNING ADMISSION TO THE BAR OF TEX. XIII, § 1(a), <https://ble.texas.gov/txrulebook>.

341. *Id.*

342. *Id.* XIII § 9(a).

343. RULES OF PROF'L PRACTICE 14-705(a)(7) (UTAH SUP. CT. 2016) (emphasis added).

344. RULES OF PROF'L PRACTICE 14-701(t) (UTAH SUP. CT. 2016) (emphasis added).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	Part of the 5-year requirement may be waived if “any jurisdiction where applicant currently licensed and practicing for not less than 6 months requires less than 5 years’ “admission” as a condition of admission on motion and attorney “has been Actively Engaged in the Practice of Law for not less than 3 of the preceding 10 years.” ³⁴⁵	“Actively Engage in the Practice of Law” is defined to mean “any of the following qualified work performed for at least 25 hours per week . . .” ³⁴⁶ “Week” is defined as “a consecutive seven-day period.” ³⁴⁷		
Virginia	“has practiced law for at least 3 of the immediately preceding 5 years and has made such	Yes, in the regulations: “An applicant	None	No

345. RULES OF ADMISSION TO THE BAR OF VT. SUP. CT. Part M, Rule 15(a), (a)(1)(A) & (a)(1)(b), https://www.vermontjudiciary.org/sites/default/files/documents/900-00014.Rules_Admission.Bar_.pdf.

346. *Id.* Part I, Rule 2(a). Like New Hampshire, Vermont also has a specific admission by motion rule for lawyers licensed and practicing in Maine or New Hampshire: “The 5-year requirement may be waived if [the applicant] is currently licensed to practice in Maine or New Hampshire and has been Actively Engaged in the Practice of Law in Maine or New Hampshire for not less than 3 years immediately preceding filing an Application for admission under this Rule.” *Id.* Part M, Rule 15(a)(2).

347. *Id.* Part I, Rule 2(n).

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	progress in the practice of law that it would be unreasonable to require the applicant to take an examination. ³⁴⁸	may apply . . . only if the applicant has been engaged in the <i>full-time practice of law</i> for at least 3 of the last 5 years. ³⁴⁹		
Washington	“present satisfactory proof of active legal experience for at least 3 of the 5 years immediately preceding the filing of the application.” ³⁵⁰	No	None	No
West Virginia	“must have been lawfully engaged in the active practice of law for 5 of the 7 years next preceding his or	“Engagement in the active practice of law” is defined to mean “practice on a substantial basis	None	

348. Code of Virginia § 54.1-3931; RULES OF SUP. CT. OF VA. Rule 1A:1(c)(3). The rule also requires that the applicant have “been admitted to practice law before the court of last resort of any state or territory of the United States or the District of Columbia for at least 5 years.” *Id.* at 1A:1(c)(2).

349. REGULATIONS GOVERNING APPLICATION FOR ADMISSION TO VA. BAR PURSUANT TO RULE OF THE SUP. CT. OF VA. 1A:1 ¶3 (“REQUIREMENT OF MINIMUM CURRENT PRACTICE”) (effective Aug. 1., 2017) (emphasis added), <http://barexam.virginia.gov/motion/motionrules.html>.

350. WASH. ADMISSION & PRACTICE RULES 3(c)(ii), http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&set-Name=APR&pdf=1.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	her application and must have held a valid license to practice law from some state throughout such 5 year period. . . ³⁵¹	motivated by a desire to earn a livelihood from that practice. Practice for the required period must have been active and continuous. ³⁵²		“Practice on a substantial basis motivated by a desire to earn a livelihood from that practice.” ³⁵³
Wisconsin	“has been substantially engaged in the practice of law . . . for 3 years within the last 5 years prior to filing application. . .” ³⁵⁴	No.	None	No
Wyoming	“has engaged in the active, authorized practice of law for a minimum of 300 hours per year for 5 of the 7 years immediately	No; rule requires 300 hours per year. “Full-time” only referred to with respect to “teaching, as a full-time faculty member” at an ABA-		

351. W. VA. RULES FOR ADMISSION TO THE PRACTICE OF LAW 4.0(b), <http://www.courtsww.gov/legal-community/rules-for-admission.html#rule4>.

352. *Id.* at Rule 4.0(c).

353. *Id.*

354. WIS. SUP. CT. RULES 40.05(b), <https://docs.legis.wisconsin.gov/misc/scr/40.pdf>.

Jurisdiction ²⁶⁴	Durational component	Does the rule (or applicable regulation or policy statement) state that “full-time” practice is required? If so, is “full-time” defined?	What, if any, other specifications are provided regarding the durational component?	Does the rule (or applicable regulation or policy statement) address law being the “principal means of livelihood” or similar derivation?
	preceding the date of application.” ³⁵⁵	accredited law school. ³⁵⁶ “Active, authorized practice of law” is defined and lists the activities that constitute the active practice of law; one of those activities is “as a significant and primary occupation, serving as an attorney for fees or payment from one or more clients, including individuals, legal service programs, trusts, partnerships, and non-governmental corporations. . .” ³⁵⁷		Yes, in one instance: “significant and primary occupation” ³⁵⁸

355. WYO. RULES & PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW 302(f), http://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES_AND_PROCEDURES_GOVERNING_ADMISSION_TO_THE_PRACTICE_OF_LAW.pdf.

356. *Id.* at Rule 303(a)(3).

357. *Id.* at Rule 303(a)(1).

358. *See id.*