MSBA

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Mr. Douglas Peterson, Chair
Minnesota Board of Law Examiners
180 E. 5th St., Suite 950
St. Paul, Minnesota 55101

RE: MBLE Request for Comments Regarding Rule 7A, Rule on Admission to the Bar

Dear Mr. Peterson,

The Minnesota State Bar Association submits this letter in response to the Minnesota Board of Law Examiners' September 12, 2017 public notice and request for comments regarding the interpretation of Rule 7A, Rules for Admission to the Bar. We are also requesting the opportunity to have a representative of our Rules of Professional Conduct Committee present oral testimony at one of the public meetings to be held by MBLE.

MBLE's public notice indicated that it is conducting a "comprehensive review" of Rule 7A, which includes MBLE's current interpretation of the phrase "engaged as a principle occupation" in the practice of law as being full-time or substantially full-time; whether that phrase should be measured as 120 hours or more of practice per month; whether 60 of the past 84 months is a reasonable look-back period regarding the practice of law; and how part-time employment and absences from employment should be addressed.

I. Establishing Equivalent Measures of Competency.

We begin our comments by recognizing that we are discussing just one of the two critical halves of the process of becoming admitted to the bar in Minnesota: competency and character and fitness. Only competency is at issue here. Regardless of whether MBLE and the Minnesota Supreme Court retain or modify Rule 7A, all applicants to the Minnesota Bar will continue to undergo a character and fitness evaluation.

The primary manner in which applicants to the Minnesota bar establish competency is through passage of the bar examination. According to MBLE's 2015 annual report, roughly 75% of lawyers admitted that year established their competency through successful passage of the bar examination. Most of the remaining 25% of admitted lawyers established competency through one of the three waive-in methods set forth in the Minnesota Rules for Admission to the Bar. Those applicants were roughly evenly divided between establishing they had practiced law in 60 of the past 84 months (Rule 7A);

receiving a sufficient score on the Multistate Bar Examination within the previous two years (Rule 7B); or receiving a sufficient score on the Uniform Bar Examination within the past three years (Rule 7C). Only a handful of admittees established competency through the House Counsel or Legal Services waive-in provisions (Rules 8 to 10).

Our understanding of the purpose of the bar examination is that it is intended to establish, in conjunction with graduation from an ABA-accredited law school, minimal competency to practice law. It is not expected, for example, that a new admittee is competent to practice in all areas or to handle any legal matter simply by virtue of having passed the bar examination. There is an implicit understanding that newly admitted lawyers who passed the bar examination have developed a sufficient understanding of legal principles that they can then go forth and undertake additional training, self-study, and experience that allows them to adequately represent clients.

Rules 7B and 7C extend this concept of minimal or threshold competency to applicants who have received a designated score on either of two accepted bar examinations, the Multi-State Bar Examination (MBE) or the Uniform Bar Examination (UBE), within the past two years for the MBE or the past three years for the UBE. There is no practice-of-law requirement attached to either of these two provisions. Hence, the rules appear to assume that the competency established by passage of a bar examination may be valid for two or three years, depending on the examination for which the applicant sat, regardless of whether the applicant has practiced law within that time.

Rule 7A provides for an alternative to bar passage as a measure of competency: engaging in the practice of law as one's principal occupation for 60 of the 84 months preceding the lawyer's application. There are several ways in which Rule 7A is both far more stringent than, and somewhat inconsistent with, the bar-examination based methods of establishing threshold competency:

- The level of competency of a lawyer who has engaged in the practice of law as a principal occupation for 60 of the past 84 months establishes far greater capability to practice law than is reflected by the bar exam. For example, a new lawyer passing the bar examination may still need significant additional training to properly represent clients, whereas the attorney who has practiced law for 60 months may have represented dozens, perhaps hundreds, of clients; studied the law as a law professor; served as a judge and ruled on numerous cases; etc. In addition, these applicants at one time most likely took and passed a bar examination, except lawyers who were initially admitted in diploma-privilege states, such as Wisconsin.

- Under Rule 7B, MBE results are valid for 24 months but then become "stale." In the 25th month following a passing score, the applicant is

no longer eligible to waive-in under Rule 7B and must practice for at least 60 months from bar passage to establish the same level of competency as would have been assumed if the application had been submitted in the 24th month following the exam. The same concept applies to UBE results under Rule 7C, only those scores become stale in the 37th month following passage with a sufficient score. It is unlikely that the assumed decline in competency to practice can be measured on a strict scale of months and it is disproportionate that such a decline in competency, however speculative, can only be reestablished by practicing law for a minimum of 60 months.

- If bar exam results can remain valid for either two or three years, then the most important look-back period for establishing the competency of attorneys seeking admission on motion under Rule 7A, based on engaging in the practice of law as a principal occupation, should also be the past two or three years. In other words, a lawyer who has practiced law for the previous two years should be considered at least as competent as a lawyer who passed the MBE two years earlier and has never practiced law since passing the examination.

- The inconsistency between Rule 7A on the one hand and Rule 7B and 7C on the other, suggests that there should be more than one route for applicants under Rule 7A to establish competency and that a blend of factors should be acceptable. The applicant who achieved a passing score on the MBE thirty months ago but who has practiced law continuously during that time should be deemed as least as competent as the applicant who achieved a passing score 24 months ago but who has been unemployed during that entire time.

II. Determining the Minimum Threshold for Competency Through Practice

With this in mind, we turn to MBLE's current interpretation of the phrase in Rule 7A that an applicant must have "engaged, as principal occupation, in the lawful practice of law" for 60 of the past 84 months. As stated in the public notice, "A Board policy published to the Board's website advises applicants that "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)."

Hours-based guidelines. The words "principal occupation" suggest that the practice of law might not be the applicant's only occupation; otherwise the rule could have been written as the applicant's "sole" occupation. "Principal occupation" connotes that an applicant might have other occupations as well but that the practice of law would be the main focus of the applicant's work. Hence, a "principal" occupation could be one that occupies a majority of an

applicant's work, or the majority of time in a commonly-understood, 40-hour work week.

The words of the rule do not support an equivalence between "principal" and "full-time or substantially full-time." Moreover, because the essential question under Rule 7A should be whether an applicant can establish competency to practice law on a level comparable to passage of the bar exam, a requirement of full-time practice places an unnecessary burden on applicants. For most lawyers, the difference between full-time practice and half-time practice is one of volume, not competency. Put another way, as much competency is needed to serve clients half-time as would be needed to serve clients full time.

We agree that a lawyer who practices a *de minimus* amount of time, on the order of a few hours a week or per month, may not have sufficient practice experience to satisfy a competency requirement, except as may be suggested by other factors discussed below. We also agree that to comport with the existing "principal occupation" language of the rule, and in the absence of other indicia of competency discussed below, the amount of time an applicant devotes to law practice should be at least half-time, or over 80 hours per month.

We are concerned, however, that measuring hours worked is itself subject to interpretation. Solo and small firm attorneys, in particular, may bill fewer than 80 hours per month and still be engaged in the half-time or even full-time practice of law. The Clio Legal Trends Report 2017[1] aggregated data of 60,000 solo and small firm attorneys and found that the average lawyer billed only 2.3 hours out of an eight hour day. The remainder of time is absorbed by administrative tasks, marketing, continuing legal education, and similar non-billable activities. Similarly, a law professor might have a full-time contract but only teach six or nine credit hours a week, using remaining time for research and writing, grading student work, etc.

To the extent that the question of whether the practice of law is an applicant's principal occupation will be based on evidence of a specific number of hours worked, MBLE should broadly interpret the "work" to ensure that it encompasses all of the activities that are related to and a necessary part of the practice of law, even if every hour does not involve the consideration of legal issues.

In addition, there are many attorneys who work less than full-time without any impact on their competency. Many government attorneys, in-house corporate attorneys, law firm associates and partners, legal services attorneys, and other attorneys work fewer than 30 hours per week without sacrificing their competency to practice law. Encouraging legal employers to allow

[1] https://www.clio.com/2017-legal-trends-report/ (last visited Nov. 26, 2017).

flexibility in working hours and schedules has been the focus of past and ongoing bar association efforts to improve the experience of women in the practice of law. The Self-Audit for Gender Equality (SAGE)(2003), compiled by the MSBA's Women in the Legal Profession Committee, identifies offering "equitable and viable alternative part time and flexible work schedules" as a best practices goal for Minnesota law firms.[2]

In Minnesota, such flexible work schedules, including part-time schedules, have become commonplace. *See* MSBA, Self-Audit for Gender and Minority Equity, at 52-53 (Sept. 2006).[3] It is important that however MBLE interprets the phrase "engaged, as a principal occupation" in the practice of law, that MBLE recognize that leaves of absence and flexible work schedules have become mainstream elements of the legal profession that are not likely to have any impact on a lawyer's competency to practice law.

Length of look-back period. MBLE's public notice also encouraged comments regarding "whether 60 of the last 84 months is a reasonable look back period." As alluded to in Section I, above, the most relevant period of time for establishing competency should be the two or three-year period immediately preceding the application, similar to the length of time bar examination results are currently regarded as reflecting competency. Indeed, if an applicant could engage in the practice of law as a principle occupation for even the one year preceding the application, that itself likely establishes competency equivalent to passing the bar examination. Guidelines that look at the past 60 of 84 months, for applicants who have not recently practiced law, should be considered as alternative measures of competency, as discussed below.

In addition, it is not clear what effect leaves of absence, such as parental leaves or FMLA leaves to deal with an illness or care for ailing relatives, have on MBLE's calculation of whether an applicant has met the current 60 of 84 months requirement. If Rules 7B and 7C provide any measure of the longevity of a lawyer's competency, then parental and FMLA leaves of up to six months, bookended by practicing law before and after the leave, should not be deducted from the time requirement because a lawyer's competency is not likely to decline during such periods. Indeed, we are not aware of any legal employers who require special training or competency testing for employees who are returning from leaves of absence; such requirements might be viewed as illegal penalties against employees who take leaves. As with the number of hours of work considered necessary to be "engaged, as a principal occupation, in the practice of law," We are concerned that if a

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[2] Available at http://www.mnbar.org/docs/default-source/diversity-msba/2003-sage-best-practices.pdf?sfvrsn=2 (last visited Nov. 26, 2017).

[3] Available at http://www.mnbar.org/docs/default-source/diversity-msba/2005-sage-diversity-report-final.pdf?sfvrsn=2 (last visited Nov. 26, 2017).

waive-in formula continues to be based on a certain number of recent months of practice and excludes parental or FMLA leaves, the rule could have a discriminatory effect on women and people with disabilities.

III. Reasonable Alternative Measures of Competency.

Whatever interpretation MBLE adopts to assess whether an applicant has engaged in the practice of law as a principal occupation, MBLE should also allow applicants who do not strictly meet that criterion to provide other evidence of competency. By doing so, MBLE would recognize that lawyers increasingly use their law degrees in non-lawyer roles and shift back and forth between the practice of law and other endeavors, from operating non-legal businesses, to caring for children and aging relatives, to holding elective office, without a loss of competency to practice law.

Multi-factor tests are common in various areas of the law. For example, the IRS uses a nine-factor test to determine whether a taxpayer's expense deductions relate to a business or a hobby.[4] To establish competency under Rule 7A, such criteria could include:

1. Extensive practice history. The duration of practice by the applicant prior to the periods set forth in Rules 7A(1), 9B(2) and 10B(2) bears on that applicant's competency. A lawyer who has not practiced for 60 of the last 84 months but has practiced law for 20 of the past 25 years does not likely present a competency risk to the public. In addition, a lawyer with extensive experience likely has practiced in a niche that would not be tested by the bar examination.

2. Practice area. The similarity between the applicant's law practice in another jurisdiction and the applicant's anticipated practice in Minnesota is relevant to the lawyer's competency. Also, whether the applicant's anticipated practice in Minnesota involves a discrete or specific area of law as opposed to a more general practice of law also bears on competency.

3. Supervision. Whether the applicant's past law practice, while not meeting the "principal occupation" threshold, was supervised or observed by a practicing attorney who can attest to the applicant's competency. The observers identified by the applicant could be supervisors, adversaries, subordinates, judges, administrators, court clerks, or law partners.

4. Income. Whether the applicant's past law practice generated more than half the applicant's annual income. For example, a lawyer might work only ten hours per week for a corporate client on a continuous

[4] https://www.irs.gov/faqs/small-business-self-employed-other-business/income-expenses/income-expenses (last visited Nov. 15, 2017).

contract basis but that work could be sufficient to constitute the lawyer's principal occupation and demonstrate competency to practice law. A client's satisfaction with the regular work of a lawyer, even if performed for fewer than 80 hours a month, should be a significant factor in determining a lawyer's competency to continue practicing law, albeit in Minnesota.

5. Law-related Businesses. MBLE should consider whether the applicant's principal occupation in a law-related business provided the applicant with regular exposure to and experience with specific areas of law, such as providing tax advice within an accounting firm; serving as a compliance officer in a health care business; providing human resources outsourcing services; working as a financial planner; or working in other "JD preferred" occupations.

We appreciate the opportunity to comment on Rule 7A and look forward to the opportunity to meet with MBLE to discuss these issues further.

Sincerely,

Sonia Miller-Van Oort