

#011

From: Lewis Goldfarb <lgoldfarb@mdmc-law.com>
Sent: Thursday, July 30, 2015 10:28 AM
To: Comments Mailbox
Subject: Comments: Special Committee on Attorney Ethics and Admissions
Attachments: P:\lgoldfarb\NJSC 7-30-15.pdf

Dear Mr. Grant,

Attached are my personal comments in response to the June 9, 2015 request for comments by the New Jersey Supreme Court on the issue of "Admission by Motion." These comments represent my personal views and not necessarily the views of any member of my law firm. Thank you. Lewis H. Goldfarb

MDM[®]**C**

www.mdmc-law.com
1300 Mt. Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075

Lewis Goldfarb
Of Counsel
McElroy, Deutsch, Mulvaney & Carpenter, LLP

✉ lgoldfarb@mdmc-law.com
✉ Download vCard
☎ 973-425-8689
☎ 973-425-0161

New Jersey | New York | Colorado | Pennsylvania | Connecticut | Massachusetts | Delaware

THE INFORMATION CONTAINED IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAMED ABOVE. This message may be an attorney-client communication, and as such is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that you have received this document in error and that any review, dissemination, distribution or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by reply e-mail message or by telephone and delete the original message from your e-mail system and/or computer database.

♻️ Please consider the environment before printing this e-mail.

**RESPONSE OF LEWIS H GOLDFARB TO THE JUNE 9, 2015 REQUEST FOR
COMMENTS BY THE NEW JERSEY SUPREME COURT ON THE ISSUE OF
“ADMISSION BY MOTION”**

The comments set forth below urge the New Jersey Supreme Court to join forty-two other States and permit attorneys licensed in these States, and in good standing, to gain admission to the New Jersey Bar by motion without the need to pass a bar exam. Such a determination would also benefit the members of the New Jersey Bar as they would qualify for admission to out-of-state bars based on reciprocity.

By way of background, I was born in Newark, New Jersey, graduated from Millburn High School and received my J.D. from Rutgers Law School (Newark) in 1969. I am an attorney in good standing licensed to practice law in the District of Columbia ('69), Virginia ('74), Michigan ('85), New York ('01) and the United States Supreme Court. I have been practicing law in the New York/New Jersey metropolitan area since returning to New Jersey in 2001. I have served as a trial attorney at the Federal Trade Commission in Washington, DC, and Associate General Counsel for DaimlerChrysler Corporation (now Fiat Chrysler). I have been a partner at Hogan & Hartson (now HoganLovells) in New York City and am currently Of Counsel to the firm of McElroy, Deutsch, Mulvaney and Carpenter in Morristown. As a private practitioner, I handle primarily class action, antitrust and consumer protection litigation mostly in Federal Courts throughout the Country. However, I am not allowed to appear before the Courts in this State without filing a motion in every instance.

Preparing for and taking the N.J. bar exam is not necessary to establish my fitness to effectively represent clients in New Jersey Courts. I am unwilling to do so, therefore cannot be admitted to the New Jersey Bar. I believe it is time for the Court to eliminate a requirement that has long hindered the public's access to a free and open legal marketplace.

Forty years ago last month the U.S. Supreme ruled for the first time that lawyers are not exempt from Federal Antitrust Law, specifically, Section 1 of the Sherman Act. Goldfarb v. Virginia State Bar, et al. 421 U.S. 773 (1975). The Virginia State Bar and the local bar association made two arguments in favor of exemption: (1) as a “learned profession” lawyers were exempt from Federal Antitrust Law, and (2) the conduct at issue, use of a minimum fee schedule, was mandated by the Virginia State Bar, a state agency, and was therefore exempt under the “state action” doctrine as set forth in Parker v. Brown. The Court rejected these and other arguments concluding that the enforcement of the minimum fee schedule by the State Bar constituted “classic price fixing” in violation of the Sherman Act.

In February of this year the U.S. Supreme Court extended the reach of Goldfarb to prohibit the North Carolina Dental Board from issuing cease and desist orders to non-dentists who were providing teeth whitening services in the state. North Carolina State Bd. of Dental Examiners v. FTC, No. 13-534. The Court found, in relevant part, that:

“Because a controlling number of the Board’s decision makers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust

immunity only if it was subject to active supervision by the State, and here that requirement is not met.”

In light of these two Supreme Court rulings and others, I believe that were this court to uphold the practice of requiring passage of the New Jersey Bar Exam as a condition of admission to the Bar, such a ruling would be tantamount to state sanctioned antitrust behavior with no legitimate public interest justification. A brief review of the NJBSA’s arguments in favor of keeping the bar exam requisite in place further supports this conclusion.

Opposition to Admission by Motion

The arguments of those on the Committee (“Special Committee on Attorney Ethics and Admissions”) who oppose admission by motion have one common theme: **New Jersey lawyers will face greater competition, make less money and have trouble surviving in what they term “the most difficult period [for attorneys] since the Great Depression.”p. 12.** The basic flaw in this argument is that the financial well-being of New Jersey lawyers cannot serve as justification for anti-competitive conduct. The law has changed over the past 40 years—lawyers and other professionals are no longer exempt from the forces of our free enterprise system, nor should they be. Removing unreasonable barriers to competition in the market for legal services is the most effective way to insure the highest quality and lowest cost legal services for consumers, and that is the only legitimate rationale for a ruling by this court that truly serves the public interest.

A closer look at the specific comments of the opponents of a rule change further confirms that economic protectionism is the primary factor motivating their opposition:

- **Because of our unique geographical position (between Philadelphia and NYC) it is likely that significant numbers of lawyers will seek admission by motion. “There are already too many licensed New Jersey lawyers.” New Jersey law firms are “cutting back, laying off, or not hiring.” p. 12**

This is a purely economic rationale for restricting access to the New Jersey Bar. It raises the obvious question about our free enterprise system: Who decides how much competition in legal services is good for the public—practicing NJ lawyers or the free market? The US Supreme Court has left no doubt it is the latter. The NJSBA, comprised entirely of “active market participants” in the market for legal services is precluded by law from making this purely economic decision to restrain access to bar membership in New Jersey. Before the New Jersey Supreme Court specifically blesses this restraint on competition it must articulate the benefits to New Jersey consumers that would flow from having fewer choices in the marketplace for legal services.

- **“The flow of newly-admitted lawyers must be managed prudently and carefully to further the interests of clients, the existing legal community, the judiciary’s regulatory system and the public. There is nothing to be lost and much to be gained if we place a hold on this matter for a modest period—three years—during which**

we can assess developments. With so many of our colleagues struggling not simply to thrive, but to survive, it is unfair to them to do otherwise.” p. 15

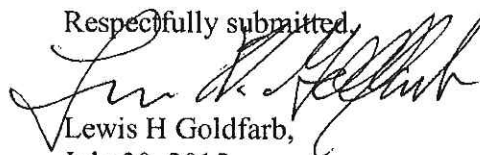
As an alternative to acting on the recommendations of the American Bar Association since 2001, as well as half of the members of the Committee, opponents of admission by motion argue that no action should be taken until the completion of a three year assessment of its impact on lawyers. This might be justified if admission by motion were a new idea. Forty-two states, many bordering on major metropolitan areas brimming with lawyers, have had this “experiment” in place for decades with no documented adverse impact on the public, or lawyers for that matter. Removing an unjustified barrier to practicing law in New Jersey will not be seen as groundbreaking but rather as falling into line.

- **The NJSBA commented that “diluting New Jersey’s criteria for admission to practice law” does not serve the public interest since the public “has a right to expect that a lawyer licensed here is familiar with New Jersey law, procedures, rules...traditions...unwritten expectations about how lawyers should behave...”, as well as “our great cultural tradition.”p. 13**

These are certainly lofty words by those seeking to maintain the status quo. This argument obviously fails because, as stated in the Committee report, the New Jersey “bar examination does not test New Jersey law, rules or procedures, it is a test of general knowledge.” As to the need to maintain “our great cultural tradition,” it is not clear what the commentator had in mind. Certainly we’re all proud of New Jersey’s multi-cultural traditions, maybe a bit less so as to other attributes of New Jersey’s history. Regardless, this argument hardly qualifies as a valid public interest justification for keeping the existing barrier for admission to the New Jersey Bar

Before the State of New Jersey through its Supreme Court carves out an exemption from Federal Antitrust Law that would preserve a barrier to competition from out-of-state lawyers, it must find that the primary beneficiary of such an exemption is the public at large, not just the lawyers. I submit that neither the members of the Committee nor the NJSBA has demonstrated how the public benefits from requiring licensed, out of state lawyers in good standing to take a bar exam as a condition to obtaining a license to practice law in New Jersey. These comments represent my personal views, not necessarily those of any member of my law firm.

Respectfully submitted,


Lewis H Goldfarb,
July 30, 2015