



**PRO HAC VICE**

# **Attorney Admissions**

## **Identifying and Working with Local Counsel and *Pro Hac Vice* Admissions**

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**A**t some point during law school, typically during trial advocacy and professional responsibility, burgeoning future lawyers learn two important concepts—*pro hac vice* and consulting local counsel when not licensed to practice in a particular state. Some practicing attorneys may never have to address these items; however, there is a significant number who do. For example, military spouses, corporate counsel, and trial attorneys encounter these issues on a regular basis.

Latin for “this time only,” *pro hac vice* “enables an out-of-state lawyer [to] be admitted to practice in a local jurisdiction for a particular case only.”<sup>1</sup> The requirement to consult local counsel when advising clients outside the requisite practice jurisdictions is found in both the American Bar Association’s *Model Rules of Professional Conduct* (ABA Rules), as well as various states’ rules and local rules of both state and federal court. Given the prevalence of these issues, the purpose of this article is to provide a basic semblance of these concepts, as well as practical guidance for addressing these situations when they arise.

### **Pro Hac Vice**

Lawyers are limited to the jurisdictions where they are licensed to practice. Yet, as in most areas of the law, there are exceptions. One important aspect of *pro hac vice* admissions is appreciating the number of times that the lawyer can appear in a court outside of their jurisdiction without becoming licensed in that particular state. In November 2015, the American Bar Association released a chart in relation to *pro hac vice* admission rules.<sup>2</sup> This chart provides a comprehensive overview of the individual state’s procedural rules, as well as the cost. Another important consideration is whether the attorney is a government attorney because exceptions often apply and are found in the court’s local rules.<sup>3</sup>

When considering litigating, one must always consult either the Federal Rules of Civil Procedure (FRCP) or the respective State Rules of Civil Procedure (e.g., Texas Rules of Civil Procedure or Alaska Rules of Civil Procedure), as well as the local rules of the particular court where the case will be filed. These rules are important for providing the framework and limitations on the representation. For example, Alaska R. Civ. P. 81(a)(3) provides that, “[l]ocal counsel

shall be primarily responsible to the court for the conduct of all stages of the proceedings, and their authority shall be superior to that of attorneys permitted to appear [*pro hac vice*].”

The language in the U.S. Court of Federal Claims (USCFC) Rule 83.1 establishes the requirements for *pro hac vice* admission in that particular court.<sup>4</sup> USCFC Rule 83.1 (a)(2)(A) and (B) establish and what most other courts require—“[a]n attorney may participate *pro hac vice* in any proceeding before this court if: (A) the attorney is admitted to practice before the highest court of any U.S. state, territory, or possession or the District of Columbia; and (B) the attorney of record for any party has requested and is present for such participation and has received the court’s approval.”

It is important to note that *pro hac vice* status should be considered in light of issues subpoenas. The Notes of Advisory Committee on Rules—1991 Amendment to FRCP 45 states:

Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted *pro hac vice*, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks’ offices some distance from the place at which the action proceeds. This change does not enlarge the burden on the witness.<sup>5</sup>

The Advisory Committee’s comments provide some important takeaways. First, the goal was to make the administrative side of a lawsuit easier for both the parties and the courts. Second, an admitted *pro hac vice* attorney may issue a subpoena. Hence, being admitted *pro hac vice* does not mean merely being an observer; rather, it involves being an active participant in the process.

### **Consulting Local Counsel**

A general rule to follow is that if an attorney is not licensed in a given jurisdiction, then outside counsel should be consulted immediately. A good starting point for identifying the nuances are in ABA Rule 5.5, which is somewhat lengthy but worth including in its entirety.<sup>6</sup> Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice of Law states:

(a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires *pro hac vice* admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Basically, ABA Rule 5.5, which has been adopted by all U.S. states in various forms, requires a lawyer practicing outside of their licensed jurisdiction(s) to consult local counsel, unless certain exceptions are met.<sup>7</sup> Those exceptions include an attorney's role

as corporate counsel, are services where *pro hac vice* admission is not required, or the services being provided are authorized by other legal standards including "federal or state laws or rules."<sup>8</sup> The consequences of not adhering to these requirements could lead to a suspension or disbarment. Therefore, it is important to consult the relevant rules of professional responsibility, as well as the *Federal Practice Handbook*.

### Practice Tips

Once the attorney knows that consulting local counsel or being admitted *pro hac vice* is required, it is helpful to know the next steps. Here are some practical tips, which are based on the Oregon Federal Courts Procedures:<sup>9</sup>

- Review the ABA's *pro hac vice* admissions chart;
- Consult the FRCP or the respective state's rules of civil procedure;
- Visit the court's website and navigate to the local rules;
- Some courts require that a form be filed (i.e., Form 22 in Oregon);
- Ask for the judge's rules if a judge has been assigned;
- Consult both your state's professional rules of conduct, as well as those of the state in which the representation will take place;
- Consult the *Federal Practice Handbook*; and
- Coordinate with local counsel and the client.

In general, these steps should be followed because they are required. Exceptions may exist, such as those for government attorneys; however, given that rules change, it is prudent to consult the local rules prior to presuming that the exception still exists or that the process is still the same. Taking these steps and being proactive can reduce the risk of complications both from a respective state bar and in the proceedings/services.

### How to Choose Local Counsel

Often, in addition to a prior relationship or familiarity with the client and/or the client's business operations, your client may wish to retain your representation because of your experience with a specific substantive area of federal practice (e.g., patent law, ERISA). In cases where knowledge of the substantive area of federal law plays a significant role, important issues need to be addressed when selecting local counsel. Some practitioners do not seek out local counsel with the substantive law experience and merely desire those local practitioners familiar with the particular district court's local rules and the individual judge's rules of practice. While those requirements are necessary and beneficial, it is advantageous to enlist local counsel familiar with the substantive area of law. This is especially true in patent litigation matters since many federal districts have adopted separate local patent rules that also vary from district to district (e.g., compare the District of New Jersey's local patent rules with the Southern District of New York's local patent rules).

The ability to utilize a practitioner who not only understands his or her way around the courthouse but also appreciates the nuances of substantive issues in the litigation creates greater efficiencies for the client.

Local counsel can be a mere "paper pusher," but the client does not benefit from this arrangement. Also, the court law clerks and judges are well aware of the practitioners who appear before them on

a regular basis. It is preferable for the court to have a favorable pre-disposition toward the attorney who is functioning as local counsel. When appearing in a district for the first time, often the first decision ascribed to *pro hac vice* counsel is the selection of local counsel.

Although it should go without saying, it nevertheless is worthy to note the imperative to perform due diligence on the selected local counsel. Local counsel's reputation before the court and the individual judge is extremely important. Likewise, your own familiarity with the local rules and individual judge's rules is equally important. Reliance upon your local counsel does not excuse your own professional responsibilities to the client and the court.

While the *pro hac vice* requirements and the breadth of authority granted to the *pro hac vice* admittee varies greatly from federal district to district, often even after *pro hac vice* admission, all filings must be signed by local counsel and appearances may also require the presence of local counsel. This requirement needs to be factored in when scheduling filing deadlines and appearances.

Another consideration that should be factored in is the additional costs to the client associated with local counsel fees. The added expense for local counsel in high-stakes "bet the company" litigation may get lost in the noise. However, in cases where legal fees do not reach seven figures, the additional expense does warrant consideration. Thus, cost may limit the options of selected local counsel. And, while cost should not be the deciding factor, it is a factor to be balanced with the others.

Summary of considerations when selecting local counsel:

1. Reputation before the bench in the particular district.
2. Reputation with the individual judge (i.e., reported decisions, etc.)
3. Experience with the court and the judge.
4. Experience in the particular subject matter of the dispute (e.g., patents, ERISA).
5. Experience with local and federal rules of procedure.
6. Costs.
7. Capacity to fulfill the role and be responsive to your and your client's needs in the case.
8. Experience working in the role as local counsel.

## Conclusion

Failing to adhere to the requirements for *pro hac vice* admission, as well as consulting local counsel, could lead to adverse bar proceedings. The FBA's *Federal Practice Handbook*, as well as the ABA's Model Rules and *pro hac vice* admissions chart provide an excellent starting point when navigating these subjects. Overall, lawyers do have the ability to practice outside their jurisdiction—they just have

to keep their actions within the navigational beacons of the various laws and standards. ☺



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## Endnotes

<sup>1</sup>See *Pro Hac Vice*, THE FREE DICTIONARY, legal-dictionary.thefreedictionary.com/Pro+Hac+Vice (last visited June 12, 2016).

<sup>2</sup>See American Bar Association, Center For Professional Responsibility, *Pro Hac Vice Admission Rules* (March 28, 2016), available at [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/prohac\\_admin\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/prohac_admin_rules.authcheckdam.pdf).

<sup>3</sup>See Richard J. Vangelisti & Scott F. Kocher, *Welcome to Oregon: What Every Lawyer Should Know About Practice in Oregon Courts* (April 2009), available at [www.vangelisti.com/documents/article\\_rjv\\_sfk\\_Welcome\\_to\\_Oregon\\_Courts\\_2009\\_000.pdf](http://www.vangelisti.com/documents/article_rjv_sfk_Welcome_to_Oregon_Courts_2009_000.pdf).

<sup>4</sup>USCF Rule 83.1, [www.uscfc.uscourts.gov/sites/default/files/court\\_info/Rule\\_83\\_1.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/Rule_83_1.pdf) (last visited June 12, 2016).

<sup>5</sup>FED.R.CIV.P. 45.

<sup>6</sup>American Bar Association, *Rule 5.5: Practice of Law; Multijurisdictional Practice of Law*, available at [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_5\\_unauthorized\\_practice\\_of\\_law\\_multijurisdictional\\_practice\\_of\\_law.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html).

<sup>7</sup>See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009) (noting that "nearly all states have adopted into law [the Model Rules] in whole or in part").

<sup>8</sup>MODEL RULES OF PROF'L CONDUCT R. 5.5(4)(d)(1),(2).

<sup>9</sup>*Supra* note 3.

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