

REPORT

Introduction

There are increasing instances in which litigation in U.S. courts involves issues related to international or foreign law. There are also increasing instances in which foreign entities or individuals find themselves in U.S. courts. One consequence is that litigants occasionally seek to retain foreign lawyers who can assist U.S. counsel on relevant issues. These clients may want help from a lawyer who knows the client's operations, or their domestic, estate or property issues abroad. A foreign lawyer may also have knowledge about a country's laws, language, and customs that may help U.S. courts, lawyers, and juries better understand a litigant's position.

The ABA Model Rule on Pro Hac Vice Admission currently provides judges no guidance about granting such limited and temporary practice authority to foreign lawyers. The ABA Commission on Ethics 20/20 concluded that this omission should be addressed to give judges such guidance when they exercise their discretion to authorize foreign lawyers to appear *pro hac vice*.¹

This proposal has ample precedent. A form of *pro hac vice* admission for non-U.S. lawyers is already permitted in at least fifteen states,² and is allowed in the U.S. Supreme Court.³ Numerous federal courts also have rules or other authority that permit foreign lawyers to be specially admitted to appear before them in a particular matter.⁴ Notably, the Commission has not learned of any resulting difficulties.

The Conference of Chief Justices has endorsed in principle the Commission's proposal. On July 28, 2010, after reviewing an early draft of the Commission's proposal, the Conference adopted a Resolution urging the ABA House of Delegates to add foreign lawyers in the "carefully limited" manner suggested by the Commission to the Model Rule on Pro Hac Vice Admission.⁵

As the Conference suggested, the Commission is proposing numerous restrictions on the *pro hac vice* authorization for foreign lawyers. The Commission's proposal lists factors – well beyond those applicable to a U.S. licensed lawyer seeking to appear *pro hac vice* – to guide a judge in determining whether to grant a foreign lawyer's application and, if so, how to determine the

¹ MODEL RULE ON PRO HAC VICE ADMISSION (2002),

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/rule_prohac.authcheckdam.pdf.

² See ABA Center for Professional Responsibility, *Comparison Chart of ABA Model Rule for Pro Hac Vice Admission With State Versions and Amendments Since 2002* (last updated Aug. 16, 2012), available at

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf.

³ SUP. CT. R. 6(2). See also *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

⁴ See, e.g., CT. OF MILITARY COMM'N REVIEW RULES OF PRACTICE R. 8(f) (2008) ("Foreign Attorneys"); *DataTreasury Corp. v. Wells Fargo & Co.*, Slip Copy, 2010 WL 3912498 (E.D.Tex., 2010) (Canadian lawyer admitted *pro hac vice* in patent infringement case); *Rudich v. Metro Goldwyn Studio, Inc.*, No. 08-cv-389-bbc, Opinion and Order (Aug. 28, 2008) (admission *pro hac vice* of Israeli lawyer in copyright case); *U.S. v. Black*, No. 05 CR 00727 (N.D. Ill. Dec. 1, 2005) (Canadian lawyer admitted *pro hac vice* in criminal case).

⁵ See Conference of Chief Justices, *Resolution 13 Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers*,

<http://cej.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last visited Nov. 12, 2012).

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scope of the practice authority. These factors include, but are not limited to, the legal training and experience of the foreign lawyer, the foreign lawyer's familiarity with the law of the jurisdiction applicable to the matter, the extent to which the foreign lawyer's relationship and familiarity with the client or the matter will facilitate the fair and efficient resolution of the litigation, and the foreign lawyer's English language facility. The foreign lawyer also bears the burden of demonstrating to the judge and to local counsel (who must support that application) that he or she satisfies the conditions for such authorization. Disciplinary counsel and an opposing litigant may object to the application.⁶

The foreign lawyer could only appear as a co-counsel or in an advisory or consultative role, alongside an in-state lawyer and only for purposes of that particular proceeding. Moreover, the in-state lawyer would be responsible to the court and the client for the conduct of the proceeding, for independently advising the client on the substantive law and procedural issues of a United States jurisdiction, and for advising the client whether the in-state lawyer's judgment differs from that of the foreign lawyer. The Commission believes that these conditions and limitations, as well as others described below, provide abundant protection to the courts, litigants, and the public.

Before approving this Resolution for submission to the House of Delegates, the Commission's Working Group on Inbound Foreign Lawyers conducted research and carefully vetted arguments raised in favor of and in opposition to adding foreign lawyers to the Model Pro Hac Vice Rule. In addition to members of the Commission, members from the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professional Discipline, the Section of International Law, the Real Property, Trust and Estate Law Section, the Task Force on International Trade in Legal Services, and the Section of Legal Education and Admissions to the Bar actively participated in and contributed to the Working Group's deliberations.

In sum, by adopting the Commission's proposal, the ABA would retain its leadership role in setting the standards for *pro hac vice* admissions, just as additional jurisdictions are considering this and related issues.⁷ Moreover, the Commission's proposal would foster greater uniformity and ensure that jurisdictions adopt appropriate, and carefully limited, rules on the role of foreign lawyers in U.S. courts.

Background

As a result of globalization, foreign and international law issues are arising with greater frequency in U.S. courts, both for companies and individuals. Globalization has also increased the number of foreign companies with U.S. offices or operations as well as the number of U.S.

⁶ For example, according to the 2010 Report of the Office of General Counsel to the Board of Governors of the State Bar of Georgia, between May 1, 2009 through April 30, 2010, the Office of the General Counsel reviewed 763 *pro hac vice* applications; it objected to only fourteen of them.

⁷ See, e.g., Supreme Court of Texas, *Task Force on International Law Practice in Texas*, <http://www.supreme.courts.state.tx.us/ilptf/about.asp> (last visited Nov. 10, 2012).

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companies with foreign offices or operations.⁸ These companies are regularly involved in litigation in the U.S., and these cases sometimes involve foreign or international law.

Demographic shifts have led to an increase in the number of individuals in the U.S. who have cases implicating foreign or international law. As of 2009, the total foreign-born population in the U.S. was 36,750,000, approximately 12% of the U.S. population.⁹ These foreign-born residents have family law, estate planning, and business relationships in their countries of origin or the countries of origin of their spouses or business associates.¹⁰ When these legal matters are litigated in U.S. courts, they sometimes implicate foreign or international law. For example, the Commission heard that it is not uncommon for family law practitioners to have cases that cross international boundaries, necessitating involvement by and coordination with foreign lawyers in order to provide the full panoply of required legal services. Lawyers who practice in the areas of trust and estate law, real estate law, and intellectual property law are similarly affected.

In sum, it is clear that globalization has affected litigation as much as it has affected the rest of society. The result has been an increase in litigation in U.S. courts concerning parties, property or businesses located in other countries, ranging from complex, international mass torts to those involving individual parties with international child custody or estate law issues. These cases sometimes implicate foreign or international legal issues about which foreign lawyers may have valuable insights.

Inclusion of Foreign Lawyers Within the Pro Hac Vice Rule is Consistent With Current Policy

The Commission's proposal is consistent with what is already permitted by law in a number of state and federal courts. Currently, at least fifteen states permit *pro hac vice* admission by foreign lawyers.¹¹ The U.S. Virgin Islands also permits foreign lawyers to appear *pro hac vice* in its courts. The Commission inquired and did not learn of any problems arising out of these procedures. Additionally, the Texas Supreme Court Task Force on International Law Practice is considering whether to recommend to the Court a rule that permits *pro hac vice* practice authority for foreign lawyers.¹²

The Supreme Court of the United States provides in its Rules that "an attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*."¹³ Some federal

⁸ See, e.g., ABA Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Feb. 4, 2012), available at <http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf>; Illinois Department of Commerce & Economic Opportunity, *Foreign Direct Investment in Illinois*, available at http://www.ildceo.net/dceo/Bureaus/Trade/Foreign_Direct_Investment; and Texas Office of the Governor, *Foreign Investment in Texas: The Industries and Countries Leading Current Growth*, www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf (last visited Aug. 15, 2012).

⁹ See U.S. Census Bureau, Table 40, Native and Foreign-Born Populations by Selected Characteristics: 2009 (2011), <http://www.census.gov/compendia/statab/2011/tables/11s0040.pdf>.

¹⁰ See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 Fam. L.Q. 4 (2011); Allison Maxim, *International Parental Child Abduction: Essential Principles of the Hague Convention*, Vol. LXIX Bench & Bar of Minnesota, no. IV (2012).

¹¹ See *supra* note 2.

¹² *Supra* note 7.

¹³ *Supra* note 3.

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courts of special jurisdiction, such as the U.S. Court of Federal Claims¹⁴ and the Court of Military Commission Review,¹⁵ have rules that permit foreign lawyers to be specially admitted to appear before them in a particular matter.

Other federal courts, whether by rule or practice, have permitted foreign lawyers to be admitted *pro hac vice*.¹⁶ For example, in *In re Livent, Inc.*, Nos. 98 Civ. 5686 (VM)(DFE) & 98 Civ. 7161 (VM)(DFE), 2004 WL 385048 (S.D.N.Y. March 2, 2004), the U.S. District Court for the Southern District of New York admitted *pro hac vice* two Canadian lawyers who were not admitted to any U.S. jurisdictions at the time of application.¹⁷ In granting admission *pro hac vice*, the Court stated: “Our Court’s *pro hac vice* rule, Local Civil Rule 1.3(c), omits any mention of an attorney of a foreign country. But admission *pro hac vice* is a sensible exercise of discretion on the particular facts of this litigation.”¹⁸ Obviously, there are occasions in which judges exercise their discretion to deny applications for *pro hac vice* admission by a foreign lawyer.¹⁹

Explanation of Proposed Amendments to the ABA Model Rule on Pro Hac Vice Admission

a. Amendments Specific to Foreign Lawyers

¹⁴ “Any person qualified to practice in the highest court of any foreign state may be specially admitted to practice before this court but only for purposes limited to a particular case; such person may not serve as the attorney of record. . . . A member of the bar of this court must file with the clerk a written motion to admit the applicant” CT. OF MILITARY COMM’N REVIEW RULES OF PRACTICE R. 8(f), *supra* note 4.

¹⁵ “An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*. Counsel of record for the party on whose behalf leave is requested to argue *pro hac vice* must file a motion seeking permission of the CMCR. The motion must identify the courts to which the *pro hac vice* counsel is admitted to practice and must indicate whether any disciplinary proceedings are pending against that counsel.” CT. OF MILITARY COMM’N REVIEW RULES OF PRACTICE R. 8(f), *supra* note 4.

¹⁶ *See, e.g.*, U.S. D. W.D.N.Y., L.R. CIV. P., R. 83.1(c) (amended effective Jan.1, 2011). As amended the Rule deletes the prior specific reference to foreign lawyers, but the Clerk’s office confirmed to the Commission that this change is not meant to preclude admission of foreign lawyers as the court’s longstanding policy has permitted; the new language remains sufficiently broad to encompass foreign lawyers. Former Rule 83(i) of the Local Rules of Civil Procedure for the U.S. District Court for the Western District of New York provided that, “[a]n attorney duly admitted to practice in any . . . foreign country may in the discretion of the Court be admitted *pro hac vice* to participate before the Court in any matter in which he or she may for the time be employed.”

¹⁷ *See also DataTreasury Corp. v. Wells Fargo & Co.*, Slip Copy, 2010 WL 3912498 (E.D.Tex., 2010) (Canadian lawyer admitted *pro hac vice* in patent infringement case); *Rudich v. Metro Goldwyn Studio, Inc.*, No. 08-cv-389-bbc, Opinion and Order (Aug. 28, 2008) (admission *pro hac vice* of Israeli lawyer in copyright case. Although there are later proceedings in the case, the *pro hac vice* representation was maintained); and *U.S. v. Black*, No. 05 CR 00727 (N.D. Ill. Dec. 1, 2005) (Canadian lawyer admitted *pro hac vice* in criminal case).

¹⁸ *In re Livent, Inc.*, Nos. 98 Civ. 5686 (VM)(DFE) & 98 Civ. 7161 (VM)(DFE), 2004 WL 385048, at *3 (S.D.N.Y. Mar. 2, 2004).

¹⁹ *See, e.g., DeGuzman v. Nicholson*, 20 Vet.App. 526 (2006) where the U.S. Court of Appeals for Veterans Claims would not permit a lawyer from the Philippines to be admitted *pro hac vice*. In denying the application for *pro hac vice* admission, the court held as a matter of statutory interpretation that “in order for an attorney to be allowed to represent an appellant in a particular case under Rule 46(c) without having been admitted to practice before the Court as a member of the Court’s bar, the requirements for attorneys set forth in Rule 46(a) must be met.” While this court’s rules also allow for nonlawyer practitioners, in this case it held that this particular foreign lawyer did not meet the good cause shown criteria for nonlawyer *pro hac vice* admission. One judge concurred with the court’s denial of *pro hac vice* admission for this lawyer based on existing facts, but disagreed with the court’s incorporation of the requirements for full admission in Rule 46(a) into Rule 46(c)’s requirements for *pro hac vice* admission.

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The Commission determined that, to ensure that foreign lawyers are subject to more careful scrutiny than U.S. lawyers for purposes of *pro hac vice* authority, a new Section III should be created to address foreign lawyers.

Section III, Paragraph A contains a proposed definition of a “foreign lawyer” that is substantively the same as the one used in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants, the ABA Model Rule for Temporary Practice by Foreign Lawyers, and the recently adopted ABA Model Rule on Practice Pending Admission. In particular, the foreign lawyer must be a member in good standing of a recognized legal profession in the lawyer’s home country, and the members of that profession must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This longstanding ABA definition of a “foreign lawyer” has been adopted by the courts, and the Commission is not aware of any problems that have arisen from its use.

Proposed new Section III of the ABA Model Pro Hac Vice Rule contains the following important limitations and safeguards for clients, courts, and the public.

1. While the foreign lawyer would be of the client’s choosing, granting *pro hac vice* status to the foreign lawyer is entirely within the judge’s discretion, and the foreign lawyer bears the burden of demonstrating to the judge and to local counsel (who must support that application) that he or she satisfies the conditions for such authorization. Moreover, under the Model Rule, Disciplinary Counsel and an opposing litigant may object to the application.
2. The foreign lawyer may only appear as a co-counsel or in an advisory or consultative role, alongside an in-state lawyer in the proceeding. Importantly, authorization to practice *pro hac vice* does not constitute, and should not be read to provide, full admission to the practice of law in the jurisdiction in which the foreign lawyer seeks this privilege; it is a supervised limited practice authorization for a particular matter on a temporary basis.
3. When a foreign lawyer is authorized to appear *pro hac vice*, the in-state lawyer has added duties. The in-state lawyer is responsible to the court and the client for the conduct of the proceeding, for independently advising the client on the substantive law of a United States jurisdiction as well as procedural issues, and for advising the client whether the in-state lawyer’s judgment differs from that of the foreign lawyer. State courts have elaborated on the extent of local counsel’s gatekeeping responsibilities and the extent to which local counsel will be held accountable.
4. The court is empowered to define and impose limits on the scope of the foreign lawyer’s authority and may require specific participation by the in-state lawyer, such as requiring the in-state lawyer to sign all pleadings or be present at depositions.
5. Unlike situations where a U.S. licensed lawyer seeks to appear *pro hac vice*, the

Commission's proposal lists additional factors to guide the judge in determining whether to grant a foreign lawyer's application for *pro hac vice* authority and its scope. These include, but are not limited to, the legal training and experience of the foreign lawyer, the foreign lawyer's familiarity with the law of the jurisdiction applicable to the matter, the extent to which the foreign lawyer's relationship and familiarity with the client or the matter will facilitate its fair and efficient resolution, and the foreign lawyer's English language facility.

6. The foreign lawyer must make full disclosure, under oath, to the court, opposing party and disciplinary counsel of his or her *pro hac vice* and disciplinary history. The judge may deny the request if, for example, the judge believes that the *pro hac vice* admission would be detrimental to the prompt, fair and efficient administration of justice; is detrimental to legitimate interests of parties to the proceedings other than the client(s); poses a risk of inadequate representation to one or more of the clients the applicant proposes to represent; or if the applicant has engaged in such frequent appearances as to constitute regular practice in the state. The judge can revoke the *pro hac vice* authorization for the same reasons.
7. The foreign lawyer would be required to contribute to the jurisdiction's lawyers' fund for client protection.
8. The foreign lawyer applicant is required to state, under penalty of perjury, that he or she is familiar with and will comply with all applicable rules of professional conduct and rules of the court or agency involved.
9. The foreign lawyer is subject to the disciplinary jurisdiction of the court before which *pro hac vice* authority has been granted and the jurisdiction's lawyer disciplinary authority. Because the foreign applicant would be required to provide contact information for all the agencies and courts before which the foreign lawyer has been admitted to practice, the court and disciplinary counsel can report any misconduct to the lawyer's home licensing authority.²⁰

b. Additional Proposed Amendments to the Model Rule and Appendix A

Other changes to the Model Rule and its Appendix A are intended to bring the Rule's terminology in line with other ABA policies. For example, the Commission proposes use of the term "Disciplinary Counsel" instead of "lawyer regulatory authority," "Rules of Professional Conduct" instead of "ethical rules," and "Rules of Disciplinary Enforcement" instead of "rules of discipline." The terms "Disciplinary Counsel" and "Rules of Disciplinary Enforcement" are consistent with the ABA Model Rules for Lawyer Disciplinary Enforcement, which have been ABA policy for decades. Changes in Paragraph I.F. 1(a) are intended to increase clarity and eliminate redundancy.

²⁰ As noted in the Commission's Report accompanying its Resolution to amend Model Rule 5.5, the ABA Standing Committee on Professional Discipline and the ABA Task Force on International Trade in Legal Services are developing a model international reciprocal discipline notification protocol to facilitate the necessary information exchange between U.S. and non-U.S. lawyer regulators.

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The Commission recommends requiring all lawyers registered under the Rule, domestic or foreign, to pay any annual client protection fund assessment. Language to this effect has been added to Section I, paragraph E(4) of the Rule. This requirement ensures that the provisions of the Model Rule on Pro Hac Vice Admission are consistent with Rule 1 (B)(2) of the ABA Model Rules for Lawyers' Funds for Client Protection.²¹

In addition, the Commission has added language to Section I, paragraphs E(2) and (4) to clarify that the contribution to the client protection fund is considered a separate payment from the nonrefundable *pro hac vice* application fee. A number of jurisdictions use all or part of the *pro hac vice* application fee to fund legal services to the poor. This clarifying language, which was recommended by several commenters, will ensure that there is no negative effect on access to justice funding.

The Commission also recommends reorganizing the order of items in Appendix A of the Rule (required information for the verified application) to improve logical flow and provide better substantive guidance. Other suggested changes, such as including e-mail addresses and telephone numbers, will increase the ease with which those investigating, granting or denying the application can communicate with the applicant and others who may have relevant information. The same is true of the Commission's recommendation to require the applicant to provide certified copies of requested court, agency or disciplinary orders.

Paragraph 3 of the Verified Application in Appendix A ensures that the judge and others on whom the Verified Application is served are provided with the identity of, and contact information for, the foreign courts and agencies before which the foreign lawyer is authorized to practice. Requiring a foreign lawyer to provide the contact information will facilitate inquiries of authorities in the lawyer's home country and notification of the home country authorities in the event of misconduct by the foreign lawyer. Any such notification would supplement any disciplinary action or sanctions that may be imposed by the U.S. courts, agencies and disciplinary authorities.

The Commission also recommends that Appendix A to the Model Rule be amended to require that the foreign lawyer provide accurate English translation(s) of any documents demonstrating the lawyer's admission to practice and good standing in any foreign jurisdictions. This requirement mirrors a similar requirement in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants.

Proposed amendments in Paragraphs 5, 6, and 7 of Appendix A to the Model Rule relate to time limitations for disclosure of previous denials of requests for *pro hac vice* admission, revocation of *pro hac vice* authority, and concluded and pending disciplinary proceedings. A five-year period is suggested, but bracketed, to indicate that jurisdictions may impose whatever time limitations they deem appropriate. These changes would apply equally to U.S. and foreign lawyers and are intended to ensure internal consistency within the Rule.

²¹ See MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION R. 1(B)(2), available at http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule1.html (last visited Nov.10, 2012).

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The proposed amendments to Paragraph 9 of Appendix A are intended to highlight the responsibilities of local counsel. New Paragraph 10 would require the foreign lawyer applicant and local counsel to agree that service of any documents upon the foreign lawyer can be accomplished by service on local counsel or that lawyer's agent. This requirement will help ensure accountability of foreign lawyers admitted *pro hac vice*.

Conclusion

These proposed amendments to the ABA Model Rule on Pro Hac Vice Admission ensure that courts are responsive to the needs of 21st century clients and counsel, while providing adequate safeguards for the courts, the profession, and the public. The Commission on Ethics 20/20 respectfully requests that the House of Delegates approve the amendments to the Model Rule.

Respectfully submitted,

ABA Commission on Ethics 20/20
Jamie S. Gorelick, Co-Chair
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