

Lawyers

September 4, 2012

1 The views expressed herein have not been approved by the House of Delegates or the Board of
2 Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.
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5 **Resolution**
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7 **RESOLVED:** That the American Bar Association amends the ABA Model Rule on Pro
8 Hac Vice Admission as follows (insertions underlined, deletions ~~struck through~~):
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10 **ABA Model Rule on Pro Hac Vice Admission**
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12

13 **I. Admission In Pending Litigation Before A Court Or Agency**

14 **A. Definitions**

15 1. An “out-of-state” lawyer is a person not admitted to practice law in
16 this state but who is admitted in another state or territory of the United States or of
17 the District of Columbia, and not disbarred or suspended from practice in any
18 jurisdiction.

19 2. An out-of-state lawyer is “eligible” for admission pro hac vice if that
20 lawyer:

21 a. lawfully practices solely on behalf of the lawyer’s employer and its
22 commonly owned organizational affiliates, regardless of where such lawyer
23 may reside or work; or

24 b. neither resides nor is regularly employed at an office in this state;
25 or

26 c. resides in this state but (i) lawfully practices from offices in one or
27 more other states and (ii) practices no more than temporarily in this state,
28 whether pursuant to admission pro hac vice or in other lawful ways.

29 3. A “client” is a person or entity for whom the out-of-state lawyer has
30 rendered services or by whom the lawyer has been retained prior to the lawyer’s
31 performance of services in this state.

32 4. An “alternative dispute resolution” (“ADR”) proceeding includes all
33 types of arbitration or mediation, and all other forms of alternative dispute
34 resolution, whether arranged by the parties or otherwise.

35 5. “This state” refers to [state or other U.S. jurisdiction promulgating
36 this ~~Rule~~]. This Rule does not govern proceedings before a federal court or federal
37 agency located in this state unless that body adopts or incorporates this Rule.

38 **B. Authority of Court or Agency To Permit Appearance By Out-of-State
39 Lawyer**

40 1. **Court Proceeding.** A court of this state may, in its discretion, admit an
41 eligible out-of-state lawyer retained to appear in a particular proceeding pending
42 before such court to appear pro hac vice as counsel in that proceeding.

43 2. **Administrative Agency Proceeding.** If practice before an agency of
44 this state is limited to lawyers, the agency may, using the same standards and
45 procedures as a court, admit an eligible out-of-state lawyer who has been retained to
46 appear in a particular agency proceeding to appear as counsel in that proceeding
47 pro hac vice.

48 C. **In-State Lawyer's Duties.** When an out-of-state lawyer appears for a client
49 in a proceeding pending in this state, either in the role of co-counsel of record with
50 the in-state lawyer, or in an advisory or consultative role, the in-state lawyer who is
51 co-counsel or counsel of record for that client in the proceeding remains responsible
52 to the client and responsible for the conduct of the proceeding before the court or
53 agency. It is the duty of the in-state lawyer to advise the client of the in-state
54 lawyer's independent judgment on contemplated actions in the proceeding if that
55 judgment differs from that of the out-of-state lawyer.

56 D. **Application Procedure**

57 1. **Verified Application.** An eligible out-of-state lawyer seeking to appear
58 in a proceeding pending in this state as counsel pro hac vice shall file a verified
59 application with the court where the proceeding litigation is filed. The application
60 shall be served on all parties who have appeared in the case and the Disciplinary
61 Counsel lawyer regulatory authority. The application shall include proof of service.
62 The court has the discretion to grant or deny the application summarily if there is
63 no opposition.

64 2. **Objection to Application.** The Disciplinary Counsel lawyer
65 regulatory authority or a party to the proceeding may file an objection to the
66 application or seek the court's imposition of conditions to its being granted. The
67 Disciplinary Counsel lawyer regulatory authority or objecting party must file with
68 its objection a verified affidavit containing or describing information establishing a
69 factual basis for the objection. The Disciplinary Counsel lawyer regulatory
70 authority or objecting party may seek denial of the application or modification of
71 it. If the application has already been granted, the Disciplinary Counsel lawyer
72 regulatory authority or objecting party may move that the pro hac vice admission
73 be withdrawn.

74 3. **Standard for Admission and Revocation of Admission.** The courts
75 and agencies of this state have discretion as to whether to grant applications for
76 admission pro hac vice. An application ordinarily should be granted unless the court
77 or agency finds reason to believe that such admission:

- 78 a. may be detrimental to the prompt, fair and efficient
79 administration of justice,
- 80 b. may be detrimental to legitimate interests of parties to the
81 proceedings other than the client(s) the applicant proposes to represent,
- 82 c. one or more of the clients the applicant proposes to represent
83 may be at risk of receiving inadequate representation and cannot adequately
84 appreciate that risk, or
- 85 d. the applicant has engaged in such frequent appearances as to
86 constitute regular practice in this state.

87 4. **Revocation of Admission.** Admission to appear as counsel pro hac vice
88 in a proceeding may be revoked for any of the reasons listed in Section I.D.3
89 above.

90 E. **Verified Application and Fees:**

91 1. **Required Information.** An application shall state the information
92 listed on Appendix A to this ~~r~~Rule. The applicant may also include any other
93 matters supporting admission pro hac vice.

94 2. **Application Fee.** An applicant for permission to appear as counsel

95 pro hac vice under this Rule shall pay a non-refundable fee as set by the [court or
96 other proper authority ~~lawyer regulatory authority~~] at the time of filing the
97 application.

98 3. Exemption for Pro Bono Representation. An applicant shall not be
99 required to pay the fee established by I.E.2 above if the applicant will not charge an
100 attorney fee to the client(s) and is:

101 a. employed or associated with a pro bono project or nonprofit
102 legal services organization in a civil case involving the client(s) of such
103 programs; or

104 b. involved in a criminal case or a habeas proceeding for an
105 indigent defendant.

106 4. Lawyers' Fund for Client Protection. Upon the granting of a request
107 to appear as counsel pro hac vice under this Rule, the lawyer shall pay any required
108 assessments to the lawyers' fund for client protection.

109 F. Authority of the [Disciplinary Counsel Lawyer Regulatory Authority], the
110 and Court: Application of Ethical Rules of Professional Conduct, Rules of
111 Disciplinary Enforcement Discipline, Contempt, and Sanctions

112 1. Authority Over Out-of-State Lawyer and Applicant.

113 a. During pendency of an application for admission pro hac vice
114 and upon the granting of such application, an out-of-state lawyer submits to
115 the authority of the courts and the jurisdiction of [Disciplinary Counsel
116 lawyer regulatory authority] of this state for all conduct arising out of or
117 relating in any way to the application or proceeding in which the out-of-state
118 lawyer seeks to appear, regardless of where the conduct occurs. The
119 applicant or out-of-state lawyer who has obtained pro hac vice admission in a
120 proceeding submits to this authority for all that lawyer's conduct (i) within
121 the state while the proceeding is pending or (ii) arising out of or relating to
122 the application or the proceeding. An applicant or out-of-state lawyer who
123 has pro hac vice authority for a proceeding may be disciplined in the same
124 manner as an in-state lawyer.

125 b. The court's and the [Disciplinary Counsel's lawyer regulatory
126 authority's] authority includes, without limitation, the court's and the
127 [Disciplinary Counsel's lawyer regulatory authority's] rules of professional
128 conduct, rules of disciplinary enforcement, contempt and sanctions orders,
129 local court rules, and court policies and procedures.

130 2. Familiarity With Rules. An applicant shall become familiar with all
131 applicable the rules of professional conduct, rules of disciplinary enforcement of
132 the [lawyer regulatory authority], local court rules, and policies and procedures of
133 the court before which the applicant seeks to practice.

134 II. Out-of-State Proceedings, Potential In-State and Out-of-State Proceedings, and All
135 ADR

136 A. In-State Ancillary Proceeding Related to Pending Out-of-State Proceeding.
137 In connection with proceedings pending outside this state, an out-of-state lawyer
138 admitted to appear in that proceeding may render in this state legal services
139 regarding or in aid of such proceeding.

140 **B. Consultation by Out-of-State Lawyer**

141 1. **Consultation with In-State Lawyer.** An out-of-state lawyer may
142 consult in this state with an in-state lawyer concerning the in-state's lawyer's
143 client's pending or potential proceeding in this state.

144 2. **Consultation with Potential Client.** At the request of a person in this
145 state contemplating a proceeding or involved in a pending proceeding, irrespective
146 of where the proceeding is located, an out-of-state lawyer may consult in this state
147 with that person about that person's possible retention of the out-of-state lawyer in
148 connection with the proceeding.

149 **C. Preparation for In-State Proceeding.** On behalf of a client in this state or
150 elsewhere, the out-of-state lawyer may render legal services in this state in
151 preparation for a potential proceeding to be filed in this state, provided that the out-
152 of-state lawyer reasonably believes he is eligible for admission pro hac vice in this
153 state.

154 **D. Preparation for Out-of-State Proceeding.** In connection with a potential
155 proceeding to be filed outside this state, an out-of-state lawyer may render legal
156 services in this state for a client or potential client located in this state, provided that
157 the out-of-state lawyer is admitted or reasonably believes the lawyer is eligible for
158 admission generally or pro hac vice in the jurisdiction where the proceeding is
159 anticipated to be filed.

160 **E. Services Rendered Outside This State for In-State Client.** An out-of-state
161 lawyer may render legal services while the lawyer is physically outside this state
162 when requested by a client located within this state in connection with a potential or
163 pending proceeding filed in or outside this state.

164 **F. Alternative Dispute Resolution (“ADR”) Procedures.** An out-of-state lawyer
165 may render legal services in this state to prepare for and participate in an ADR
166 procedure regardless of where the ADR procedure is expected to take or actually
167 takes place.

168 **G. No Solicitation.** An out-of-state lawyer rendering services in this state in
169 compliance with this Rule or here for other reasons is not authorized by anything in
170 this ~~Rule~~ to hold out to the public or otherwise represent that the lawyer is
171 admitted to practice in this jurisdiction. Nothing in this Rule authorizes out-of-state
172 lawyers to solicit, advertise, or otherwise hold themselves out in publications as
173 available to assist in litigation in this state.

174 **H. Temporary Practice.** An out-of-state lawyer will ~~only~~ be eligible for
175 admission pro hac vice or to practice in another lawful way only on a temporary
176 basis.

177 **I. Authorized Services.** The foregoing services may be undertaken by the out-of-
178 state lawyer in connection with a potential proceeding in which the lawyer
179 reasonably expects to be admitted pro hac vice, even if ultimately no proceeding is
180 filed or if pro hac vice admission is denied.

181 **III. Admission of Foreign Lawyer in Pending Litigation Before a Court or Agency**

182 **A. A foreign lawyer is a person admitted in a non-United States jurisdiction and**
183 **who is a member of a recognized legal profession in that jurisdiction, the members of which**
184 **are admitted to practice as lawyers or counselors at law or the equivalent and are subject**
185 **to effective regulation and discipline by a duly constituted professional body or a public**

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186 authority, and who is not disbarred, suspended or the equivalent thereof from practice in
187 any jurisdiction.

188 B. The definitions of “client” and “state” in paragraphs I(A)(3) and (5) are
189 incorporated by reference in this Paragraph III.

190 C. A court or agency of this state may, in its discretion, admit a foreign lawyer in a
191 particular proceeding pending before such court or agency to appear pro hac vice as co-
192 counsel with an in-state lawyer, or in an advisory or consultative role, in that proceeding.

193 D. When a court or agency of this state authorizes a foreign lawyer to appear for a
194 client in a proceeding pending before such court or agency, either in the role of co-counsel
195 with an in-state lawyer or in an advisory or consultative role, the in-state lawyer is
196 responsible for the conduct of the proceeding and for independently advising the client on
197 the substantive law of a United States jurisdiction and procedural issues in the proceeding.

198 E. The court or agency, in its discretion, may limit the activities of the foreign
199 lawyer or require further action by the in-state lawyer, including but not limited to,
200 requiring the in-state lawyer to sign all pleadings and other documents submitted to the
201 court or to other parties, to be present at all depositions and conferences among counsel,
202 and to attend all proceedings before the court or agency.

203 F. Paragraphs I (D), (E), (F) are incorporated by reference in this Paragraph III.

204 G. In addition to the factors listed in paragraph I(D)(3) above, a court or agency in
205 ruling on an application to admit a foreign lawyer pro hac vice, or in an advisory or
206 consultative role, may weigh the following factors:

207 1. the legal training and experience of the foreign lawyer including in
208 matters similar to the matter before the court or agency;

209 2. the extent to which the matter will include the application of:

210 a. the law of the jurisdiction in which the foreign lawyer is
211 admitted or

212 b. international law or other law with which the foreign
213 lawyer has a demonstrated expertise;

214 3. the foreign lawyer’s familiarity with the law of a United States jurisdiction
215 applicable to the matter before the court or agency;

216 4. the extent to which the foreign lawyer’s relationship and familiarity with
217 the client or with the facts and circumstances of the matter will facilitate the
218 fair and efficient resolution of the matter;

219 5. the foreign lawyer’s English language ability; and

220 6. the extent to which it is possible to define the scope of the foreign lawyer’s
221 authority in the matter as described in paragraph III (E) so as to facilitate its
222 fair and efficient resolution, including by a limitation on the foreign lawyer’s
223 authority to advise the client on the law of a United States jurisdiction except
224 in consultation with the in-state lawyer.

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APPENDIX A

229 The out-of-state lawyer's verified application for admission pro hac vice shall
230 include:

- 231 1. the applicant's residence and business address, telephone number(s), and e-
mail address(es);
- 232 2. the name, address, and telephone number(s), and e-mail address(es) of each
233 client sought to be represented;
- 234 3. the U.S. and foreign jurisdictions in, and agencies and courts before which
235 the applicant has been admitted to practice, the contact information for each,
236 and the respective period(s) of admission;
- 237 4. the name and address of each court or agency and a full identification of each
238 proceeding in which the applicant has filed an application to appear pro hac
239 vice in this state within the preceding two years and the date of each
240 application;
- 241 5. a statement as to whether, within the last [five (5)] years, the applicant (a)
242 has been denied admission pro hac vice in any jurisdiction, U.S. or foreign,
243 including this state, (b) has ever had admission pro hac vice revoked in any
244 jurisdiction, U.S. or foreign, including this state, or (c) has otherwise ever
245 formally been disciplined or sanctioned by any court or agency in any
246 jurisdiction, U.S. or foreign, including this state. If so, specify the nature of
247 the allegations; the name of the authority bringing such proceedings; the
248 caption of the proceedings, the date filed, and what findings were made and
249 what action was taken in connection with those proceedings. (a A certified
250 copy of the written finding or order shall be attached to the application. If
251 the written finding or order is not in English, the applicant shall submit an
252 English translation and satisfactory proof of the accuracy of the translation);
- 253 56. whether any formal, written disciplinary proceeding has ever been brought
254 against the applicant by a disciplinary counsel or analogous foreign
255 regulatory authority in any other jurisdiction within the last [five (5)] years
256 and, as to each such proceeding: the nature of the allegations; the name of
257 the person or authority bringing such proceedings; the date the proceedings
258 were initiated, which, if any, of the proceedings are still pending, and, for
259 those proceedings that are not still pending, the dates upon which the
260 proceedings were finally concluded; the style caption of the proceedings; and
261 the findings made and actions taken in connection with those proceedings,
262 including exoneration from any charges. (a A certified copy of any written
263 order or findings shall be attached to the application. If the written order or
264 findings is not in English, the applicant shall submit an English translation
265 and satisfactory proof of the accuracy of the translation.);
- 266 67. whether the applicant has been held formally in contempt or otherwise
267 sanctioned by any court in a written order in the last [five (5)] years for
268 disobedience to its rules or orders, and, if so: the nature of the allegations;
269 the name of the court before which such proceedings were conducted; the
270 date of the contempt order or sanction, the caption of the proceedings, and
271 the substance of the court's rulings. (a A copy of the written order or
272 transcript of the oral rulings shall be attached to the application. If the

written finding or order is not in English, the applicant shall submit an English translation and satisfactory proof of the accuracy of the translation);

7. the name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear pro hac vice in this state within the preceding two years; the date of each application; and the outcome of the application;

8. an averment as to the applicant's familiarity with the rules of professional conduct, rules of disciplinary enforcement of the ~~lawyer regulatory authority~~, local or agency rules, and court policies and procedures of the court or agency before which the applicant seeks to practice; and

9. the name, address, telephone number(s), e-mail address(es), and bar number of an the active member in good standing of the bar of this state who will sponsor supports the applicant's pro hac vice request, who The bar member shall appear of record together with the out-of-state lawyer, and who shall remain ultimately responsible to the client as set forth in Paragraph C of this Rule.

10. for applicants admitted in a foreign jurisdiction, an averment by the in-state lawyer referred to in Paragraph 9 above and by the lawyer admitted in a foreign jurisdiction that, if the application for pro hac vice admission is granted, service of any documents by a party or Disciplinary Counsel upon that foreign lawyer shall be accomplished by service upon the in-state lawyer or that in-state lawyer's agent.

1011. **Optional:** the applicant's prior or continuing representation in other matters of one or more of the clients the applicant proposes to represent and any relationship between such other matter(s) and the proceeding for which applicant seeks admission.

112. Optional: any special experience, expertise, or other factor deemed to make it particularly desirable that the applicant be permitted to represent the client(s) the applicant proposes to represent in the particular cause.

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Report

Introduction

In August 2002, the ABA House of Delegates adopted the Model Rule on Pro Hac Vice Admission as part of the package of policies proposed by the Commission on Multijurisdictional Practice. The Model Pro Hac Vice Rule was developed cooperatively by the ABA Section of Litigation and the ABA Tort Trial and Insurance Practice Section and provided to the MJP Commission for inclusion in its package of proposals. The Model Rule currently applies only to U.S. lawyers. For the reasons described below, and with the several conditions and limitations described, the ABA Commission on Ethics 20/20 requests that the House of Delegates adopt amendments to the ABA Model Rule on Pro Hac Vice Admission to include foreign lawyers. “Foreign lawyer” is a term of art that is defined in the proposal and in this Report. As noted below, at least 15 U.S. jurisdictions, many federal courts, and the U.S. Supreme Court either include foreign lawyers in their pro hac vice rules or, in the exercise of the courts’ inherent authority, permit foreign lawyers pro hac vice admission.

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 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 response to the Working Group’s recommendation that the Commission propose amendments to the Model Pro Hac Vice Rule, the Commission disseminated in June 2010 templates and memoranda developed by the Working Group illustrating and explaining the basis for those suggested changes.

Subsequent to that circulation the Commission received Conference of Chief Justices’ Resolution 13, dated July 28, 2010. That resolution was proposed to the Conference by its Task Force on the Regulation of Foreign Lawyers and the International Practice of Law at the Conference of Chief Justices’ 2010 Annual Meeting. In that resolution, the Conference noted the trends that provide the basis for the Commission’s proposal, including the fact that “legal transactions and disputes involving foreign law and foreign lawyers is increasing...” and endorsed in principle the “carefully limited” changes

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proposed by the Commission to add foreign lawyers to the Model Rule on Pro Hac Vice Admission and urged their adoption by the ABA House of Delegates.¹

At subsequent meetings, the Commission on Ethics 20/20 considered additional written responses and oral testimony on the subject. The members took seriously concerns raised, in particular by those who questioned the qualifications of foreign lawyers who would appear *pro hac vice* in U.S. state courts. The Commission, however, did not learn of any problems that have arisen with regard to *pro hac vice* admission of foreign lawyers in the 15 U.S. jurisdictions that already permit this practice. Further, the Commission believes that the multiple conditions and limitations described below provide abundant protection to the courts, litigants, and the public.

Why U.S. Clients Need Foreign Lawyers

U.S. trade flow and census data demonstrate the reality of an increasingly international client base and the need for the legal profession, with sufficient safeguards, to accommodate their needs and choice of counsel in transactional matters and in litigation. For example, in 2009, the U.S. exported \$1.570 trillion in goods and services, and imported \$1.946 trillion.² In 2010, the U.S. exported \$1.831 trillion in goods and services and imported \$2.329 trillion.³ In 2009, the U.S. exported \$7.26 billion in legal services and imported \$1.7 billion.⁴ In 2007, there were \$2.129 trillion in foreign-owned assets in the U.S. and \$1.472 trillion in U.S.-owned assets abroad.⁵ While these numbers have decreased due to the global economic crisis, they are still significant. Indeed, during the first three quarters of 2010 there were \$988 billion in foreign-owned assets in the U.S. and \$767 billion in U.S.-owned assets abroad.⁶ These numbers reflect the extent to which various kinds of legal issues can implicate international law or the law of other nations.

The U.S. Census Bureau provides a variety of demographic information about the foreign-born population in this country. These citizens are particularly likely to have legal needs that require the assistance of foreign counsel. U.S. Census data from 2000 shows that the foreign-born population in the U.S. was 31,107,899. Between 1990 and

¹ See Conference of Chief Justices, *Resolution 13 Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers*,

<http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last viewed March 2, 2011).

² See U.S. Department of Commerce, Bureau of Economic Analysis, *News Release: U.S. International Transactions*, available at

<http://www.bea.gov/newsreleases/international/transactions/transnewsrelease.htm> and accompanying tables.

³ See U.S. Department of Commerce, Bureau of Economic Analysis, *U.S. International Trade in Goods and Services* (December 2010), available at

<http://www.bea.gov/newsreleases/international/trade/2011/trad1210.htm>.

⁴ See *Table G. Other Private Services Receipts*, U.S. Bureau of Economic Analysis, available at http://www.bea.gov/international/xls/table_G.xls and *Table H Other Private Services Payments*, U.S. Bureau of Economic Analysis, available at http://www.bea.gov/international/xls/table_H.xls.

⁵ See, U.S. Department of Commerce, Bureau of Economic Analysis, *Annual Revision of the U.S. International Accounts SCB* (July 2009), available at <http://www.bea.gov/international/ai1.htm>.

⁶ *Supra* note 5.

2000, every jurisdiction had at least a 19% increase in its foreign-born population, and every jurisdiction except five had at least a 30% increase.⁷ Nineteen states saw an increase of more than 100%.⁸ States with the largest percentage increases were: Alabama, Arizona, Arkansas, Delaware, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and Utah.⁹

In 2009, the total U.S. population was 301,483,000; of that number 36,750,000 (or approximately 12%) were foreign born.¹⁰ This number represents an increase of 5,642,101 foreign-born residents from 2000. According to the U.S. Census Bureau's 2011 Statistical Abstract, the 2008 American Community Survey showed that in California, Florida, Nevada, Massachusetts, Washington State, and Rhode Island, the percentage of the total state population comprised of foreign-born residents was 26.8%, 18.5%, 18.9%, 14.4%, 12.3%, and 12.2% respectively.¹¹ Data that year for the 25 largest U.S. cities shows that, for example, foreign-born residents comprised 14.5% of the population in Charlotte, North Carolina; 11.3% of the population in Nashville, Tennessee; and 20% of the population in Austin, Texas.¹² These numbers reflect the extent to which American residents are likely to have legal needs that implicate international law or the law of other nations.

It is clear that as communications and commerce have become increasingly globalized so too have clients, their families, businesses, and other assets. As a result, there has been a concomitant increase in litigation in U.S. courts implicating parties, property or businesses located in other countries. Foreign-born residents have family law, estate planning, and business relationships with their countries of origin or the countries of origin of their spouses or business associates. Foreign-owned and American companies also are involved in multinational litigation that involves U.S. courts. Cases can range from complex, international mass torts to those involving individual parties with international child custody or estate law issues.

Under these circumstances, clients (both institutional and individual) will on occasion need to or wish to seek the involvement of both U.S. and foreign lawyers and thus, when appropriate, want foreign lawyers of their choosing to appear *pro hac vice* along with their U.S. counsel. Foreign lawyers are often as knowledgeable as their U.S. counterparts in international law issues, and in the case of organizational clients, possess intimate

⁷ See U.S. Census Bureau, *The Foreign-Born Population: 2000*, Census 2000 Brief at 3 (Dec. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> and http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF3_DP2&prodType=table.

⁸ *Id.*

⁹ *Id.*

¹⁰ See U.S. Census Bureau, *Table 40 Native and Foreign –Born Populations by Selected Characteristics: 2009*, available at <http://www.census.gov/compendia/statab/2011edition.html>.

¹¹ See U.S. Census Bureau, *Table 38, Native and Foreign Born Population by State 2008*, available at <http://www.census.gov/compendia/statab/2011edition.html>.

¹² See U.S. Census Bureau, *Table 39 Nativity and Place of Birth of Resident Population—25 Largest Cities: 2008*, available at <http://www.census.gov/compendia/statab/2011edition.html>.

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knowledge of their clients' businesses. Cases in U.S. courts may, under established U.S. choice of law rules, turn in whole or in part on another nation's law. A lawyer from that nation will ordinarily be more knowledgeable about his or her nation's law than a U.S. lawyer. Foreign lawyers also have knowledge about a country's language, culture, and customs that may help U.S. courts, lawyers, and juries better understand a litigant's position. 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.

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

The Commission's proposal to include foreign lawyers within the Model Rule on Pro Hac Vice Admission has a precedent. In 1993, when the ABA House of Delegates adopted the Model Rule for Licensing of Legal Consultants (now the Model Rule for the Licensing and Practice of Foreign Legal Consultants), it recognized that a state may want to admit foreign lawyers *pro hac vice*.¹³ The current ABA Model Rule on Pro Hac Vice Admission does not include foreign lawyers. As a result, there is a gap between what the Foreign Legal Consultant Rule has long acknowledged and the scope of the Model Pro Hac Vice Rule. The Commission's proposal would close this gap by including qualified foreign lawyers in a new Section of the Model Pro Hac Vice Rule.

The Commission's proposal incorporates into ABA policy, with many client and public protections, that which is already permitted by law in a number of states as well as in federal courts. Currently, at least fifteen states permit *pro hac vice* admission by foreign lawyers.¹⁴ The U.S. Virgin Islands also permits foreign lawyers to appear *pro hac vice* in its courts. The Commission 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 for adoption a rule that permits *pro hac vice* practice authority for foreign lawyers.

¹³ Section 4(a) of the 1993 Model Rule for the Licensing of Legal Consultants provided that such consultant cannot "appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule])" Section 3(a) of the current Model Rule for the Licensing and Practice of Foreign Legal Consultants provides that the foreign legal consultant cannot "appear as a lawyer on behalf of another person in any court, or before any magistrate or other judicial officer, in this jurisdiction (except when admitted *pro hac vice* pursuant to [citation of applicable rule]). See American Bar Association, ABA Model Rule for the Licensing of Foreign Legal Consultants, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_licensing_foregn.authcheckdam.pdf.

¹⁴ See American Bar Association Center for Professional Responsibility, *Comparison Chart of ABA Model Rule for Pro Hac Vice Admission With State Versions and Amendments Since 2002* (last updated August 16, 2012), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf.

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The Supreme Court of the United States provides in its Rules that “[A]n attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*.¹⁵ Some federal courts of special jurisdiction have rules that permit foreign lawyers to be specially admitted to appear before them in a particular matter. For example, the U.S. Court of Federal Claims¹⁶ and the Court of Military Commission Review.¹⁷

Other federal courts, whether by rule or practice, permit foreign lawyers to be admitted *pro hac vice*.¹⁸ 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.¹⁹ 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.”²⁰ The Court noted that the two Canadian lawyers had represented the defendants in related litigation in Canada²¹ and that the Court’s “local rules, like the Federal Rules, should ‘be construed and administered to secure the just, speedy and inexpensive determination of every action.’”²² The Court defined the parameters of the representation and ordered that the two lawyers “may function as the sole questioners on behalf of [the defendants] at any depositions” and “may also appear at the trial, provided that a full-time member of the

¹⁵ SUP. CT. R. 6(2). See also, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); 1970 J. Sup. Ct. U.S. 267 (Jan. 18, 1971) (special leave of Court under Rule 6).

¹⁶ “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” U.S. CT. FED. CLAIMS R. 83.1(b)(6) (“Foreign Attorneys”).

¹⁷ “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) (“Foreign Attorneys”).

¹⁸ See, e.g., U.S. D. W.D.N.Y., L.R. Civ. P., R. 83.1(c) (amended effective January 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, “an 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.”

¹⁹ 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. Conrad Black*, No. 05 CR 00727 (N.D. Ill. Dec. 1, 2005) (Canadian lawyer admitted *pro hac vice* in criminal case).

²⁰ *In re Livent, Inc.*, Nos. 98 Civ. 5686 (VM)(DFE) & 98 Civ. 7161 (VM)(DFE), 2004 WL 385048, at *3 (S.D.N.Y. March 2, 2004).

²¹ *Id.* at 2.

²² *Id.* at 3.

bar of our Court is always in attendance.”²³ Also, as occurs with U.S. lawyers, there are occasions where judges, in the exercise of their discretion, deny an application for pro hac vice admission by a foreign lawyer.²⁴

Judges at the state and federal level have long been entrusted with deciding whether to admit a lawyer pro hac vice. The application process for pro hac vice authorization is designed to provide courts and judges with sufficiently detailed information to do so in the best interests of clients and the justice system.

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

a. Foreign Lawyer Specific Proposed Amendments

The ABA Commission on Ethics 20/20 believes that the realities of an increasingly borderless world and the needs of clients support the amendment of the ABA Model Rule for Pro Hac Vice Admission to provide U.S. courts with a template by which, if they choose, they can allow a foreign lawyer to participate in a U.S. state court or agency proceeding *pro hac vice*. The Commission determined that the best way in which to accomplish this is to add to the Model Pro Hac Vice Rule a new Section III.

The proposed definition of a “foreign lawyer” in new Section III, Paragraph A is taken from the ABA Model Rule for Licensing of Foreign Legal Consultants and the ABA Model Rule for Temporary Practice by Foreign Lawyers, which appears as Recommendation 9 of the ABA Commission on Multijurisdictional Practice, adopted by the ABA House of Delegates in August 2002. 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. Use of this definition limits the types of foreign lawyers who can seek to be admitted *pro hac vice* in a manner that is protective of the public and clients; it prohibits an individual who may simply be permitted to use the title “lawyer” from qualifying to apply for *pro hac vice* admission. 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.

²³ *Id.*

²⁴ See, e.g., *Juliana DeGuzman v. R. James Nicholson, Secretary of Veterans Affairs*, 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.

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

1. While the foreign lawyer would be of the client's choosing, granting *pro hac vice* status to the foreign lawyer is 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.²⁵
2. The foreign lawyer may only appear as a co-counsel, alongside an in-state lawyer or in an advisory or consultative role in the proceeding. Authorization to practice *pro hac vice* does not constitute 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.
3. The in-state lawyer is responsible to the court and the client for the conduct of the proceeding and for independently advising the client on the substantive law of a United States jurisdiction as well as procedural issues. 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 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. The 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 and the extent to which the foreign lawyer's relationship and familiarity with the client or the matter will facilitate its fair and efficient resolution;
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.

²⁵ 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. 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* admission has been granted and the jurisdiction's lawyer disciplinary authority. Because the foreign applicant will be required to provide contact information for all the U.S. and foreign jurisdictions in, and 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.

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.

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 Paragraph I.E.(4) of the Rule. This requirement ensures that the provisions of the Model Pro Hac Vice Rule are consistent with Rule 1 (B)(2) of the ABA Model Rules for Lawyers' Funds for Client Protection.²⁶

The Commission 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 amend the Model Pro Hac Vice Rule to require the applicant to provide certified copies of requested court, agency or disciplinary orders.

²⁶ 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.

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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 any need to make inquiry of authorities in the lawyer's home country and to notify 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 Ethics 20/20 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 his or her admission to practice and good standing as a lawyer in any foreign jurisdictions. This requirement would mirror that in the ABA Model Rule for 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* admission, and concluded and pending disciplinary proceedings. The 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.

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 provide U.S. jurisdictions with a balanced approach to this issue that meets the needs of 21st Century clients and counsel while providing adequate safeguard 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.