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Pro Hac Vice: Procedure and Practice in Oregon

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With many kinds of litigation becoming increasingly "national" in scope, Oregon plaintiffs and defense lawyers alike are being asked more frequently to serve as "local" counsel for out-of-state "lead" counsel who are admitted *pro hac vice*. This article looks at two primary aspects of serving as local counsel. First, it surveys the process to obtain *pro hac vice* admission for out-of-state lawyers in Oregon state and federal court.[1] Second, it examines the role of local counsel in Oregon practice. With both, the focus is on trial courts—although similar procedures and considerations apply with equal measure to appellate courts.[2]

Procedure

Pro hac vice procedures in Oregon's state and federal courts share many common aspects but also have some marked differences. After surveying the process for admission, revocation of *pro hac vice* admission is also noted briefly.

State Court. *Pro hac vice* admission in Oregon state court is governed by ORS 9.241 and UTCR 3.170. The former confirms the Supreme Court's authority to regulate the temporary practice of law by out-of-state lawyers in both courts and administrative proceedings. The latter outlines the specific requirements for *pro hac vice* admission. ORS 9.241 and UTCR 3.170 create a two-tier approval process.

First, the out-of-state lawyer, typically through local counsel, must obtain a "certificate of compliance" from the Oregon State Bar. The required form is available on the Bar's web site.[3] Tracking the language of UTCR 3.170, the out-of-state lawyer must certify that the lawyer: is a member in good standing in the lawyer's "home" state bar; has no regulatory discipline pending (or, if there is, explain it); will associate with Oregon counsel; and, if the lawyer will engage in private practice, has professional liability insurance "substantially equivalent" to the Professional Liability Fund plan. The out-of-state lawyer's application must be accompanied by a certificate of good standing from the lawyer's "home" jurisdiction and a certificate reflecting the lawyer's malpractice coverage. When the required information and the accompanying fee are provided, the Bar then countersigns the certificate with an "acknowledgement of receipt" and notes any possible deficiencies for the consideration of the court in which the out-of-state lawyer wishes to appear. There are no "firm" admissions. Rather, each out-of-state lawyer must be admitted individually for the particular case concerned. The out-of-state lawyer's certificate must be renewed (again, through a form on the Bar's web site and accompanied by a renewal fee) every twelve months. The certification process requires the out-of-state lawyer to submit to both the regulatory jurisdiction of the Oregon Supreme Court and personal jurisdiction in Oregon for any legal malpractice claims arising out of the case involved.

Second, the local counsel files a motion for admission with the court concerned attaching the certificate with the acknowledgement from the Bar. The court then makes its own determination about whether the lawyer has met the criteria of UTCR 3.170 and should be admitted. Although many such motions are granted routinely, courts can and do hold hearings on the adequacy of applications—especially when the Bar has highlighted apparent deficiencies. Other parties must be served with the motion and have standing to object. In particular, out-of-state lawyers are often surprised when the Bar notes that their insurance does not conform to the PLF because Oregon's basic coverage, in contrast to most commercial policies, does not have a deductible. Usually, this will not put the application at risk. But, *pro hac vice* motions have been denied on several occasions in Multnomah County Circuit Court when the lawyers involved did not have malpractice insurance at all because UTCR 3.170 specifically requires "insurance" and the notes to UTCR 3.170 state unequivocally that its requirements "may be modified only by order of . . . [the Supreme] Court."[4]

Federal Court. LR 83-3 governs *pro hac vice* admission in civil matters in the District of Oregon and, generally, is more straightforward than its state counterpart because it only requires approval of the court. The required form is available on the court's web site[5] and simply requires the out-of-state lawyer to list the other jurisdictions where the lawyer is admitted (both state and federal)

and to certify that the lawyer is not subject to disciplinary proceedings (or must provide an explanation if they are) and that the lawyer will maintain malpractice insurance covering the case for the duration of the proceedings. The application is filed with the court through local counsel in the particular proceeding in which the out-of-state lawyer wishes to appear and is served on the other parties through the court's ECF system. Like the corresponding state rule, the federal local rule admits individual lawyers, not firms, and, therefore, each out-of-state lawyer who wishes to appear *pro hac vice* must submit a separate application.

Revocation. Both state (*see, e.g., Tahvili v. Washington Mut. Bank*, 224 Or App 96, 197 P3d 541 (2008)) and federal (*see, e.g., Cole v. U.S. District Court*, 366 F3d 813 (9th Cir 2004)), law recognize that a *pro hac vice* admission can be revoked. In *Tahvili*, for example, an out-of-state lawyer repeatedly disobeyed the court's rulings and the trial judge revoked the out-of-state lawyer's *pro hac vice* admission as, in effect, a sanction similar to disqualification. The Court of Appeals found that the trial judge had the requisite "good cause" under UTCR 3.170(3), which provides: "At any time and upon good cause shown, the court or administrative body may revoke the out-of-state attorney's permission to appear in the matter." Revocation can be initiated by the court *sua sponte*[6] as in *Tahvili*, or by motion from an opposing party.[7]

Practice

The practical aspects of serving as local counsel can vary significantly based on the case involved and the relationship between local and out-of-state counsel. Three in particular are recurring: the role of local counsel; lessening malpractice risk; and documenting fee arrangements.

***Role*.** Both UTCR 3.170(1)(c) and LR 83-3(a)(1) require that local counsel "meaningfully participate" in the case involved. In practice, what is "meaningful" varies by both case and courtroom. The *Tahvili* case noted earlier, however, provides a stark reminder that local counsel may be required to "meaningfully participate"—whether they anticipated it or not. *Tahvili* initially unfolded like many cases, with local counsel having limited involvement other than the purely local aspects the litigation such as advising out-of-state lawyers on Oregon practice, procedure and personalities. Almost immediately as trial began, however, the out-of-state lawyer in *Tahvili* got cross-wise with the judge when he disobeyed a number of rulings. This quickly led to a dramatic exchange:

> "[Out-of-State Lawyer] . . . then argued that the disputed evidence could be admitted because it was not offered for the truth of the matter asserted. The trial court disagreed, and added:
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> 'Stop it already. You have rulings you don't like, abide by them. Whether you like them or not doesn't matter. But I will emphasize again, if you do this again, actually, the easiest thing will be . . . [Local Counsel] . . . is going to try the case.
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> . . .
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> "The court then asked where . . . [Local Counsel] . . . was, and . . . [Out-of-State Lawyer] . . . replied that he presumed that . . . [Local

> Counsel] . . . was back at his office. When the court asked why, . . . [Out-of-State Lawyer] . . . responded 'He's not needed at this point in the trial.' The court replied that . . . [Local Counsel] . . . was needed 'since he is your sponsoring counsel who is supposed to be meaningfully participating. He cannot meaningfully participate in absentia.' Consequently, the trial court then ordered that . . . [Local Counsel] . . . return and 'be here for the balance of the trial to be meaningfully participating,' because it appeared to the court that it 'may well be likely that he will be trying this case.'" 224 Or App at 102.

When the court then revoked the out-of-state lawyer's *pro hac vice* admission, the local counsel was put in the unenviable position of having to step in to try a case when the expectation throughout was that he would just be assisting with the truly local aspects of the litigation. The local counsel requested that the trial be rescheduled, but because that would have amounted to a mistrial, the judge denied a reset. When the local counsel then informed the court that he was unable to proceed, the defendants moved for a directed verdict—which the court granted. The Court of Appeals affirmed. Although the result in *Tahvili* is rare, it underscores that having sponsored an out-of-state lawyer's admission on the promise to "meaningfully participate," local counsel can be put in an uncomfortable position if the court orders just that.

Lessening Risk. One of the risks of being "local" counsel is that "lead" counsel may not involve local counsel in overall strategy or contacts with the client. If lead counsel makes a mistake well out of local counsel's area of responsibility, the question for local counsel is whether their firm must share space with lead counsel on the defendants' side of the case caption in the

resulting malpractice lawsuit. The "meaningful participation" requirement makes it difficult for local counsel to insulate themselves completely. Case law is sparse on this point, but one notable decision, *Macawber Engineering, Inc. v. Robson & Miller,* 47 F3d 253 (8th Cir 1995), focused on the scope of local counsel's retention in affirming summary judgment for a local counsel firm where the error was unambiguously the fault of lead counsel, and, indeed, local counsel had not even been informed of the particular issue involved. *Macawber* suggests that local counsel avail themselves of RPC 1.2(b), which allows a lawyer to limit the scope of a representation, by outlining in its own engagement agreement with the client the particular activities for which the local firm will be primarily responsible. This is not a perfect solution in light of the "meaningful participation" requirement, but offers local counsel an avenue to protect themselves to the extent they can.

Fee Arrangements. Fee arrangements when serving as local counsel vary. Many are hourly—with the local firm either billing the client directly or having its bill being treated as an expense on lead counsel's bill to the client.[8] Sharing in a contingent fee, by contrast, generally requires careful analysis of choice-of-law issues and documenting with the client any agreed fee-split. *Bechler v. Macaluso*, 2010 WL 2034635 (D Or May14, 2010) (unpublished), presents an example of the former. In *Bechler*, the court refused to enforce a fee agreement between a California lawyer and his Oregon clients in a wrongful death case because the California lawyer had failed to comply with ORS 20.340,

which mandates specific disclosures in personal injury contingent fee agreements. *Frost v. Lotspeich*, 175 Or App 163, 30 P3d 1185 (2001), in turn, illustrates the latter. In *Frost*, two lawyers agreed to split a contingent fee but failed to secure the client's approval under the predecessor to current RPC 1.5(d)(1), which requires that "the client gives informed consent to the fact that there will be a division of fees[.]" Absent client consent, the lawyers were left to litigate their respective shares of the contingent fee. The Court of Appeals determined that California law applied and, relying on the corresponding California professional rule that is very similar to the current version of the Oregon rule, found that the fee-split was unenforceable between the two lawyers if there was no evidence on remand that the client had approved the split.

ABOUT THE AUTHOR

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[1] Oregon RPC 5.5(c)(2) authorizes the temporary practice in Oregon by out-of-state lawyers for preliminary activities where they "reasonably expect" to be admitted *pro hac vice*.

[2] *Pro hac vice* admission in Oregon appellate courts is governed by ORAP 8.10(4). Attorney admission to the Ninth Circuit, in turn, is governed by FRAP 46 and Ninth Circuit Rule 46-1.

[3] http://www.osbar.org/rulesregs/phvinstruction.html.

[4] *See, e.g.,* orders denying *pro hac vice* admissions in: *Godman v. ArvinMeritor*, Multnomah County Circuit Court Case No. 0403-02627; *Steadman v. Allis-Chalmers*, Multnomah County Circuit Court Case No. 0705-06242 (on file with author).

[5] http://www.ord.uscourts.gov/index.php/attorneys/attorney-admissions.

[6] *Cole* addresses the associated issue of the adequacy of notice when revocation is used as a sanction. In *Tahvili*, the out-of-state lawyer had been forewarned.

[7] *See, e.g.,* order vacating *pro hac vice* admission, *Steadman v. Allis-Chalmers*, Multnomah County Circuit Court Case No. 0705-06242 (on file with author).

[8] ABA Formal Ethics Opinion 00-420 addresses the analogous area of treating contract lawyers' bills as an "expense."