The Pro Hac Vice Motion

All federal and state courts have regulations restricting the practice of law in the court to attorneys who are members of the legal bar of the state. As these regulations often serve to place a severe hardship on a nonresident attorney, a procedure known as pro hac vice has developed. Pro hac vice means simply that the nonresident attorney will be permitted to practice within the state in connection with the stated case. However, in order to receive the benefit of the procedure, the nonresident attorney must fully comply with the formalities that the state has evolved for this purpose. One common requirement is that the attorney associate local counsel.¹ Delays in pretrial conferences and motion hearings will thus be less frequent, and the party to the suit will be insured of having adequate representation in situations in which the nonresident attorney proves to be unknowledgeable with respect to local customs.²

In re Melvin Belli involved petitioner’s service as legal counsel in a negligence case in federal district court. Petitioner Belli sought to be admitted as a nonresident attorney by a pro hac vice motion. Subsequently, petitioner made derogatory comments about the trial judge in a television interview. He stated that the judge’s son had an interest in the outcome of the suit and also claimed that the judge had been told on a prior occasion not to sit in cases of this nature. Although the case was reassigned to a different judge, it was ruled that petitioner did not have a right to the benefits of the pro hac vice motion because his remarks about the original trial judge were basically unfounded.³

As a general rule, the pro hac vice privilege will be denied by the court when there is evidence of any “unlawyerlike” conduct by the nonresident attorney.⁴ This view has been extended to result in the revocation of the privilege once it has been granted when there is evidence of improper conduct by the attorney outside the court-

⁴ Thomas v. Cassidy, 249 F.2d 91 (4th Cir. 1957), cert. denied, 355 U.S. 958 (1958) (court did not enlarge on its phrase “unlawyerlike conduct”).
room or improper handling of the suit by the attorney. A few courts have adopted a more narrow approach and will deny the motion only when the attorney has been guilty of conduct so unethical as to justify his disbarment. This notion was carried to its ultimate limits when the privilege was granted to a nonresident attorney who employed an agent for the solicitation of clients. The court upheld his admission, though he clearly violated the accepted ethical standards of conduct, because of the lower court’s vast discretionary power in this area. Generally, however, courts will readily deny the motion for improper conduct or a breach of ethics per se by the nonresident attorney. They will even deny the motion when the nonresident attorney is found in a position to obstruct discovery procedures, and this holds true even though there is no breach of ethical rules.

When a nonresident attorney has a conflict of interest, the courts have split as to the desirability of granting the motion. One case has held that the privilege will not be denied in an antitrust case merely because the nonresident attorney has previously been employed in the antitrust division of the Department of Justice and was so employed when the defendant was investigated and indicted. However, if the attorney had seen the file on the defendant and participated in the investigation against him, the result might well have been different. The weight of authority, however, appears to favor denying or revoking the privilege when there is a possible conflict of interest on the attorney’s part. This attitude was evident in a case in which the privilege was revoked because of a conflict of interest on the attorney’s part in attempting to represent a brokerage firm and its vice-president individually and then seeking to represent the vice-president in a suit the brokerage company had

5. In a criminal case the privilege was removed for cause because the attorney climbed a fence to see an impounded car, and, when he was discovered by the police, it was found that a bullet hole in the car had been altered. United States v. Madsen, 148 F. Supp. 625 (Alas. 1957).
6. Parker v. Parker, 97 So. 2d 136 (1957) (Attorney’s privilege was removed because he failed to follow the court’s suggestion of first establishing a prima facie case before continuing to investigate defendant’s financial position.).
7. Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).
9. United States v. 38 Cases, More or Less, 369 F.2d 399 (W.D. Penn. 1964) (pro hac vice motion denied an attorney who was an employee of an interested party and who was in a position to successfully obstruct discovery if admitted).
brought against him. 11

The courts view with disfavor any action by the nonresident attorney which is said to impair the integrity of the judicial process. Consequently, the courts have usually denied the privilege when uncomplementary comments made by the nonresident attorney have been directed toward the court, as in Belli. 12 An extreme example is State v. Ross in which a nonresident attorney was denied admission to the court on a pro hac vice motion before he actually committed an improper act. The attorney had simply asserted that he would not follow the requirements of the Code of Professional Responsibility regarding out-of-court statements. 13 Similarly, the courts have shown great concern when publicity of a case is involved. The leading case of this type is State of New Jersey v. Kavanaugh. Here the nonresident attorney's privilege was revoked because he circulated a letter asserting that a witness for the prosecution intended to perjure himself and he sought assistance of the governor of New Jersey to adjudicate the very issues that were on trial. Although the court recognized the lawyer's first amendment rights, it was felt that he was adversely infringing on the trial processes. 14

Notwithstanding the problems discussed above, courts are generous in granting the motion, 15 especially when all formalities have


12. 371 F. Supp. 111 (D.D.C. 1974) (attorney also falsely stated that ten years prior blacks could not sit on the same side of the courtroom as whites).

13. The attorney relied on Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970), but the court held that Canon 7 of the Code of Professional Responsibility is the general rule and would be followed by the court. State v. Ross, 36 Ohio App. 2d 185, 304 N.E.2d 396 (Ohio 1973).


15. Though courts are generous in granting the motion, another problem nonresident attorneys often face is recovering fees for the work they have done if their client refuses to pay. The older cases have uniformly denied the recovery of fees to nonresident attorneys when they have not been admitted on a pro hac vice motion because they are said to be illegally practicing law. Taft v. Amsel, 23 Conn. Supp. 225, 180 A.2d 756 (1962); East St. Louis v. Freels, 17 Ill. App. 339 (1885), Sellers v. Phillips, 37 Ill. App. 74 (1890); Browne v. Phelps, 211 Mass. 376, 97 N.E. 762 (1912); Fein v. Ellenbogen, 84 N.Y.S.2d 787 (1948); Harriman v. Strahan, 47 Wyo. 208, 33 P.2d 1067 (1934), annotated in 11 A.L.R.3d 907 (1967). A few cases have
been met, the opposing counsel raises no objection, and there is a need for the nonresident attorney. The United States Court of Appeals for the Fifth Circuit goes so far as to state that the district court must grant the motion when there has been a showing that the attorney is a member in good standing of a state bar regardless of his experience in the practice.

Although the process appears very simple, an important dispute has arisen as to whether the motion should be granted as a matter of right or left to the discretion of the court. The cases have uniformly taken the latter position and have strongly suggested that this procedure functions solely as a privilege and a matter of courtesy and that a constitutional right to obtain its benefits does not exist. The appellate courts are reluctant to overturn the trial court's discretionary powers and they recognize a wide latitude.

recognized an exception to this general rule and will allow the attorney to recover when he has made a full disclosure to his client of his lack of a license to practice law before the rendition of the services or when the services do not require litigation or courtroom appearances by the attorney. Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964); Wescott v. Banker, 83 N.J.L. 460, 85 A. 315 (1912), annotated in 11 A.L.R.3d 907 (1967).

In addition, a few of the more liberal courts have allowed attorneys to recover in federal cases though they were not members of the state bar. Western Life Ins. Co. v. Nanney, 296 F. Supp. 432 (E.D. Tenn. 1969); Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964); Lamb v. Jones, 202 So. 2d 810 (Fla. 1967); Estate of Waring, 47 N.J. 367, 221 A.2d 193 (1966); Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964). See also Note: Attorneys: Interstate and Federal Practice, 80 Harv. L. Rev. 1711 (1967); Annot., 11 A.L.R.3d 907 (1967).


17. Metalsals Corporation v. Weiss, 70 N.J. Super. 355, 175 A.2d 698 (1961) (attorney not admitted because there was no indication that the case required his particular expertise).


19. United States v. Bergamo, 154 F.2d 31 (3rd Cir. 1946) (Sixth amendment does not give a person a constitutional right to be represented by an attorney who is not a member of the state's bar); United States v. Madsen, 148 F. Supp. 625 (D. Alas. 1957); New Jersey v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, cert. denied, 343 U.S. 924 (1968). But see Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) (state bar unwilling to serve in a civil rights case).

Yet, some courts have required that the motion not be denied “arbitrarily” and only be denied for “extreme circumstances.” Courts also have the discretionary power to revoke the privilege after it has been granted, but this should not be done in the middle of a suit when such action will prejudice the affected party, unless good cause for so doing can be shown. As in most cases the trial court’s discretion is bounded only by “what is right and equitable under the circumstances.”

Recently, a group of cases in the civil rights field have developed which may be construed as holding that a constitutional right to the benefits of the pro hac vice motion does exist in certain instances. The major case is Lefton v. City of Hattiesburg. There, local attorneys were unwilling to represent an individual in a civil rights case. The court held that when this unwillingness abridges the right of a class of litigants to make use of the federal court system or results in the denial of the sixth amendment right of a criminal defendant to the counsel of his choice, a constitutional right to have a nonresident attorney exists. However, State of New Jersey v. Kavanaugh limited Lefton by stating that a constitutional right to obtain the representation of an attorney who is not a member of the state bar does not exist as long as the state bar is willing to act and represent the party. Therefore, though Lefton is a step in the direction of making pro hac vice a constitutional right, the motion still seems to exist primarily as a privilege apart from the specific factual situation of Lefton.

The problems surrounding the granting of the pro hac vice motion are part of the old dilemma of our federal system whereby state boundaries serve as barriers to the practice of law. It appears, however, that this aspect of federalism is presently under some pressure. Pro hac vice has been a step in breaching state barriers over who

22. Magee v. Superior Court, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973) (the fact that the judge does not personally know the attorney not “extreme circumstance”).
24. Atchison, Topeka & Santa Fe Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956) (Court will consider many factors and will use “sound discretion exercised with due regard for what is right and equitable under the circumstances” to achieve a just result.).
practices law, as it establishes means by which outsiders can be admitted to practice, even if only as to one particular case. In addition, the Supreme Court of the United States has held that laymen who are members of the Patent Bar, for example, may practice their specialty though they have offices in the individual states and give advice on such federal matters in the individual states.27 Also, the United States Court of Appeals for the Second Circuit indicated that a nonresident attorney may be free from state regulations when he is consulted about federal claims, even though the attorney has not been admitted by a pro hac vice motion.28

A major objection to the pro hac vice motion has been the failure of the courts to develop and implement consistent standards for its granting or denial. Given the highly discretionary nature of the court’s function in this area, the nonresident attorney is often unsure of how his motion will be received by the court and of whether or not he will be permitted to represent his client. Although it may be unwise to completely eliminate the use of discretion by courts in this regard, at the very least the states need to take action to develop a well-defined set of standards to govern the granting of the pro hac vice motion.

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