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Advocate's VIEW

Foreign jurisdictions: It pays to follow the rules

A recent trip to the Great Stupa of Dharmakaya, located in Red Feather Lakes, Colo., reminded me that advance planning and knowledge about the applicable rules and protocols is well advised before beginning any trip. Thus, in the case of visit to the Great Stupa, a Buddhist shrine said to promote harmony, prosperity and freedom of ignorance, there are many "suggestions," the aim of which is enhancement of one's visit and preservation of the sacred grounds, such as: "[B]eware of the poisonous fauna"; "bring a water bottle, the Stupa is located at 8,000 feet" and so on.

A similar awareness and attention to rules and protocols is called for when the attorney is called upon either to travel to another jurisdiction in connection with a matter pending before a foreign tribunal or to advise an out-of-state attorney about practicing or appearing on a matter pending before a New York tribunal. This article will identify a few pointers relative to the practice of law in foreign jurisdictions.

In the case of an attorney not admitted to the New York bar who contemplates representation of a client involved in a matter pending in New York, the basic "rule" is set forth in New York Judiciary Law §478, which makes "unlawful" practicing or appearing as an attorney-at-law without being admitted and registered. Thus, the visiting attorney cannot appear in court, conduct a deposition or represent in any manner that he/she is entitled to practice in New York.

A violation of this law is commonly referred to as the unauthorized practice of law. See e.g. *Leskinen v Fusco*, 18 Ad3d 387 (First Dept. 2005) (describing various types of activities that constitute unauthorized practice of law). A survey of case law from courts in other states establishes that the rule is all but universal.

New York attorneys are subject to discipline in New York in the case of a failure to adhere to similar admission to practice laws enacted by other states. Thus, Rule 5.5(a) of the New York Rules of Professional Conduct expressly prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

Foreign attorneys migrating into New York on a particular matter are most likely subject to the same rule since New York's Rule 5.5(a) is identical to Rule 5.5(a) of the ABA's Model Rules

of Professional Conduct, some version of which has been adopted in all of the 50 states with the exception of California.

Research of case law reported in a search of all states establishes the wide range of risks attendant to the unwary who engage in the unauthorized practice of law such as disciplinary action, orders denying payment of fees, injunctions and even criminal prosecution. See e.g. New York Judiciary Law § 485 (violation of the prohibition against the unauthorized practice of law is a misdemeanor).

In recognition that the rule impacts upon a party's right to retain the counsel of his/her choice, the New York legislature has authorized the courts to permit appearances by non-admitted attorneys on a limited basis. New York Judiciary Law §53. 3. (providing Court of Appeals with rule making authority for admission to practice as attorneys and counselors admitted to practice in other states or countries). The practice of permitting appearances by attorneys/counselors admitted to practice in other states and countries is generally referred to as admission to practice *pro hac vice*, which literally translates into "for the occasion." Again, even a cursory survey of case law from courts of other states shows that limited admissions in foreign jurisdictions are commonplace.

The process for admission *pro hac vice* in New York requires the applicant and/or local counsel to become acquainted with the New York Rules of Court. The starting point is NY Ct Rules §520.11(a), which provides that an attorney and counselor-at-law or the equivalent, who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted *pro hac vice* in the discretion of any court of record to participate "in any matter in which the attorney is employed."

Section 520.11(c) mandates that in the case of litigated matters no attorney may be admitted *pro hac vice* to participate in pretrial or trial proceedings unless he or she is associated with an attorney who is a member in good standing of the New York bar, who shall be the attorney of record in the matter. As a practice pointer, timely recognition and adherence of this rule is the foreign attorney's best suit, since association and collaboration



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with knowledgeable and capable local counsel will prove to be invaluable.

In addition, the applicant and/or local counsel is well advised to be knowledgeable about the rules adopted by each of the four Appellate Divisions. See §602.2 (First Dept.); §690.3 (Second Dept.); §805.3 (Third Dept.); §1022.9 (Fourth Dept.).

The respective rules of the First, Second and Third Departments permit admission *pro hac vice* to participate in the trial or argument of a particular cause in which the attorney may be employed, whereas the Fourth Department permits admission *pro hac vice* with respect to a pending appeal or proceeding.

Each of the four Appellate Divisions have specific requirements concerning the information to be reflected in the application for admission *pro hac vice*.

Section 520.11 makes clear that the trial court is the gatekeeper with discretion to determine whether to admit the attorney who seeks limited admission. See e.g. *Johnson v Mesch Engineering, PC*, 212 AD2d 970 (Fourth Dept. 1995) (recognizing the court's discretionary authority).

Section 520.11(d) mandates that an attorney admitted *pro hac vice* must be familiar and comply with the standards of professional conduct and the rules governing attorney conduct in New York. Also, admission *pro hac vice* means that the foreign attorney has agreed to be subject to the jurisdiction of New York courts with respect to any acts occurring during the course of the attorney's participation. *Id.*

While an application for admission *pro hac vice* is generally considered to be a routine matter with favorable outcomes to be expected, attorneys should be mindful that a foray into a foreign jurisdiction requires planning and forethought about the requirements and the implications. If the foreign attorney is mindful of relatively routine rules and procedures, the desirable outcomes of harmony and prosperity while litigating in a foreign jurisdiction are more likely to occur. However, as in the case of any travel experience, lack of planning can make for a miserable trip.

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