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# Practice Tips

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## FREQUENTLY ASKED QUESTIONS (AND ANSWERS) ABOUT PRO HAC VICE ATTORNEYS

Out-of-state lawyers seeking to practice in Nevada soon learn there is no procedure to be admitted to practice by motion. Some areas of law, such as immigration, which are governed by federal law, do not require that the attorney be specifically licensed in Nevada<sup>1</sup> (however an attorney must be licensed in Nevada to practice bankruptcy law in Nevada,<sup>2</sup> although it is also primarily governed by federal law). If no exception applies for the out-of-state attorney wishing to appear in a particular case, we have a pro hac vice rule, which is contained in Supreme Court Rule 42 (Practice of attorneys not admitted in Nevada).

Sometimes, time is of the essence for the attorney's involvement in the case, which may be required prior to the pro hac vice application's completion and acceptance. Unsurprisingly, over the years a frequent question for our ethics hotline has been whether or not an out-of-state attorney can appear in court before the application process is completed.

Rule of Professional Conduct 5.5 (Unauthorized Practice of Law) addresses this situation in two separate subsections.

The first is RPC 5.5(b)(1), which states:

*Exceptions.* A lawyer who is not admitted in this jurisdiction, but who is admitted and in good standing in another jurisdiction of the United States, does not engage in the unauthorized practice of law in this jurisdiction when:

- (1) The lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized.

The second subsection is 5.5(c), which specifically refers to SCR 42, and states as follows:

*Interaction with Supreme Court Rule 42.*

Notwithstanding the provisions of paragraph (b) of this Rule, a lawyer who is not admitted to practice in this jurisdiction shall not represent a client in this state in an action or proceeding governed by Supreme Court Rule 42 unless the lawyer has been authorized to appear under Supreme Court Rule 42 or reasonably expects to be so authorized.

Accordingly, RPC 5.5 permits an out-of-state attorney to start representing a client in Nevada without requiring the completion of the SCR 42 application process. Of course, if the out-of-state attorney seeks to make a court appearance, that fact should be disclosed to the court and opposing party. Also, it is strictly up to the presiding court whether or not to allow the appearance.

On a similar note, if there is a pleading that needs to be filed prior to the acceptance of the pro hac vice, the local counsel should be the person signing off on the pleading. This includes the initial complaint, given that the court, which must allow the out-of-state attorney to participate, does not have the opportunity to make a ruling at the time the complaint is filed. Further, local rules may require that any pleadings be signed by local counsel. See, e.g., Eighth Judicial District Rule 7.44 (Presence of local counsel required).

Another frequent SCR 42 question is whether or not the local counsel must be present at a deposition. SCR 42(2)(f) requires that the out-of-state attorney associate local counsel as condition of the pro hac vice admission. SCR 42(14) specifies the Nevada counsel's duties:



#### Responsibilities of Nevada attorney of record.

- (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
- (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
- (c) The Nevada attorney of record shall be responsible to the court, arbitrator, mediator, or administrative agency or governmental body for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

The section requires that local counsel actively participates in the representation of the client, and is responsible for making sure the out-of-state counsel complies with all Nevada rules. However, SCR 42(14)(b) only mandates local counsel's presence when there is a court appearance, unless the court allows otherwise. Therefore, local counsel's presence at a deposition isn't specifically required under SCR 42. You may wish to review the local rules for the presiding court to make sure there aren't any additional restrictions in place.

Another frequent question in regard to SCR 42 is which type of proceedings allow for pro hac vice counsel. SCR 42(1) states:

#### Application of rule.

- (a) This rule applies to:
  - (1) All actions or proceedings pending before a court in this state;
  - (2) All actions or proceedings pending before an administrative agency or governmental body in this state, unless that agency or governmental body provides otherwise;
  - (3) All arbitration, mediation, or alternative dispute resolution procedures in this state that are court annexed or court ordered, or that are mandated by statute or administrative rule; and
  - (4) All services incident to any of these proceedings including, but not limited to, discovery and settlement negotiations.
- (b) This rule does not apply to arbitration, mediation or alternative dispute resolution procedures in which the parties engage voluntarily or by private agreement.

In short, SCR 42 admission is available for cases pending before any court in this state, administrative proceedings, court-annexed or court-ordered arbitrations, mediations or other alternative dispute procedures.

But, given the language of SCR 42(1)(b), there is no mechanism for an out-of-state attorney to associate into a private arbitration for a Nevada matter (the rule doesn't apply to private arbitrations that concern another jurisdiction's law). Recently, the state bar petitioned the Nevada Supreme Court to amend SCR 42 to permit out-of-state attorneys to associate into private arbitrations, mediations or other alternative dispute procedures.<sup>3</sup> The Supreme Court declined to do so.<sup>4</sup>

The out-of-state attorney may be able to appear in a private arbitration if he/she can qualify for an exception under RPC 5.5(b)(5), which states the out-of-state attorney is not engaging in the unauthorized practice of law if:

The lawyer is engaged in the occasional representation of a client in association with a lawyer who is admitted in this jurisdiction and who has actual responsibility for the representation and actively participates in the representation, provided that the out-of-state lawyer's representation of the client is not part of a regular or repetitive course of practice in this jurisdiction...

The Nevada lawyer in such an instance would have to actively participate in the case and bear actual responsibility for the client's representation. But, assuming that the Nevada attorney complies with the rule, the out-of-state attorney's participation would not constitute the practice of law.

Should you still have questions regarding SCR 42 or any of the Rules of Professional Conduct, please feel free to call the ethics hotline at (800) 254-2797. ■

1 See The Office of the Chief Immigration Judge, *Immigration Court Practice Manual*, Chapter 2.3.

2 See United States District Court for the District of Nevada Local Rule IA 10-1.

3 See Nevada Administrative Docket Petition (ADKT) 460, *In The Matter Of The Amendment Of Supreme Court Rule 42(1) Regarding The Admission Of Out-Of-State Attorneys Participating In Private Arbitrations*.

4 See *Order Declining to Amend Supreme Court Rule 42(1)*, ADKT 460, filed April 11, 2011.

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