ADVISORY OPINION 10-001

The Committee on Unlawful Practice of the West Virginia State Bar has received several inquiries from West Virginia attorneys, as well as attorneys licensed in other states, regarding its interpretation of Rule 8 of the West Virginia Rules for Admission to the Practice of Law, relating to admissions *pro hac vice*. The Committee would note that it had previously issued its "Advisory Opinion 93-005", an interpretation of this Rule, but recognizes that the Rule has been amended on several occasions after the issuance of that Advisory Opinion. In addition, the Committee has received anecdotal examples of misinterpretation or misapplication of this Rule. The Committee therefore believes it timely to issue this advisory opinion in order to clarify the duties of both the attorney seeking admission *pro hac vice*, as well as those of the required responsible West Virginia local attorney. In particular, the issues that the Committee has been asked to address include the following:

1. Whether the requirement in Rule 8 of admission *pro hac vice* extends to matters in which no action, suit or proceeding is pending;

2. To what extent is the responsible local attorney required to participate in proceedings involving the attorney admitted *pro hac vice*;

3. Whether presiding judicial officers can "excuse" local counsel from participation or "waive" the requirement of participation; and

4. What limitations exist for attorneys seeking to be admitted *pro hac vice*, particularly their ability to be admitted on a frequent basis, or in multiple or consolidated actions.

In order to protect the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the courts could exercise little, if any, control, only duly licensed persons meeting the qualifications for admissions to the Bar established by the West Virginia Supreme Court of Appeals of West Virginia are permitted to practice law in the State of West Virginia. *State ex rel. Frieson v. Isner*, 168 W.Va. 758, 285 S.E.2d 641 (1981), and the Definition of the Practice of Law, as prescribed by the Supreme Court of Appeals of West Virginia, and as amended in 1961. The practice of law, both in court and out of court, by a person not licensed to practice is an illegal usurpation of the privilege of a duly licensed attorney at law. *West Virginia State Bar v. Earley*, 144 W.Va. 504, 109 S.E.2d 420 (1959).

The justification for excluding from the practice of law persons who are not admitted to the bar and for limiting and restricting such practice to licensed members of the legal profession is not the protection of the members of the bar from competition or the creation of a monopoly for the members of the legal profession, but is instead the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons for whom the judicial department of the government can exercise only slight or no control. *West Virginia State Bar v. Earley, supra.* The West Virginia Supreme Court has adopted an exception to the rule that only attorneys licensed and admitted to practice law in the State of West Virginia appear in

actions, suits, proceedings, or other matters in any court of the state or before any judge, tribunal, or body of the State of West Virginia. That exception is found in Rule 8 of the Rules for Admission to the Practice Law, dealing with admissions *pro hac vice*. The "general rule" for admission *pro hac vice* is found in Subsection (a) of Rule 8.

> Whenever it shall appear that a person, who has not been lawfully licensed and admitted to the practice of the law in the State of West Virginia, has been fully licensed and admitted to practice before a court of record of general jurisdiction in any other state or country or in the District of Columbia, and is in good standing as a member of the bar of such jurisdiction, he may appear in a particular action, suit, proceeding or other matter in any court of this state or before any judge, tribunal or body of this state, upon full compliance with the requirements of this Rule. Except in conformity with this Rule, members of the bar of any jurisdiction other than the State of West Virginia may not in this state do any act, or hold themselves out as entitled to do any act, within the definition of the practice of law, as prescribed by the Supreme Court of Appeals of West Virginia. *Rule 8.0 (a), West Virginia Rules for Admission to the Practice of Law, as amended.*

Based upon the above mandatory Rule, the Committee on Unlawful Practice is of the opinion that any attorney not lawfully licensed and admitted to the practice of law in the State of West Virginia, must first receive admission *pro hac vice* pursuant to Rule 8 of the Rules for Admission to the Practice of law before that attorney may appear in any action, suit, proceeding, or other matter in any court of this state or before any judge, tribunal, or any body of this state. Moreover, said attorney may not act, or hold themselves out to do any act, within the definition of the practice of law as prescribed by the Supreme Court of Appeals of West Virginia[1] until such attorney has been admitted *pro hac vice*.

As noted, Rule 8.0 (a) states that the requirement of admission *pro hac vice* is necessary before an applicant attorney can perform *any* act that falls within the definition of the practice of law. Based upon the clear language of the Rule, the Committee finds that attorneys licensed in states other than West Virginia *must* apply for admission *pro hac vice* in conformity with Rule 8 of the West Virginia Rules for Admission to the Practice of Law prior to engaging in *any act* that would fall within the definition of the practice of law. This requirement exists notwithstanding the absence of a pending action, suit or proceeding within which the applicant can seek to obtain an order granting admission *pro hac vice*. Under those circumstances, and along with the other requirements contained in Rule 8, the applicant must file a miscellaneous action in a West Virginia court of general jurisdiction to seek an order granting the applicant's admission.

Rule 8 also requires the participation of a "responsible local attorney", to associate with the attorney to be admitted *pro hac vice*. Subsection (c) of Rule 8 obligates the "applicant" to associate with a local attorney who is an active member in good standing of the state bar, and

[1] "In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill." *Definition of the Practice of Law, Supreme Court of Appeals of West Virginia, as amended.*

who has an office for the transaction of business within the State of West Virginia. This subsection further obligates the local attorney to "sign all pleadings and affix the attorney's West Virginia State Bar ID number thereto", and requires the local attorney to "attend all hearings, trials or proceedings actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice*." Lastly, the Rule requires that the local counsel "shall further attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice*, and shall be a responsible attorney in the matter in all other respects." (Emphasis added.)

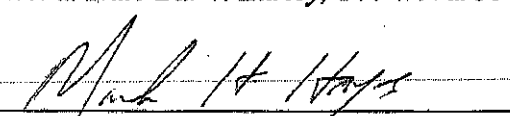
Over the past several years, the Committee has received numerous requests for an explanation of the Rule's requirements for local counsel; in particular, we have been asked to clarify what "other actions" necessitate involvement of responsible local counsel. It is the concerted opinion of the Committee that these "other actions" include any events that are brought about because of the existence of the in-court or out-of-court proceedings; that is, if the event is a necessary part of the proceedings – such as depositions, arbitration, mediation, scheduling conference before a court employee other than the presiding judge, etc. – then the responsible local counsel is *required* to attend. The rationale for this requirement is simple. The local counsel is the attorney that is subject to eligibility requirements and discipline as imposed by the West Virginia Supreme Court and its designees, while the applicant attorney largely remains outside the personal jurisdiction of those entities. The requirement that the responsible local counsel actually appear at these "actions" will help ensure that the public will be properly served by qualified counsel.

The second related inquiry that the Committee often receives is to clarify the nature of the required attendance by local counsel for proceedings conducted before a judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice*, or for depositions or other "actions" that occur in the proceedings which are not actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice*. These inquiries usually raise the issue of whether the responsible local counsel is required to attend the proceedings, deposition or other actions in person or whether that responsible local counsel can simply appear by telephone, video-conferencing or other means. The Committee is not unmindful of the cost of requiring two counsel to personally appear at every such proceeding, deposition or other action; however, the Committee believes that the protection afforded by requiring such attendance outweighs the inconvenience or cost associated with such attendance. That is not to say, though, that both the responsible local counsel and attorney admitted *pro hac vice* are necessarily required to appear in person. Assuming that personal attendance is not required by the presiding judge, tribunal or other body of the State of West Virginia, the responsible local counsel may attend the proceeding, deposition or other action by telephone or video-conferencing if the attorney admitted *pro hac vice* appears in a similar manner. The Committee continues to be concerned with the ability to ensure that the public has the benefit of attorneys that have been properly trained and who are subject to the discipline of the West Virginia Supreme Court and its designees. The requirement that responsible local counsel attend the proceeding, deposition or other action, as described herein, will help protect the public from unqualified or undisciplined attorneys.

Prior to the 2000 amendment to Rule 8 of the West Virginia Rules for Admission to the Practice of Law, the provisions of subsection (c) of that Rule required the attendance of the responsible local counsel "unless released from such responsibility by appropriate order". As noted, this provision was removed from the language of Rule 8 by the 2000 amendment and, thereby, the attendance requirements contained in Rule 8 became mandatory and not subject to any release order by the presiding judge, tribunal or other body of the State of West Virginia. Any order purporting to release a responsible local counsel that was entered after the entry of the 2000 order of the West Virginia Supreme Court amending Rule 8 is, therefore, void and is of no effect. Responsible local counsel shall appear at all proceedings, depositions and other actions consistent with this Advisory Opinion.

Finally, the Committee has been asked to address the growing number of out-of-state attorneys who seek admission *pro hac vice* in frequent, multiple or consolidated cases. Subsection (d) of Rule 8 provides some guidance to the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice*. That subsection requires that, "if the applicant's appearances within the State of West Virginia within the past 24 months are numerous or frequent or involve improper conduct, the court or tribunal shall deny such person the continuing privilege of appearance." The relevant issue is, of course, what number of appearances within that 24 month period would constitute "numerous or frequent" appearances sufficient to warrant a denial of the application. The Committee is of the opinion that the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission *pro hac vice* is in the best position to determine the answer to this question. The Committee recognizes that complex or rare matters may require specific expertise that, perhaps, might necessitate numerous appearances by an experienced out-of-state attorney. See, *State ex rel. H. K. Porter Company, Inc. v. White*, 182 W.Va. 97, 386 S.E.2d 25 (1989). The Committee believes that the presiding judge, tribunal or other body of the State of West Virginia should make a careful determination, given all of the facts available, as to whether an application that might be subject to this subsection should be denied. As such, the Committee does not believe that it would be helpful to establish a set number of applications that might violate this subsection. The Committee would caution that the Rule requires a separate and distinct application for *each* action, suit, proceeding or other matter. Applicants *must* seek admittance *pro hac vice* separately for every matter, and such obligation is not waived by the consolidation or joinder of matters by the presiding judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission.

It is a privilege to practice law within the State of West Virginia, and the West Virginia Supreme Court has recognized that admissions to practice *pro hac vice* must be closely monitored to protect "the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control." Syllabus point 6, *W.Va. State Bar v. Earley*, 144 W.Va. 504, 109 S.E.2d 420 (1959).



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