RULES CONCERNING THE STATE BAR OF MICHIGAN

(Based upon the ABA Model Rule – Pro Hac Vice)

Draft Rule 18 - *Pro Hac Vice* Temporary Practice

I. Permission to Appear In Pending Litigation Before A Court or Agency

A. Definitions

1. An *out of state* lawyer is a person not admitted to practice law in this State but who is admitted in another state or territory of the United States or the District of Columbia and not disbarred or suspended from practice in any jurisdiction.

2. ~~An out of state lawyer is "eligible for admission" *pro hac vice if that lawyer:*~~ *Eligibility to Appear.* An out of state lawyer is eligible to appear *pro hac vice* if that lawyer:

a. lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates, ~~regardless of where such lawyer may reside or work~~; or

b. neither resides nor is regularly employed at an office in this state; or

c. resides in this State but (i) lawfully practices from offices in ~~one or more other~~ another state~~s~~ and (ii) practices no more than temporarily in this State, whether pursuant to admission *pro hac vice* or in other lawful ways.

3. A *client* is a person or entity ~~for whom~~ who has retained the out of state lawyer ~~has~~ to render~~ed~~ legal services, ~~or by whom the lawyer has been retained~~ prior to the lawyer's performance of services in this State.

4. An *alternative dispute resolution* ("ADR") proceeding includes all types of arbitration or mediation, and all other forms of alternative dispute resolution, whether arranged by the parties or otherwise.

5. This Rule does not govern proceedings before a federal court or agency located in this State unless that body adopts or incorporates this Rule.

B. Authority of Court or Agency to Permit Appearance by Out of State Lawyer

1. Court proceeding. A court of this State may, in its discretion, permit an eligible out of state lawyer ~~retained to appear in a particular proceeding pending before such court~~ to appear *pro hac vice* as counsel in ~~that proceeding~~ a proceeding pending before the court, pursuant to this Rule.

2. Administrative Agency Proceeding. If practice before an agency of this State is limited to lawyers, the agency may, using the same standards and procedures as a Michigan court, permit an eligible out of state lawyer ~~who has been retained to appear in a particular agency proceeding~~ to appear *pro hac vice* as counsel in a proceeding ~~*pro hac vice*~~ pending before the agency.

C. ~~In-State Lawyer's~~ Michigan Lawyer's Duties. When an out of state lawyer appears for a client in a proceeding pending in this State, either in the role of co-counsel of record with the ~~in-state~~ Michigan lawyer, or in an advisory or consultative role, the ~~in-state~~ Michigan lawyer ~~who is co-counsel or counsel of record for that client in the proceeding~~ remains responsible to the client and responsible for the conduct of the proceeding before the court or agency. It is the duty of the ~~in-state~~ Michigan lawyer to advise the client of the ~~in-state~~ Michigan lawyer's independent judgment on contemplated actions in the proceeding if that judgment differs from that of the out of state lawyer.

D. Application Procedure

1. Verified Application. An eligible out-of-state lawyer seeking to appear *pro hac vice* in a proceeding pending in this State ~~as counsel *pro hac vice*~~ shall file a verified application with the court where the litigation is filed. The application shall be served on all parties who have appeared in the case. A copy of the application, together with the application fee, shall also be filed with the State Bar of Michigan. ~~[lawyer regulatory authority]~~ The application shall include proof of service. The court has the discretion to grant or deny the application summarily if there is no opposition. Failure to pay the fees to the local court and the State Bar of Michigan may result in denial of the application.

2. Objection to Application. The ~~lawyer regulatory authority~~ State Bar of Michigan or a party to the proceeding may file an objection to the application or seek the court's imposition of conditions to its being granted. The ~~lawyer regulatory authority~~ State Bar of Michigan or objecting party must file with its objection a verified affidavit containing ~~or describing~~ information establishing a factual basis for the objection. The ~~lawyer regulatory authority~~ State Bar of Michigan or objecting party may seek denial of the application or modification of it. If the application has already been granted, the ~~lawyer regulatory authority~~ State Bar of Michigan or objecting party may move that the *pro hac vice* permission be withdrawn.

3. Standard for Pro Hac Vice Permission ~~and Revocation of Admission~~. The courts and agencies of this State have discretion ~~as to whether~~ to grant applications for permission to appear *pro hac vice*. An application ordinarily should be granted unless the court or agency finds ~~reason to believe that such admission~~ any of the following:

a. the permission may be detrimental to the prompt, fair and efficient administration of justice.

b. the permission may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent

c. one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk, or

d. the applicant has engaged in such frequent appearances as to constitute regular practice in this State. For purposes of this rule, more than 3 separate representations within a 365 day period shall be presumed to be a "general practice."

4. Out-of-state lawyers who have been disciplined or held in contempt by reason of misconduct committed while engaged in representation that is permitted by this rule may thereafter be denied permission to appear pro hac vice under this rule.

5. No lawyer is authorized to appear pursuant to this rule if the lawyer:

a. is disbarred or suspended from practice in any jurisdiction;

b. is a Michigan resident;

c. is a member of the Michigan Bar but ineligible to practice law;

d. has failed to provide notice to the State Bar of Michigan or pay the filing fee as required by this rule or

e. is engaged in a "general practice" as defined elsewhere in this rule.

~~4~~ 6. Revocation of Permission. Permission to appear as counsel *pro hac vice* in a proceeding may be revoked for any of the reasons listed in section I.D.3 above.

E. Application

1. Required Information. An application shall state the information listed on Appendix A to this rule. The applicant may also include any other matters supporting permission to appear *pro hac vice*.

2. Application Fee. An applicant ~~for permission to appear as counsel *pro hac vice*~~ under this Rule shall pay a non-refundable fee at the time of the filing of the application as set by the ~~lawyer regulatory authority~~ State Bar of Michigan ~~at the time of the filing of the application~~. The amount of the fee shall be equal to the dues paid by an active member of the State Bar of Michigan plus the amount of the Client Protection Fund Assessment.

3. Exemption for *Pro Bono* Representation. An applicant shall not be required to pay the fee established by I.E.2 above if the applicant will not charge an attorney fee to the client(s) and is:

a. employed or associated with a *pro bono* project or nonprofit legal services organization in a civil case involving the client(s) of such programs; or

b. involved in a criminal case or a *habeas* proceeding for an indigent defendant.

F. Authority of the ~~[Lawyer Regulatory Authority]~~ Attorney Grievance Commission and Attorney Discipline Board and Court: Application of Ethical Rules, Discipline, Contempt and Sanctions

1. Authority Over Out-of-State Lawyer and Applicant.

a. ~~During pendency of an application for admission *pro hac vice* and upon the granting of such application,~~ An out-of-state lawyer submits to the authority of the Michigan courts and ~~the lawyer regulatory authority~~, the Attorney Grievance Commission and the Attorney Discipline Board ~~of this State~~ for all conduct relating in any way to the proceeding in which the out-of-state lawyer seeks to appear. The applicant or out-of-state lawyer ~~who has obtained *pro hac vice* admission in a proceeding~~ submits to this authority for all that lawyer's conduct (i) within ~~the state~~ this State while the proceeding is pending or (ii) arising out of or relating to the application or proceeding. An applicant or out-of-state lawyer who has *pro hac vice* authority for a proceeding under this rule may be disciplined in the same manner as a ~~in-state~~ Michigan lawyer.

b. The court's and ~~lawyer regulatory authority's]~~ Attorney Grievance Commission and the Attorney Discipline Board's authority includes, without limitation, the ~~court's and [lawyer regulatory authority's]~~ Michigan Court Rules, the Michigan Rules of Professional Conduct, the Professional Disciplinary Proceedings Rules, contempt and sanctions orders, local court rules and court policies and procedures.

2. Familiarity With Rules. An applicant shall become familiar with the Michigan Rules of Professional Conduct, ~~rules of discipline of the [lawyer regulatory authority]~~, the Professional Disciplinary Proceedings Rules, local court rules, and policies and procedures of the court ~~before~~ in which the applicant seeks to practice.

II. Out-of-State Proceedings, Potential ~~In-State~~ Michigan and Out-of-State Proceedings, and all ADR

A. ~~In-State~~ Michigan Ancillary Proceeding Related to Pending Out-of-State Proceeding. In connection with proceedings pending outside this State, an out-of-state lawyer admitted to appear in that proceedings may render ~~in this State~~ legal services regarding ~~or in aid of~~ such proceeding~~,~~ in Michigan.

B. Consultation by Out-of-State Lawyer

1. Consultation with ~~In-State~~ Michigan Lawyer. An out-of-state lawyer may consult in this State with a ~~in-state~~ Michigan lawyer concerning the ~~in-state~~ Michigan lawyer's client's pending or potential Michigan proceeding in this State.

2. Consultation with Potential Client. At the request of a ~~person in this state~~ Michigan resident who is contemplating filing a proceeding or involved in any pending proceeding, ~~irrespective of where the proceeding is located~~, an out-of-state lawyer may consult ~~in this State~~ with ~~that person~~ the Michigan resident about ~~that person's possible retention of~~ retaining the out-of-state lawyer in connection with the proceeding.

C. Preparation for ~~In-State~~ Michigan Proceeding. On behalf of any client ~~in this State or elsewhere~~, the out-of-state lawyer may render legal services in this State in preparation for a potential Michigan proceeding ~~to be filed in this State~~, provided that the out-of-state lawyer reasonably believes he is eligible for admission *pro hac vice* in this State.

D. Preparation for Out-of-State Proceeding. In connection with a potential proceeding to be filed outside this State, an out-of-state lawyer may render legal services in this State for ~~a client or potential client located in this state~~ an existing or potential Michigan client, provided that the out-of-state lawyer is admitted or reasonably believes the lawyer is eligible for admission generally or *pro hac vice* in the other jurisdiction ~~where the proceeding is anticipated to be filed~~.

E. Services Rendered Outside This State for ~~In-State~~ Michigan Client. An out-of-state lawyer may render legal services while the lawyer is physically outside this state when requested by a Michigan client ~~located within this State~~ in connection with a potential or pending proceeding filed in or outside this State.

F. Alternative Dispute Resolution ("ADR Procedures"). An out-of-state lawyer may render legal services in this State to prepare for and participate in any ADR procedure. ~~regardless of where the ADR procedure is expected to take or actually takes place.~~

G. No Solicitation. An out-of-state lawyer rendering services in this State in compliance with this Rule, or here for other reasons, is not authorized by anything in this Rule to hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. Nothing in this Rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this State.

H. Temporary Practice. An out-of-state lawyer will ~~only~~ be eligible for permission to appear *pro hac vice* or to practice in another lawful way only on a temporary basis. For purposes of

this Rule, temporary practice is limited to no more than three separate representations within a 365 day period. *

I. Authorized Services. ~~The foregoing services may be undertaken by the out-of-state lawyer in connection with a potential proceeding in which the lawyer reasonably expects to be admitted *pro hac vice*, even if ultimately no proceeding is filed or if *pro hac vice* admission is denied~~. It is not a violation of this rule if *pro hac vice* permission is ultimately denied or a proceeding is not filed, provided the attorney reasonably expected to be admitted *pro hac vice.*

REPORT

Courts in all United States jurisdictions regularly permit lawyers from other United States jurisdictions to appear as counsel *pro hac vice*. Such permission has been almost a matter of course when sought in conjunction with locally admitted counsel. Many administrative agencies also provide for limited appearances by out-of-state lawyers. Typically, the *pro hac vice* process does not allow out-of-state lawyers to practice regularly in the jurisdiction and requires that the applicant attest to knowledge of and compliance with local rules of conduct and practice. In most jurisdictions, there is little procedural structure for addressing *pro hac vice* applications, which are entrusted solely to the discretion of the court asked to admit the lawyer. Unlike some other jurisdictions, Michigan's pro hac vice rule grants permission to appear but not admission to the State Bar. The proposed rule is an adaptation of the ABA proposed prp hac vice rule and comment that preserves the nomenclature of the Michigan *pro hac vice* rule.

The ABA Section of Litigation has reported to the Commission that "generally the *pro hac vice* procedure is an adequate method for oversight of attorneys who appear and render legal services in pending litigation outside the states where licensed," but that "[a] more uniform *pro hac vice* procedure . . . would be strongly preferable to the disparate requirements now in place."[1] The ABA Section of Tort and Insurance Practice and the International Association of Defense Counsel (IADC) have expressed a similar view, and have worked with the ABA Section of Litigation to develop a proposed *Model Rule on Pro Hac Vice Admission*. The Commission on Multijurisdictional Practice proposes that the ABA adopt the *Model Rule* and recommend it to state supreme courts for their adoption. This rule seeks to provide a procedural framework, to provide standards to guide the discretion of the court, and to address ancillary issues not dealt with in traditional *pro hac vice* practice. Lawyers who appear on behalf of clients in courts of different states, and their clients, would benefit both from the elimination of unduly restrictive provisions that exist in a few states and from increased consistency of practice from state to state.

The proposed rule recognizes that parties should generally be permitted to obtain the assistance of the lawyers of their choice. An application for *pro hac vice* appearance ordinarily should be granted. However, a court could deny an application if there were a basis for finding that the

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[1] *See* ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June 2001) at 5 and 3, http://www.abanet.org/cpr/mjp-comm_sl.html.

lawyer's appearance may be detrimental to the prompt, fair and efficient administration of justice or to the legitimate interests of parties other than the client the lawyer proposes to represent, or that one or more of the clients the lawyer proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk, or that the applicant has engaged in such frequent appearances as to constitute regular practice in this State.

In many circumstances, retaining a lawyer who is admitted in another jurisdiction promotes the client's interest and does not pose an unreasonable regulatory risk. For example, clients with sufficiently extensive legal affairs that they have employee lawyers handling some or all of those affairs are better situated than most other clients, in terms both of the ability to assess a lawyer's competence and ethical standards and of the incentive to do so. The same may be said of clients who have the advice of another lawyer in retaining the applicant for *pro hac vice* appearance. Further, clients have a special interest in being able to use lawyers with whom they have previously formed client-lawyer relationships. Such clients have had the ability to assess the lawyer's prior work, to develop trust in that lawyer, and to educate that lawyer on client affairs, objectives, and priorities. Clients ought not lightly be deprived of the ability to use such lawyers in proceedings in other jurisdictions. Likewise, parties should generally be able to use a lawyer with special experience or expertise.

In general, admission *pro hac vice* would be available only to lawyers who regularly practice law and reside outside the jurisdiction, since lawyers who reside in or are employed in the state can reasonably be expected to seek general admission to the bar if they desire to practice there and ordinarily should not be permitted to rely on *pro hac vice* admission as an alternative to general admission. The rule would permit a court to deny an application if the applicant has engaged in such frequent appearances as to constitute regular practice in the jurisdiction, since *pro hac vice* permission should not be used repetitively as a way to engage in regular practice in a jurisdiction. In addition to inquiring into the number of appearances by the particular applicant, a court could inquire into *pro hac vice* appearances by other lawyers in the same firm and consider whether the firm as a whole is engaged in regular practice through *pro hac vice* appearances. The court could also consider whether the lawyer or the lawyer's firm has targeted marketing efforts at nonlawyers who reside in or have offices in the jurisdiction. As exceptions to the general restriction on *pro hac vice* appearance of lawyers who establish offices in and reside in the jurisdiction, the rule would allow appearance of lawyers who have recently established a connection to the state and who are promptly and diligently pursuing an initial application for general admission to its bar, in-house lawyers lawfully practicing on behalf of their employers without being admitted, and lawyers residing in the jurisdiction who rarely appear in court there but are regularly practicing elsewhere.

Under the proposed rule, an eligible out-of-state lawyer desiring to appear as counsel *pro hac vice* would be required to file with the court a verified application, with proof of service on all parties who have appeared in the cause and on the relevant lawyer regulatory authority. Much of the information in the application is intended to assist the court in determining whether the lawyer has observed the requirements of professional responsibility in the jurisdictions in which the lawyer practices.

Additionally, under the proposed rule, the party must be represented by an in-state lawyer who serves as counsel of record and actively participates in the representation. Throughout the litigation, local counsel must remain responsible to the client and for the conduct of the proceeding. This includes advising the client of the lawyer's professional judgment when it differs from that of

the out-of-state lawyer on contemplated actions. Ordinarily, the interests in protecting the client, the public and the court will be served where the court ascertains that the lawyer is admitted to practice elsewhere and has complied with professional obligations, given the ability of the locally-admitted co-counsel to protect against deficiencies in the out-of-state lawyer's representation, the ability of the court to detect any obvious incompetence in the conduct of the case, and the ability of the court and the jurisdiction's disciplinary authority to sanction the lawyer for misconduct in the proceeding.

The proposed rule would provide the jurisdiction's lawyer regulatory authority an opportunity to assist the court by objecting to the application or seeking revocation of admission once granted. Since processing of applications imposes burdens on the agency, as does the potential responsibility to investigate and act on disciplinary complaints against the applicant, a fee could be imposed to defray these costs. Under the rule, the court or administrative agency to which the application for permission to appear *pro hac vice* was directed would not need to delay action on the application to await any response by the authority, but could freely reconsider any action in light of any information provided by or any objection expressed by the regulatory authority. The rule would assure that the applicant will have notice of and an opportunity to respond to any alleged grounds that may be relied upon to deny the application. If the propriety of permission turns on contested issues of fact, an evidentiary hearing would be held.

Although the proposed rule would require a lawyer to seek and obtain permission to appear *pro hac vice* in order to appear as counsel before a tribunal in a jurisdiction in which the lawyer was not admitted to practice, certain work relating to litigation and other dispute resolution proceedings could be conducted by an out-of-state lawyer without the necessity of obtaining permission to appear *pro hac vice*, subject to proposed Rule 5.5(c) of the ABA *Model Rules of Professional Conduct*. For example, permission to appear *pro hac vice* would not be required for lawyers who did not appear in court but who confined their role to giving advice to the in-state lawyer responsible for the matter or to assisting in the preparation of the case for trial. A lawyer who reasonably expected to be permitted to appear *pro hac vice* could conduct activities in contemplation of filing a lawsuit. Lawyers appearing in a litigation in a jurisdiction in which they are authorized to represent a party could participate in meetings, discovery or investigative proceedings related to that litigation in a jurisdiction in which they were not licensed. Participation in private arbitration or other private dispute resolution proceedings also would be covered by Rule 5.5(c) but not by the *pro hac vice* rule.

**Staff comment: This version contains amendments suggested by the SBM Probate and Estate Planning Section. In addition, the SBM has suggested to the Supreme Court that this proposed language defining "temporary practice" be included in MRPC 5.5, already pending before the Supreme Court, to make the two rules consistent on what constitutes "temporary practice" and "temporary basis."*