

Eight Things Michigan Litigators Should Address When Retained as Local Counsel

By Rodger D. Young and Terry Milne Osgood



Litigators occasionally receive calls from lawyers outside Michigan looking for someone to act as local counsel in a state or federal litigation or arbitration in Michigan. This article identifies eight critical topics you should address with an out-of-state lawyer when considering being retained as local counsel.

1. The division of labor between out-of-state and local counsel

Lawyers have differing ideas about what it means to act as local counsel. It is imperative that you clarify exactly what you are being retained to do in any local counsel engagement. Are you simply to advise about local practice and proper format for

motions and briefs? Will you help out-of-state counsel gain temporary admission to the relevant court or tribunal? Will you take instruction from the client, out-of-state counsel, or both? Will you accompany out-of-state counsel to motion hearings or will you argue motions? Who handles conferences? Drafting of briefs? Electronic filings? Who will appear at trial? Make sure the agreements reached on all these subjects are in writing before you begin representing the client.

2. Michigan's rules for temporary admission for out-of-state counsel

Most attorneys believe they can practice temporarily in another jurisdiction merely by filing a motion for pro hac vice

admission in the relevant court. While this remains true in some jurisdictions, Michigan state and federal courts no longer permit this practice simply on motion. You need to be aware of the current requirements.

In the U.S. District Court for the Eastern District of Michigan, pro hac vice admission is not permitted, on motion or otherwise.¹ An attorney admitted to practice in another state or federal bar who is in good standing may be fully admitted to the bar of this court by following the procedures set forth in ED Mich LR 83.20(c)(1), (d). The attorney must be accompanied at any court appearance by a member of the State Bar of Michigan acting as local counsel.² Local counsel must enter a formal appearance in the case and must attend each scheduled appearance unless the court dispenses with this requirement.³

In the U.S. District Court for the Western District of Michigan, pro hac vice admission is “disfavored,” although it is sometimes permitted on a temporary basis pending full admission.⁴ An attorney admitted to practice in another state or federal bar who is in good standing may be fully admitted to the bar of the Western District.⁵ The court “may, in its discretion” require an attorney “whose office is a great distance from the courthouse to retain local counsel.”⁶ If local counsel is required, he or she will also enter an appearance and “shall have both the authority and responsibility for the conduct of the case should lead counsel be unavailable for any appearance, hearing or trial.”⁷

In Michigan courts as well as administrative tribunals and arbitration proceedings, the requirements to obtain temporary admission to the bar, or pro hac vice admission, have become much more restrictive since 2008.⁸ Under MCR 8.126, an out-of-state attorney “must be associated with a Michigan attorney” and may appear and practice in no more than five cases in a 365-day period.⁹ By following the detailed requirements set forth in this rule, an attorney admitted to practice and in good standing outside

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3. Up-to-date court rules

One of the most important functions you perform as local counsel is ensuring that your out-of-state counsel is aware of all relevant rules governing the litigation taking place in Michigan.

For cases in federal court, this includes making available the most recent version of the local rules for the U.S. District Court for either the Eastern or Western District.¹¹ Pay special attention to the local rules governing electronic filing, which both districts require.¹²

For cases in Michigan state courts, you should provide copies of or links to the Michigan Court Rules¹³ and the Michigan Rules of Evidence,¹⁴ which apply to all litigation in our state courts.¹⁵ You should also provide relevant local rules of practice, if any, for the circuit, district, or probate court in which the matter is pending; the most up-to-date versions are usually available online. Be sure to consider whether the matter should be moved to or brought or defended in a specialty court such as the Court of Claims¹⁶ or one of Michigan’s new business courts¹⁷ recently created in larger counties to deal solely with business disputes.

For arbitration matters, ensure that out-of-state counsel is aware of the Revised Uniform Arbitration Act, MCL 691.1681, *et seq.*, which became effective July 1, 2013.

4. Pleading requirements

When a party is represented by counsel, initial filings in Michigan federal courts must be made electronically¹⁸ with a completed cover sheet mandated by local rule.¹⁹ The local rules also include certain pleading requirements unique to each district.²⁰

Requirements for initial pleadings in Michigan state courts are governed by the Michigan Court Rules.²¹ Local rules may augment these requirements.²²

FAST FACTS

Securing temporary admission for an out-of-state attorney to practice in Michigan state or federal courts (or in an arbitration) requires more than a simple motion for pro hac vice admission.

Rules governing electronic filing now play a key role in local counsel engagements.

Be aware of recent changes in Michigan law, including the establishment of new business courts, the adoption of the Revised Uniform Arbitration Act, and revisions to the briefing requirements in the local rules for the Eastern District of Michigan.

5. Seeking concurrence before filing motions

The local rules for both federal districts contain an explicit requirement that counsel attempt to obtain concurrence in relief requested before any motion is filed, and require that an express statement documenting that discussion be included in the motion.²³

The local rules for many Michigan courts contain a similar requirement.²⁴ Whether your particular court has such a requirement or not, as local counsel you should encourage meaningful communication with opposing counsel before filing any motion in a Michigan proceeding.

6. Briefing requirements

The local rules governing the filing of briefs in Michigan federal courts are detailed, and failure to meet these requirements may cause the judge's staff to refuse to accept a brief for filing. Make sure you know the page limits for briefs²⁵ as well as what is included in the page count and what may be excluded from the count. If a proposed brief will be lengthy, be aware of the procedure for obtaining permission to file additional pages.²⁶ You should also communicate the need for a statement of issues presented²⁷ and an index of legal authority.²⁸ The local rules also dictate font size,²⁹ margin requirements,³⁰ footnotes,³¹ and the procedure for filing exhibits to briefs.³²

The rules governing the filing of briefs in Michigan state courts are also detailed, and failure to meet these requirements may cause your brief to be rejected. Perhaps the most unique requirement is that briefs comply with the Michigan Uniform System of Citation.³³ This space-saving citation format is counterintuitive and may be confusing to counsel who have not previously practiced in Michigan.

Additionally, make sure you know the page limit,³⁴ font size,³⁵ and margin requirements for briefs.³⁶ Inform out-of-state counsel about Michigan's case evaluation procedure and the consequences of acceptance and rejection of any case evaluation award.³⁷

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7. How motion hearings are scheduled and conducted

There are substantial differences in how courts schedule and hear motions. In some locations, courts will set a specific date and time to hear oral argument on every motion filed. Some courts have regular motion-call dockets at which numerous motions will be heard within a short period. Some courts permit telephonic arguments. Some permit oral argument only for dispositive motions. Some do not permit oral argument on any motions, while others do so only on request. You can avoid misunderstandings with your out-of-state counsel by explaining early in the relationship how motion hearings are scheduled and conducted in the relevant Michigan forum. If you anticipate having an oral argument on any motion, be sure to address who will be responsible for conducting the argument on behalf of your client.

8. The judge

Be sure to provide the latest information about the judge or hearing officer before whom the matter is pending. You can obtain basic biographical information about most judges either on the court's website or at <http://www.martindale.com>, a general legal directory that includes factual information about most lawyers and judges.³⁸ In addition, a Google search for a specific judge and "motion practice," "guidelines," or "standing orders" will usually locate some detailed information.

Practice guidelines for all judicial officers in the Eastern District are available at http://www.mied.uscourts.gov/Judges/practice_guidelines.cfm.

You may also obtain valuable information about a particular judge from:

- The Robing Room, <http://www.therobingroom.com>, a website on which people can rate judges across the country. The results are highly subjective, but comments about judicial demeanor and temperament, political leanings, and pet peeves can be insightful.
- The Almanac of the Federal Judiciary. The print version provides significant information about federal judges and comments from counsel who have appeared before them. Westlaw's version does not include comments from counsel.

Conclusion

Do not wait to be asked to provide information to out-of-state counsel. Michigan litigators who anticipate the needs of out-of-state clients in a Michigan forum will help their cases flow smoothly. Satisfied out-of-state clients and their counsel will increase the likelihood of repeat engagements and referrals. ■



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ENDNOTES

1. See ED Mich LR 83.20(c)(1).
2. ED Mich LR 83.20(f).
3. ED Mich LR 83.20(f).
4. See WD Mich LCivR 83.1(c)(i) and (iii).
5. WD Mich LCivR 83.1(c)-(f).
6. WD Mich LCivR 83.1(f).
7. WD Mich LCivR 83.1(f).
8. See MCR 8.126(A).
9. MCR 8.126(A)(1)(a), (c).
10. MCR 8.126(A)(1)(a)-(e).
11. The local rules are available at <http://www.mied.uscourts.gov/Rules/LocalRules/> and http://www.miwd.uscourts.gov/rules_opinions.htm. All websites cited in this article were accessed August 14, 2014.
12. See ED Mich LR 5.1.1 and WD Mich LCivR 5.7; see generally Eastern District of Michigan U.S. District Court, *Electronic Filing Policies and Procedures*, available at http://www.mied.uscourts.gov/CMECF/Policies/policies_procedures.pdf and Western District of Michigan U.S. District Court, *Electronic Filing*, available at <http://www.miwd.uscourts.gov/electronic-filing>.
13. <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Pages/current-court-rules.aspx>.
14. <http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/2MichiganRulesOfEvidence.pdf>.
15. MCR 1.103, MRE 101.
16. As of November 12, 2013, Michigan's Court of Claims is located in the Michigan Court of Appeals. 2013 PA 164 of 2013. The court of claims act, MCL 600.6401 *et seq.*, sets forth the local rules that govern practice and procedure in the Court of Claims. The statute states when the Court of Claims has exclusive jurisdiction and when it has concurrent jurisdiction. See MCL 600.6419-600.6419a.
17. See MCL 600.8033-600.8047.
18. WD Mich LCivR 5.7(a); ED Mich LR 5.1.1(a).
19. WD Mich LCivR 5.1; ED Mich LR 3.1(a).
20. See, e.g., WD Mich LCivR 5.6(a) (prisoner actions); 5.6(b) (in pro per); 8.1 (Social Security cases); 8.2 (answer must repeat all paragraphs of complaint, and respond to each immediately thereafter); ED Mich LR 9.1(a) (jury demand); 9.1(b) (constitutionality challenge); 9.1(c) (three-judge court); 9.1(d) (class action).
21. See, e.g., MCR 2.110(A) (definition of a "pleading"); MCR 2.111 (general rules of pleading); MCR 2.112 (pleading special matters); MCR 2.113 (form of pleadings and other papers); MCR 2.115 (motion to correct or strike pleadings); MCR 2.118 (amended and supplemental pleadings); see also MCR 2.107 (service and filing of pleadings and other papers); MCR 2.108 (time for service and filing of pleadings).
22. See, e.g., 3rd Circuit LCR 2.107(A) and 2.113(C) (requiring counsel to obtain preprinted labels to send them to opposing parties at time of service, if case is not electronically filed).
23. See ED Mich LR 7.1(a); WD Mich LCivR 7.1(d).
24. See, e.g., 3rd Circuit LCR 2.119(B)(1)(2); 6th Circuit LCR 2.119(B)(2)(a); 7th Circuit LCR 2.119(A); 16th Circuit LCR 2.119(H); see also 36th District LCR 2.119(D); Genesee Co Probate LCR 2.119(A).
25. WD Mich LCivR 7.2(b)(c) (25 pages for dispositive motion and oppositions; 10-page reply brief); WD Mich LCivR 7.3(b)(c) (10 pages for nondispositive motions and oppositions; reply briefs only with leave of court); ED Mich LR 7.1(d)(3) (25 pages for brief or opposition to the brief; 7 pages for reply brief).
26. WD Mich LCivR 7.1(c) (court may enlarge any page limit with or without prior notice or motion); ED Mich LR 7.1(d)(3)(A) (apply *ex parte* in writing setting forth reasons).
27. WD Mich LCivR 7.1(a) (requiring "concise statement of the reasons in support of the party's position"); ED Mich LR 7.1(d)(2) (requiring "concise statement of the issues presented").
28. WD Mich LCivR 7.1(a) (requiring citation of "all applicable federal rules of procedure, all applicable local rules, and the other authorities upon which the party relies"); ED Mich LR 7.1(d)(2) (requiring, in page following the statement of issues presented, "the controlling or most appropriate authority for the relief sought").
29. WD Mich LCivR 10.1 ("no smaller than 12 point type"); ED Mich LR 5.1(a)(3) ("type size of all text and footnotes must be no smaller than 10½ characters per inch (non-proportional) or 14 point (proportional)").
30. WD Mich LCivR 10.1 (all margins must be at least one inch); ED Mich LR 5.1(a)(2) (at least one-inch margins on the top, sides, and bottom).
31. WD Mich LCivR 10.1 (requires text to be no smaller than 12 point type, but does not specifically address footnotes); ED Mich LR 5.1(a)(3) ("type size of . . . footnotes must be no smaller than 10½ characters per inch (non-proportional) or 14 point (proportional)").
32. WD Mich LCivR 7.1(b) (documents supporting motions) and 10.7 (exhibits to motions); ED Mich LR 5.1(d) (exhibits to motions).
33. Administrative Order 2006-3, available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/9MichiganUniformSystemOfCitation.pdf>.
34. MCR 2.119(A)(2) (the combined length of any motion and brief, or a response and brief, may not exceed 20 pages of double-spaced type, exclusive of attachments and exhibits; quotations and footnotes may be single spaced).
35. MCR 2.119(A)(2) (not smaller than 12 point type).
36. MCR 2.119(A)(2) (at least one-inch margins).
37. MCR 2.403.
38. You might also try Judgepedia, http://judgepedia.org/index.php/Main_Page, a website with factual information about state and federal judges.