**LOCAL GOVERNMENTS NEED RELIEF**

**FROM THE LOCAL COUNSEL REQUIREMENT**

**By: Esther Tryban Telser, City of Chicago[[1]](#footnote-1)**

As governmental entities are increasingly fiscally challenged, to the point of making difficult decisions, such as deciding between funding sufficient police forces or funding necessary improvements to schools and school curricula, such entities have become increasingly sophisticated and diligent in collecting debt owed to them from debtors in bankruptcies. Unfortunately, this activity is frequently impeded by the barriers to practice imposed by the local rules of bankruptcy and district courts regarding the practice of law in bankruptcy courts.

Specifically, all too often these rules require the association with local counsel and the payment of filing fees[[2]](#footnote-2)--both of which take limited financial resources away from other vital activities, with no guarantee that there will be any success in collecting the debt in the bankruptcy case. Thus, governmental entities are faced with the arguably equally irresponsible choices of either not pursuing bankruptcy claims or paying out additional funds in the pursuit of debt already owed and unpaid.

Federal entities, of course, do not experience this impediment to pursuing debt owed in any bankruptcy court, as there is a U.S. Attorney authorized to appear for Federal agencies in every District Court. Further, many Courts have rules specifically welcoming attorneys representing the Federal government:

Any attorney representing the United States Government, or any agency thereof, or any attorney employed by the Federal Public Defender’s Office may appear and participate in particular cases in an official capacity without submitting a petition for admission, provided the attorney is admitted to practice and in good standing before the highest court of any state.

United States District Court for the District of Alaska Local Rules (Civil) Rule 83.1(e)

Because of similar concessions, the problem is not as acute for any State or agency of a State, which is pursuing debt in a bankruptcy court outside its borders, because there are rules welcoming attorneys employed by a state:

A State attorney General or that official’s designee, who is a member in good standing of the bar of the highest court in any State or of any United States Court, may appear and represent the State or any agency thereof . . .

Rules of United States District Court for the District of Columbia Local Civil Rule 83.2 (f). Additionally, many Attorneys General participate in a cooperative arrangement by agreeing to be designated as local counsel for the counsel of sister states’ attorneys. This cooperation in serving as local counsel for other states in bankruptcy cases, of course, is itself costly for the Attorneys General in states with the greatest number of bankruptcy cases filed.

However, the burden of being required to retain local counsel most harshly impacts local governmental entities, such as municipalities, counties, districts and townships, pursuing debt (or defending preferences or treatment of debt to be paid through plans) in states other than their own. The extent of financial burden varies between jurisdictions, due to the particular requirements upon local counsel as to the amount of actual knowledge of the creditor’s matter. For instance, Colorado requires much knowledge by requiring the local counsel to sign the first pleading;[[3]](#footnote-3) however, the malpractice carriers of all local counsel require all attorneys acting as mandatory local counsel to have knowledge of the facts of any out of district creditor’s claim or dispute—knowledge acquired at the local counsel’s customary hourly rates.

**HISTORIC REASONS ARE NO LONGER RELEVANT**

Understandably, there was a reasonable rationale for requiring local counsel when the pro hac vice rules for most federal courts were originally promulgated. In general, at that time communication with and between attorneys from other districts was slow. The rationale also included the specific facts that it was difficult for practitioners to access current case law and local practice rules from districts other than that in which their office was located and it was difficult to ascertain whether an attorney from another state was duly licensed by that other state.

Times have changed. Every attorney now has electronic access to the case law of every Federal court in the United States, along with electronic access to the local rules of every bankruptcy, district and appellate of the Federal court system. Each state now provides easy access to current rolls of those authorized by it to practice law. Further, the fact that a governmental entity has retained and authorized an attorney to appear on its behalf implies that the governmental entity has sufficiently reviewed that attorney’s certification as an attorney.

Some courts have commendably recognized these changed circumstances and permit any government attorney to represent his or her employing government in bankruptcy court:

Motion for Pro Hac Vice and Association with Delaware Counsel not Required.

1. Government Attorneys. An attorney not admitted in the District Court but admitted in another United States District Court may appear representing the United States of America (or any officer or agency thereof) or any state or local government ( or officer or agency thereof) so long as a certification is filed, signed by that attorney, stating (a) the courts in which the attorney is admitted, (b) that the attorney is in good standing in all jurisdictions in which he or she has been admitted and (c) that the attorney will be bound by these Local Rules and that the attorney submits to the jurisdiction of chis Court for disciplinary purposes.

United States District Court for the District of Delaware Local Rules of Civil Practice and Procedure Rule 9010-1(e).

and

Appearances by Government Attorneys. Any attorney who is an employee of the United States government, an agency thereof, or a state, municipality or agency or political subdivision thereof, may appear and participate in particular actions or proceedings before the court on behalf of such entity in the attorney’s official capacity. Any attorney so appearing is subject to all of the rules of this court.

United States Bankruptcy Court for the Southern District of Florida Local Rule 2090-1(B)(3).

**THE TIME FOR PERMITTING NATIONAL PRACTICE IN BANKRUPTCY COURTS FOR ALL GOVERNMENT ATTORNEYS HAS COME**

In recognition of the need for governments to be permitted to pursue the debt owed to them in the most fiscally responsible manner possible and the decreased barriers to acquiring knowledge of courts’ precedential decisions and local rules, all bankruptcy courts should be encouraged to permit any attorney duly retained by a governmental entity to practice before any bankruptcy court in which the attorney’s employing governmental entity has a claim or other interest in any case before the court.

The Internet has made contact with an attorney in another city, state or country as accessible, or possibly more so, as walking into that attorney’s office down the street. Similarly, all bankruptcy courts now require electronic filing and make their systems available to all attorneys who engage in a minimal amount of training, making physical presence in a jurisdiction unnecessary.

Telephonic hearings in large bankruptcy cases have become the norm and have evolved into a very efficient process. There is no reason to believe telephonic hearings would be less effective if local counsel were not required to physically be in the courtroom for such hearings. Further, unless a judge has questions for counsel after the judge has read the parties’ briefs on any issue, bankruptcy courts could follow the trend of most district courts to dispense with hearings on motions and decide the matters on the briefs submitted. Judges faced with cases in which the briefs raise more questions than they resolve would still have the option to require all counsel to appear in person for a hearing. Hopefully, the necessity for this would diminish as counsel become more skilled in presenting all relevant facts and arguments in their papers and as technology progresses so that judges may comfortably acquire telephonically all the information they need to decide an issue. Admittedly, telephonic hearings will never suffice for issues involving credibility; however, it is rare when a governmental entity’s bankruptcy issue involves credibility and, again, dispensing with the requirement of local counsel would not force any judge to forgo in person hearings—it would just reduce the number and cost of attorneys in the courtroom by half for most local governmental entities.

**DISCIPLINE**

There was a time when the need for mandatory local counsel was justified by the inability of a court to discipline attorneys from another jurisdiction. While this concern may have been rooted in the same communication delays associated with out of district attorneys, it is difficult to use it to justify mandatory local counsel. Frankly, any judge holds the ability to mete out discipline to any attorney performing badly before him or her, simply by issuing rulings in the matter which impose ramifications for the poor performance. Further, if the poor performance rises to the level of impacting the profession or resulting in a client receiving poor representation, it is hoped that any judge would feel comfortable and compelled to report the objectionable conduct to the appropriate disciplinary or registration commission of the offending counsel. In these matters, the elimination of required local counsel may actually make a determination as to culpability for client misrepresentation clearer.

**AN EXAMPLE FOR AN EFFICIENT, COST EFFECTIVE ALTERNATIVE TO REQUIRING LOCAL COUNSEL**

Advocating the elimination of required local counsel in federal cases isn’t new. (See, Proposals to Modify New York Court Rules Concerning the Engagement of Local Counsel and the Pro Hac Vice Admission of Attorneys, Report of the New York City Bar Committee on Professional Responsibility at <http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=35> March 30, 1998). Further, as that proposal notes, national bankruptcy practice has been advocated by a National Bankruptcy Review Commission (National Bankruptcy Review Commission, Final Report, 883 (Oct. 20, 1997)) <http://govinfo.library.unt.edu/nbrc/report/19admini.pdf>. It would be a step in the right direction to eliminate the requirement for local counsel and pro hac vice filing fees for attorneys representing governmental entities in bankruptcy courts. Such a modification could serve as a trial to evaluate how such a modification would work and as a way of decreasing the financial burden on governmental entities, which would benefit all citizens of those entities.

1. Article to be published in the American Bankruptcy Institute Journal. Reprinted by permission. [↑](#footnote-ref-1)
2. “An attorney applying to appear pro hac vice must designate a local member of the bar of this Court with whom the opposing counsel and the Court may readily communicate regarding the conduct of the case and upon whom papers shall be served. . . .

   Admission fee: $150.00” United States District Court for the Northern District of Georgia, Local Rule 83.1B [↑](#footnote-ref-2)
3. The resident attorney must sign the first pleading filed and at least participate in the initial hearing on the matter or as otherwise ordered by the court.

   United States Bankruptcy Court for the District of Colorado Local Bankruptcy Rule 9010-1(b) [↑](#footnote-ref-3)