

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

DONALD N. DAIEN,

Plaintiff,

vs.

BEN YSURSA, in his official capacity
as Secretary of State of Idaho,

Defendant.

CV 09-22-S-REB

ORDER

Currently pending before the Court are: (1) Plaintiff's application for Pro Hac Vice Appearance (Docket No. 2) and (2) Plaintiff's ex parte Motion to Waive the Local Counsel Requirements of Local Rule 83.4(a) and for Approval to Use the ECF Login and Password Obtained in Previous Case (Docket No. 3). In these two related motions, Plaintiff seeks *pro hac* admission for attorney, Robert Barnes, without designated local counsel. For the reasons set forth below, the Court denies the motion to the extent that the local counsel requirement will not be waived. Accordingly, the Application for Pro Hac Vice appearance (Docket No. 2) must also be denied for lack of local counsel. However, the denial is without prejudice, and Mr. Barnes may file a second application that complies with Local Rule 83.4(e) if he does so within a timely fashion.

I. STANDARD

Local Rule of Civil Procedure 83.4 provides the District of Idaho's rules governing the admission of lawyers to practice in this Court. "Only members of the bar of this Court may practice in this Court." Dist. Idaho Loc. Civ. R. 83.4(b). Moreover, "[a]dmission to and continuing membership in the bar of this Court is limited to attorneys of good moral character who are active members in good standing of the Idaho State Bar." Dist. Idaho Loc. Civ. R. 83.4(b). The only exceptions to this rule, outlined in Rule 83.4 (c) and (e), apply to attorneys for the United States and Federal Defender and attorneys from other jurisdictions who appear *pro hac vice* with the assistance of local counsel.

An attorney from another jurisdiction who wants to appear in the District of Idaho must associate with local counsel. Rule 83.4(e) provides as follows:

An attorney not eligible for admission under Dist. Idaho Loc. Civ. R. 83.4(a) hereof, but who is a member in good standing of and eligible to practice before the bar of any United States Court or of the highest court of any state . . . who is of good moral character, and who has been retained to appear in this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate in a particular case, and no certificate of admission must be issued by the Clerk.

The attorney filing *pro hac vice* must first (1) designate a member of the bar of this Court who maintains an office within this Court as co-counsel with the authority to act as attorney of record for all purposes, and (2) file with such designation the address, telephone number, and written consent of such designee. . . .

Dist. Idaho Loc. Civ. R. 83.4(e). The Local Rule further provides that local counsel must supervise the *pro hac* attorneys, sign all pleadings, and appear before the Court in all proceedings:

All pleadings filed with the Clerk of Court must contain the names and addresses and original signatures of the attorneys appearing *pro hac vice* and associated local counsel.

The designee must personally appear with the attorney on all matters heard and tried before this Court unless such presence is excused by the Court.

Id.

The Local Rule also provides that the application for *pro hac* admission is case-specific.¹ “Absent Court approval, an attorney who has been admitted *pro hac vice* for a particular case and received an ECF login and password, may not use these in a subsequent, unrelated case.” *Id.*

The motion filed by Plaintiff’s out-of-state counsel in this case, seeking a waiver of the local counsel requirement and approval to use an ECF login and password from a different case, indicates that counsel misapprehends the language of Rule 83.4(e). The language quoted above which states that “absent Court approval” does not allow an opportunity to avoid the requirement of associating local counsel for *pro hac vice* admission. Rather, it allows the Court to permit an attorney who has already received an ECF login and password in one case, to use it again in an unrelated case—the ECF “login and password” being the “these” items referenced in the rule. In contrast, the *pro hac* attorney must apply for *pro hac vice* admission in each case.

There are three primary reasons behind the local counsel requirement: (1) members of the local bar are familiar with the rules and customs of this court and are expected to educate *pro hac* attorneys on, and enforce, those rules and customs; (2) members of the local bar of this court are more readily available than *pro hac* attorneys for conferences or other matters which arise in the course of litigation, and; (3) the court looks to members of the local bar to serve as a liaison

¹ In fact, *pro hac vice* means “for this one occasion or particular purpose.” *See Black’s Law Dictionary* (7th Ed. 1999).

between it and *pro hac* attorneys and to ensure effective communications between the court and *pro hac* attorneys. See *Ingemi v. Pelino & Lentz*, 866 F.Supp. 156, 162 (D. N.J.1994) (citations and quotations omitted).

This Court recognizes the importance of the local counsel to the *pro hac vice* attorney. Each of the Court's district judges has emphasized the importance of the local counsel requirement and the real responsibilities that accompany a local counsel designation. See *Curtis v. Osmunson*, 2006 WL 435705 (unreported, J. Lodge) (“While the Court recommends [pro hac attorney] take time to become familiar with the Local Rules, the Court will definitely not excuse local counsel from appearing at any court proceedings in this case”); *U.S. v. Stock*, 2003 WL 744927 (unreported, J. Winmill) (“The Court does not take lightly [local counsel's] consent that he would act as local co-counsel with authority to act as attorney of record in this matter, and is concerned by [local counsel's] attempt to now remove himself from any responsibility for this case by representing that he was not involved with the case, never spoke with the [party], and was simply acting as a ‘sponsor.’”).

II. DISCUSSION

The instant lawsuit is a ballot-access case challenging the constitutionality of how the State of Idaho treats independent candidates for presidency. See *Complaint* (Docket No. 1). Plaintiff's counsel, Robert E. Barnes, asks the Court to waive the local counsel requirement for *pro hac vice* admission. Plaintiff provides the following reasons in support of his motion:

- (1) His law firm (the Bernhoft Law Firm) has regularly represented clients in ballot access-related matters, has previously represented the Plaintiff, and “Plaintiff has confidence in current counsel;”

- (2) the cost of retaining local counsel would be significant and substantial;
- (3) the issues raised in this case are issues of law and “procuring local counsel would only complicate and burden the litigation, not mitigate and minimize it;” and
- (4) counsel has appeared in an Idaho case before that continues to date and his “conduct in the previous proceeding demonstrates his familiarity with the local rules necessary to prosecute this case.”

Motion to Waive the Local Counsel Requirements if Local Rule 83.4(e) and for Approval to Use the ECF Login and Password Obtained in Previous Case (Docket No. 3).

Weighing the policy reasons behind the local counsel requirement against Defendants’ reasoning, the Court finds insufficient support to waive the local counsel requirement. The Court’s concerns regarding the importance of local counsel are not alleviated by Plaintiff’s representations concerning his attorney’s experience and skill in ballot-access related matters or his own assessment of what he believes to be the purely legal nature of the controversy, because these reasons do not speak to the importance of knowing the Local Rules, the local standards of behavior or mores in this district, or the accessibility of counsel. Because this reasoning is not directly relevant to the local counsel requirement, it cannot support a decision to waive the local counsel requirement.

As for the financial burden of retaining local counsel, such burden applies in all cases involving *pro hac* counsel. Thus, it does not provide independent rationale for waiving the local counsel requirement.

Finally, the Court notes that Mr. Barnes has appeared an unrelated matter in this district, representing another member of his firm, Robert G. Bernhoft. *See* CV 04-634-E-EFS. In

September 2005, Mr. Barnes applied for *admission pro hac vice* (Docket No. 39) with designated local counsel (Docket No. 59). The case remains active and Mr. Barnes continues to appear with designated local counsel. *See* Docket Nos. 127 - 128. Thus, it may be presumed, in the course of the last three and a half years, Mr. Barnes has become acquainted with the Local Rules.

Nonetheless, the instant motion, *Motion to Waive Local Counsel Requirements of Local Rule 83.4(e) and for Approval to Use the ECF Login and Password from Previous Case*, does not comply with the Local Rules. *See* Dist. Idaho Loc. R. 7.1(b) (“Each motion, other than a routine or uncontested matter, must be accompanied by a separate brief, not to exceed twenty (20) pages.”). Moreover, the Court is simply unpersuaded by the argument that a previous appearance in the district addresses the concerns of the local counsel requirement. Specifically, this judge is concerned with issues of accessibility and attorney discipline. The Court relies on local counsel to be readily accessible if required. In addition, the requirement that local counsel be involved, who will have continuing contact with opposing counsel and this Court, generally tends to increase the professionalism and courteousness of the proceedings. In turn, such professionalism and courteousness, coupled with accessibility, tends to lead to greater administrative efficiency, consistent with the Court’s always foremost emphasis on justice.

For the above reasons, Plaintiff’s request for a waiver of the local counsel requirement is denied, as is the Application for Pro Hac Vice Admission, as it does not include designated local counsel. Nonetheless, a new ECF login and password are not necessary and Mr. Barnes may use the login and password in this case, once he has associated with local counsel and filed an appropriate Pro Hac Vice application.

III. ORDER

In accordance with the foregoing, IT IS HEREBY ORDERED that:

(1) Plaintiff's ex parte Motion to Waive the Local Counsel Requirements of Local Rule 83.4(a) and for Approval to Use the ECF Login and Password Obtained in Previous Case (Docket No. 3) is GRANTED in part, in that Plaintiff's counsel may use the ECF login and password obtained in a previous case once he has made an acceptable application for Pro Hac Vice Admission, and DENIED in part, in that the Court will not waive the local counsel requirement for *pro hac* admission;

(2) Plaintiff's Application for Pro Hac Vice Admission (Docket No. 2) is DENIED without prejudice for lack of designated local counsel as required pursuant to Dist. Idaho Loc. R. 83.4(e); and

(3) Plaintiff's counsel shall have 30 days from the date of this Order in which to file an appropriate Pro Hac Vice Admission application, or show cause why the case should not be dismissed for failure to comply with applicable local rules of this Court.



DATED: February 9, 2009

A handwritten signature in black ink, appearing to read "Ronald E. Bush". The signature is written in a cursive style with a horizontal line extending from the end.

Honorable Ronald E. Bush
U. S. Magistrate Judge