

INTRODUCTION

A lawyer serving as ‘local counsel’ can easily be placed in a difficult, even conflicted, position as a result of obligations and expectations arising from three sources:

- (1) The Pennsylvania Rules of Professional Conduct make no distinction between local and lead counsel. Obligations owed to the client, including loyalty, confidentiality, competence, communication, and diligence, apply with full force to both local and lead counsel.
- (2) However, a client’s contact with ‘local counsel’ is generally limited.
- (3) Litigation ‘local counsel’ also has significant obligations to the court, notwithstanding any limited scope agreement with the client. Litigation ‘local counsel’ must address the significant obligations expected of that role.

DISCUSSION

1. Ethical Obligations of All ‘Local Counsel’ under Pennsylvania Rules of Professional Conduct

‘Local counsel’ in either transaction or litigation matters has undiminished fiduciary obligations to the client. The scope of such counsel’s professional services can be limited with client consent, but fiduciary duties such as loyalty and communication are not narrowed. Several decisions illustrate this.

In Bank Brussels Lambert (BBL) v. Fiddler, Gonzalez and Rodriguez (Fiddler), 305 F.3d 120, 125 (2d Cir. 2002), ‘local counsel’ in a transaction matter sought to excuse their failure to report relevant information [obtained in another matter] to the client, since the information was far outside

¹ The familiar term ‘local counsel’ is used as a convenience here to identify an attorney who is retained to provide assistance and support to ‘lead counsel’ in a matter. ‘Lead’ counsel is primarily responsible for the matter, and is usually the “supervisory” lawyer, and the ‘local’ counsel is usually the “subordinate” lawyer.

However, while the term ‘local counsel’ is commonly used, the term itself does not convey the significant responsibilities, particularly for litigation ‘local counsel,’ assigned by Rules of Civil Procedure and trial Court Rules. See, Alpha Pro Tech, Inc. v. VWR International LLC, E.D. Pa. Civil Action 12-1615. Memorandum Opinion, March 14, 2018, Hon. Gene E.K. Pratter.

their limited scope of professional service. The Second Circuit rejected the assertion of a narrowed scope of duty to report, and held:

“... [‘local counsel’} likely had no duty to seek out information beyond what was necessary for the limited task for which it was retained, [but] information material to the business decision of [the client] ... [which] came into [local counsel’s] possession ...” [must be reported.]

The court described ‘local counsel’s’ assertion as:

... a miserly view of an attorney’s duty of loyalty to his or her client ... *Id.*

Curb Records v. Adams & Reese L.L.P., 203 F.3d 828 (5th Cir. 1999) held that in some circumstances 'local counsel' must ignore lead counsel and report to the client directly. In that case, lead counsel chose a strategy of ignoring all court orders for discovery. 'Local counsel' was aware of this strategy, but did not inform the client. The court held:

... local counsel [may not] turn a blind eye toward the willful disregard of court orders by lead counsel when it should be evident to him that such conduct will seriously prejudice the client’s interests. Curb Records v. Adams & Reese L.L.P., 203 F.3d 828, *6 (5th Cir. 1999).

The court concluded that ‘local counsel’ must:

... report directly to its clients any known instances of malfeasance or misfeasance on the part of lead counsel that an objectively reasonable lawyer in the locality would conclude are seriously prejudicial to the client’s interests. *Id.*

2. Rule 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer

Rule 1.2(a) provides that the client determines the objectives of representation. Thereafter, the means to achieve the objectives are usually left to counsel; in large measure, counsel has authority to proceed.

Comments to Rule 1.2 state:

[2] ... clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation.

Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such advance authorization. The client may, however, revoke such authority at any time.

Thus, 'local counsel' can normally rely on the authority of lead counsel to proceed as lead counsel directs.

Rule 1.2(c) permits a client to provide informed consent to a limited scope of representation, provided the limits are reasonable under the circumstances.

Thus, a written agreement, with informed consent of the client, can properly limit the duties 'local counsel' owes to the client. However, as discussed below, litigation 'local counsel' has a continuing obligation to the court, which cannot be restricted by agreement with the client.

3. Client Communication – Engagement Letters

Clients expect efficient handling of their representation, without the expense of duplication by lead and 'local counsel.' The client may not expect, or even want, direct communication from 'local counsel,' Indeed, the Bar Association of the City of New York noted:²

... the long standing customary practice of lead counsel acting as intermediary between local counsel and the client ... [p.4]

In view of the authority of lead counsel over means, 'local counsel' can normally rely on lead counsel's instructions as to the manner of communication, the scope of the engagement, and the fee. Thus, in ordinary circumstances, there is no ethical imperative that 'local counsel' communicate directly with the client. After discussion and assurance of authority from lead counsel, an engagement arrangement between local and lead counsel would be ethically sufficient. And, the arrangement could ethically specify communication solely with lead counsel.

However, written communication with the client is always advisable for 'local counsel.' Direct communication reduced to writing reduces the risk of later disagreement with the client over the scope of engagement.³

² Formal Opinion 2015-4: "[Duties of Local Counsel](#)"

³ This Committee's Opinion 93-2 illustrates an instance where the lack of a clear statement of the scope of representation and allocation of responsibility may have obligated local counsel to incur expenses not contemplated.

The committee found that the Inquirer would not be so obligated if the client had been fully informed of local counsel's limited scope of representation, and had given informed consent to it.

See also, Joint Formal Opinion 2011-100, "[Representing Clients in Limited Scope Engagements](#)," issued jointly by this Committee and the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility.

4. Obligations of ‘Local Counsel’ in Litigation

Pennsylvania courts, both state⁴ and federal⁵, expect ‘local counsel’ to play an ongoing role in assisting the court to maintain efficient judicial administration. These impose a continuing obligation to the court, even when the client has consented to a narrower scope of responsibility. The obligations placed by courts on ‘local counsel’, including as officers of the court, are not necessarily limited to the requirements imposed by the Rules of Professional Conduct.

Thus, obligations to the court often require that ‘local counsel’:

- Sponsor or “vouch for” lead counsel, as reputable and competent when seeking pro hac vice admission of lead counsel;
- Sign (and accept service of) all filings, meaning that ‘local counsel’s’ good name stands behind all submissions to the court;⁶
- Continue to participate in the litigation in a variety of ways.

This obligation to the court is illustrated by Alpha Pro Tech Inc. v. VWR International, LLC, E.D. Pa. Civil Action 12-1615, Memorandum Opinion March 14, 2018. The Court held that because of their ongoing obligation to the court 'local counsel' shared responsibility for lead counsel’s persistent misconduct. The court also held that the proper remedy for the client would be a claim against both lead and ‘local counsel’.

The Memorandum noted that lead counsel for Alpha Pro "consistently flouted the Court's deadlines. As the case wore on the Court repeatedly admonished [lead counsel] both in oral arguments and in written opinions, for its disregard of Court order and procedures." (Memorandum p 1, 2)

⁴ Pa Rule of Civil Procedure 1012.1. "... the sponsor shall remain the attorney of record for that party, and shall sign and serve, or be served with as the case may be, all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the court unless excused by the court. Attendance of the sponsor at a deposition in discovery shall not be required unless ordered by the court."

The explanatory note to subdivision (d) expresses an obligation of local counsel: "... to supervise the candidate [lead counsel] once admitted." Such a duty to supervise can best be read as limited to assuring compliance of lead counsel with applicable Court Orders and Rules of Civil Procedure.

⁵ Eastern District of Pennsylvania, Local Rule 83.5.2(a) “any attorney who is not a member of the bar of this court shall, in each proceeding in which that attorney desires to appear, have as associate counsel of record a member of the bar of this court upon whom all pleadings, motions, notices and other papers can be served conformably to the Federal Rules of Civil Procedure and rules of this court."

⁶ Rule 11, Federal Rules of Civil Procedure, states that "by presenting [a document] to the court --- whether by signing, filing, submitting or later advocating it --- an attorney ... certifies that the document presented [meets all requirements of Rule 11] to the best of the person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances."

As to 'local counsel', the court acknowledged that "... [they were] barely involved in this litigation..." [Memorandum fn 1]. Nonetheless, the court held that "local counsel continued to have responsibility for the matter during its pendency before this Court." *Id.*

Subsequently, Judge Pratter denied a Motion for Re-consideration filed by 'local counsel' on behalf of the client. In the opinion [2018 WL 1693347], the court identified the factors relating to the obligations of 'local counsel.' The court confirmed its original analysis, noting the expenses to the adverse party if re-consideration were held to be an appropriate remedy.

Absent a pattern of lead counsel "disregard for Court order and procedures," some courts have been reluctant to require 'local counsel' to closely monitor lead counsel, acknowledging increased legal cost to the client. In Macawber Engineering, Inc. v. Robson and Miller, 47 F.3d 253 (8th Cir. 1995), 'local counsel' was held not responsible for a failure of lead counsel to timely respond to Requests for Admission, which resulted in the grant of Summary Judgment. The Requests for Admission had not been served on 'local counsel', but only on lead counsel. The court found that 'local counsel':

... [had] no inherent duty to monitor ... conduct of lead counsel, 47 F.3d 253, 257 [if 'local counsel' were required to monitor], the costs involved in retaining 'local counsel' would increase substantially ... 'local counsel' would be forced to review all manner of litigation documents and ensure compliance with all deadlines. *Id.*

Thus, practitioners should recognize that courts mandate an on- going role for 'local counsel'. Where lead counsel is found by the court to have shown "disregard of Court order and procedures", 'local counsel' should anticipate that they may also be found partly responsible, notwithstanding any consent by the client that no duty to monitor exists.

As a practical first step, before accepting a litigation 'local counsel' representation, a lawyer should carefully evaluate both the prospective client and lead counsel.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.