

Contractually Narrowing the Duties and Liability of a Mail Drop Local Counsel

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Most firms acting as local counsel function as mere mail drops or conduits for *pro hac vice* counsel. In one matter successfully pursued by the authors' firm, however, the court found triable issues of fact regarding the scope of duty of a mail drop local counsel, acknowledging that local counsel has a general duty to supervise *pro hac vice* counsel and to provide expertise regarding local laws, procedures, and customs.¹

Those duties can surprise a firm that views its role as limited. Realistically, many out-of-state firms procure local counsel only in grudging compliance with state and federal rules.² That attitude may flow from a firm's business clients, whose experience in the era of express mail and the Internet may lead them to view local counsel requirements as a costly vestige of a less mobile era.³ Given those attitudes, it's no wonder when a client's chosen counsel directs unwanted local counsel to simply sign pleadings without asking questions.⁴

However, unless the direction and limitation of local counsel's responsibilities come directly from the client, local counsel may be exposed to liability in the event of malpractice. This article examines local counsel's obligations, and considers how local counsel contractually might narrow the scope of his or her professional duties, to bring potential legal malpractice exposure in line with those limited powers.

What New Jersey Court Rules Expect From Local Counsel

Any comforting visions local counsel might have about the scope of their duties (and thus their potential malpractice exposure) evaporate upon even a casual reading of Rule 1:21-2(c)(4). Under that rule, a firm admitted *pro hac vice* shall:

have all pleadings, briefs and other papers filed with the court signed by an attorney of record authorized to practice in this

State, who shall be held responsible for them and for the conduct of the cause and for the admitted attorney therein. The order [admitting counsel *pro hac vice*] may contain further requirements concerning the participation of New Jersey counsel as the court from time to time deems necessary.⁵

Thus, aside from being substantively responsible for the content of pleadings, local counsel also is responsible for what the rule calls "the conduct of the cause."⁶ Responsibility for the conduct of the cause is no small matter. New Jersey case law traditionally has treated that phrase as synonymous with "the labor of managing the cause."⁷ Although *pro hac vice* counsel may seek a local firm to serve as a mere mail drop, court rules require that the local firm take a greater role.

State courts, however, provide relatively little insight into the practical construction and application of the local counsel rule—most likely because litigation involving out-of-state parties is less common in state than in federal court. Suffice it to say that the few cases discussing the role of local counsel emphasize that "strict application" is mandated, and that courts must "vigilantly scrutinize" the conduct of all counsel.⁸

What Local Federal Rules Expect From Local Counsel

If local counsel is handling a matter in federal court, that firm must comply with both state and local federal rules.⁹ The local federal rule is not a carbon copy of the state rule, but it similarly imposes specific duties and a general role:

[After an out-of-state counsel has successfully moved to be admitted *pro hac vice*, if] it has not been done prior to the granting of such motion, an appearance as counsel of record shall be filed promptly by a member of the bar of this Court upon whom all notices, orders and pleadings may be served, and who shall promptly notify his or her specially admitted associate of their receipt. Only an attorney at law of this Court may file papers, enter appearances for parties, sign stipulations, or sign and receive payments on judgments, decrees or orders.¹⁰

Like the state rule, the local federal rule refers to local counsel as counsel “of record,” and requires the local firm to sign all pleadings.¹¹ The local federal rule broadens local counsel’s role by adding further specific duties (*e.g.*, providing that only local counsel may “enter appearances for parties”).¹² Because it does not expressly impose an overall managerial duty of conduct of the cause, the federal rule plausibly might be construed as setting forth a narrower scope of duty than the state rule.¹³

However, although the local federal rule does not impose a managerial duty on its face, federal courts have inferred it. In one case, the local federal rule was held to impose an obligation “to supervise the conduct” of *pro hac vice* counsel.¹⁴ In another, the court did not directly address the issue of whether the local federal rule imposed a supervisory role. Instead, the court simply noted that the equivalent state rule required *pro hac vice* counsel to be “adequately supervised” by local counsel, and accepted that state standards governing the practice of law are applicable in federal court.¹⁵

New Jersey’s federal courts have laid out local counsel’s duties, as follows:

First, members of our Bar are familiar with the rules and customs of this

Court and are expected to both *educate pro hac vice attorneys on, and enforce, those rules and customs*. Second, members of the Bar of this Court are more readily available than *pro hac vice* attorneys for conferences or other matters which arise in the course of litigation. Third, the Court looks to members of its Bar to serve as liaison between it and *pro hac vice* attorneys and to ensure effective communication between the Court and *pro hac vice* attorneys.¹⁶

Federal courts treat the duties to “educate” and “enforce” as considerably more than casual guidelines: Breach of those duties has been held to be grounds for disciplinary penalties as well as malpractice liability.¹⁷

Contractually Narrowing the Scope of Local Counsel’s Duty

The most obvious means of narrowing the scope of local counsel’s duties (and malpractice liability) is under the Rules of Professional Conduct, which provide that an attorney generally “may limit the scope of his representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁸ Under that provision, local counsel may sign a retainer agreement with the client, actively releasing local counsel of the duties to educate, supervise, manage, and enforce local rules, and instead ceding all practical control of the case to the client’s chosen out-of-state counsel. It cannot be stressed enough that the limitation must be signed by the client after consultation, as opposed to *pro hac vice* counsel, in order for the limitation to comply with the Rules of Professional Conduct.

New Jersey case law on the whole has no objection to limited representation, so long as the limits are objectively reasonable, and the client provides informed consent.¹⁹ However, no New Jersey state or federal court has express-

ly ruled upon contractual limits on representation by local counsel.

In at least two other jurisdictions, courts have approved contractual limitations upon the scope of local counsel’s duty.²⁰ Unlike New Jersey, however, local rules in those jurisdictions do not require local counsel to assume any sort of managerial role. Rather, they appear to presume that local counsel will be a passive messenger or mail-drop, unless he or she expressly assumes broader duties.²¹ Thus, such cases assist little in deciding whether a retainer agreement can be used to free local counsel from supervisory duties under New Jersey’s rules. Closer on point is *Armor v. Lantz*, which discusses New Jersey federal precedent, and holds that a client may contractually limit the duties of local counsel. Any limitation must be only to the extent permissible by local *pro hac vice* rules, which seek to ensure good communication and competent representation.²²

In light of the cited portion of the rules and New Jersey precedent, as well as cases from other jurisdictions, local counsel may enter into a retainer agreement with the client placing “reasonable” limits upon the scope of his or her duty under New Jersey law. Contractual limits upon the scope of an attorney’s duty necessarily place equivalent limits on the scope of the attorney’s malpractice liability.²³ Accordingly, the remaining question is: What contractual limits upon the scope of local counsel’s duties are reasonable, and thus permissible?

The Reasonable Needs of the Client and the Court

In determining which restrictions upon the scope of local counsel’s representation are reasonable, one must look at an out-of-state client’s reasonable needs.

Paying for two different law firms’ services can be expensive, and a client seeking to limit local counsel’s role is frequently seeking to limit local counsel’s