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Legal Duties of Local Counsel

It starts as a call from an out-of-state attorney advising that his client has been sued in your venue, and asking you to assist him by serving as local counsel. The out-of-state attorney instructs that he will direct the handling of the case, will have sole contact with the client and your role will be to assure all court filings comply with the local rules.

As local counsel, what duties do you owe to the client? They vary greatly from state to state; however, the mistake of failing to report malfeasance by lead counsel can turn out to be very costly. This article will review various positions taken by courts across the country, and also provide a best practices checklist.

Local Counsel Owes Same Duty to the Client as Lead Counsel

In Louisiana, a legal malpractice case arose out of a defense firm's role as local counsel in a copyright suit pending in Louisiana. *Curb Records v. Adams & Reese LLP*, 1999 U.S. App. LEXIS 39003, No. 98-31360 (5th Cir. Nov. 29, 1999). Curb Records' ("Curb") hired lead counsel from California to handle its affairs. Curb instructed lead counsel that he could hire local counsel however he saw fit. California counsel hired a regional defense firm to serve as local counsel in the copyright litigation as required by the Louisiana court's local rules. California counsel made it clear to the Louisiana attorney that his role as local counsel was "limited to filing and forwarding pleadings, discovery and orders" and further, that they were "not to deal directly with the client." *Id.* at *5. In furtherance of a "low profile" litigation strategy, California counsel instructed local counsel not to respond to discovery requests.

Local counsel complied with California counsel's instructions and took no action to inform the client because lead counsel did not permit direct client communication. The trial court issued multiple discovery orders, and with no response from California counsel or local counsel, the trial court imposed monetary sanctions on Curb. California counsel paid the fines by personal check, but the record was unclear whether or not Curb was aware of the sanctions. Counsel's lack of diligence also resulted in the trial court striking Curb's defenses on the motion of the plaintiff. Lacking any defenses to the copyright lawsuit, Curb was forced to agree to an unfavorable settlement.

In Curb's subsequent legal malpractice action against the local counsel, the district court granted the local attorney's motion for summary judgment, finding no basis for the malpractice claim. Relying on fundamental principles of contract and agency law, the district court found that California counsel, as Curb's agent, was authorized to act without limitation on Curb's behalf, and local counsel was retained subject to very specific limitations. The district court refused to "imply a duty that simply does not exist" and further held that local counsel "had absolutely no superior duty to disregard and violate the terms of their mandate with California counsel." *Id.* at *11.

However, on appeal, the Fifth Circuit overturned the summary judgment. The Fifth Circuit cited multiple examples in which Louisiana courts recognized that the relationship between an attorney and a client is more than a contract. Implicit in the relationship is a “trust status of the highest order” that imposes a duty on the local attorney to the client. The Fifth Circuit held that the district court erred “in relying solely on general principles of contract and agency law in defining the duties owed by [local counsel] to [a client].” *Id.* at *13.

Taking it one step further, the Fifth Circuit was forced to make an “*Erie* guess” regarding whether the local counsel’s duty to the client required that local counsel apprise the client of the foreign lead counsel’s malfeasance or misfeasance, once the local counsel became aware of it. The Fifth Circuit was persuaded that local counsel, as the professional with the greatest knowledge of the law and rules of the local court, has a duty to ensure that the client is properly informed. The Louisiana Rules of Professional Conduct also impose duties to keep the client reasonably informed and to give the client sufficient information to participate intelligently in decision making. As a result, the Fifth Circuit found that local counsel owes a “*nondelegable duty to report directly to its client 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.* at *19-20.

Similarly, an Ohio federal court has also expressly recognized “[t]he trend is away from the view that some counsel have only limited responsibility and represent a client in court in a limited capacity, or that the local counsel is somewhat less the attorney for the client than is the lead counsel.” *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1125 (N.D. Ohio 1990).

Finally, a Delaware federal court imposed sanctions on local counsel under Rule 11, finding that because local counsel’s signature was on the majority of filed documents “their culpability [wa]s on par with that of out of town counsel. Local counsel should not only be reading documents that they sign as per Rule 11, but be familiar enough with the relevant law to satisfy the requirements of Rule 11.” *Vehicle Operation Techs. LLC v. Am. Honda Motor Co.*, 67 F. Supp. 3d 637, 655 (D. Del. 2014).

Local Counsel’s Duty to the Client Can Be Limited

Not all states recognize duties such as those that the Louisiana and Ohio courts seem to impose on local counsel. Some jurisdictions recognize that an attorney’s duty to his or her client can be limited by the terms of the attorney-client relationship. For example, in *State v. Layton*, 189 W. Va. 470 (1993), a criminal client chose to proceed *pro se* with limited assistance provided by so-called “standby counsel.” Once convicted, the client alleged ineffective assistance of counsel. However, the West Virginia Supreme Court of Appeals rejected the claim of the client, Layton, stating, “[t]o prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented criminal defendant must show that counsel failed to perform competently *within the limited scope of duties assigned to or assumed by counsel.*” *Id.* at 486 (quoting *People v. Bloom*, 774 P. 2d 698, 717-18 (Cal. 1989)).¹

In another West Virginia case, *Armor v. Lantz*, 207 W. Va. 672, 682 (2000), the court held that local counsel’s duties to the client may be limited based upon the specific responsibilities assigned to local counsel.

The Eighth Circuit, discussing Minnesota law, ruled that local counsel does not automatically incur a duty of care with respect to the entire litigation. *Macawber Engineering, Inc. v. Miller*, 47 F.3d 253, 257-258 (8th Cir. 1995). This ruling considered the practical approach that the cost of litigation to a client, if local counsel must also perform a detailed review of all work of the lead counsel, would make an already expensive endeavor wholly unaffordable for some clients. *Id.*

In Mississippi, the court permits local counsel to act in a limited role. In *Forbes v. St. Martin*, 145 So. 3d 1124 (Miss. 2014), a Louisiana attorney “associated” a Mississippi attorney to prosecute Forbes’ civil personal injury claim. The personal injury claim was settled. However, the plaintiff then filed a professional liability claim asserting that both the Louisiana and Mississippi attorneys had breached their fiduciary duties. One of the allegations pertained to provisions of the contingency fee agreement between the Louisiana attorney and his client; specifically, a provision that addressed recovery of costs advanced to the client. This provision was permissible in Louisiana, but violated the Mississippi Rules of Professional Conduct. After the trial judge granted the attorneys’ Motion for Summary Judgment, the Mississippi Court of Appeals

¹ The “exoneration rule” also might be applicable in civil cases, requiring the criminal defendant to prove but for his defense attorney’s negligence the defendant would have been acquitted.

reversed in an opinion critical of both the Louisiana referral attorney and the Mississippi local counsel. However, the Mississippi Supreme Court later reversed the Court of Appeals and reinstated the trial court's summary judgment.

So What Is an Attorney Who is Hired as Local Counsel to Do?

First, know the rules of your jurisdiction regarding the duties of local counsel. Many states require that a visiting attorney "associate" a permanent member of the local bar, and that the duties of local counsel are specified in the arrangement. Further, be aware of the stringent obligations Rule 11 places on all counsel signing pleadings, however designated.

Second, regardless of the restrictions imposed by your foreign lead attorney, thoroughly review the file materials, specifically the attorney-client engagement letter or contingency fee contract, to ensure compliance with the ethical rules of your state.

Third, draft your engagement letter with lead referral counsel, specifying your role and any limitations on your duties. Consider your compensation arrangement, whether you are being paid by the lead referral counsel, or by the client. In addition, have the client sign the engagement letter detailing your limited role as local counsel.

Finally, when in doubt, err on the side of caution by always acting in the best interest of the client.

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