

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

Formal Opinion 2015-4: Duties of Local Counsel

TOPIC: Duties of Local Counsel

DIGEST: Attorneys who act as “local counsel” are subject to the same ethical rules as all lawyers. An attorney who is retained as local counsel may circumscribe her role by entering into an agreement to limit the scope of representation, provided the agreement complies with Rule 1.2(c). It is the attorney’s obligation to communicate to the client any limits on the scope of the representation, rather than to rely on undefined terms, such as “local counsel.” Any limitations to the scope of representation must be reasonable under the circumstances and the client must give informed consent. Local counsel must also comply with any relevant court rules governing the responsibilities of counsel. Such rules are beyond the scope of this Committee’s jurisdiction, which is limited to interpreting the New York Rules of Professional Conduct (the “New York Rules” or the “Rules”).

RULES: 1.1, 1.2(c), 1.3, 1.4, 1.5(g)

QUESTION: To what extent may New York attorneys hired as local counsel circumscribe their role by entering into an agreement to limit the scope of the representation?

OPINION

I. Introduction

Lawyers have traditionally used the designation “local counsel” to describe an attorney who provides assistance and support on a matter – usually, but not always, a litigation – within that attorney’s jurisdiction, where the attorney who is primarily responsible for the matter (i.e., the “lead counsel”) practices in a different jurisdiction. Yet, the New York Rules do not, on their face, distinguish between different categories of lawyers, such as “lead counsel” or “local counsel.” All lawyers, for example, are ethically obligated to provide “competent” and “diligent” representation to their clients (Rules 1.1 and 1.3), to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and to “keep the client reasonably informed about the status of the matter” (Rule 1.4). Merely being designated as “local counsel” does not necessarily limit the attorney’s role, nor does it narrow her ethical obligations to the client. Consequently, an attorney who agrees to act as local counsel may be subjected to obligations and risks that she does not anticipate or intend to assume. For example, an attorney who is asked to serve only as an office for the service of process may be held responsible when discovery deadlines are missed or important developments are not communicated to the client.¹ New York attorneys may reduce some of these risks by entering

¹ A recent example involves a District of Columbia attorney who was disciplined for failing to ensure that lead counsel timely served the complaint in a personal injury case. *See In Re Fay*, No. 14-BG-7 (March 19, 2015) (informal admonition). The Committee rejected Mr. Fay’s argument that he never entered into an attorney-client relationship, noting that Mr. Fay “authorized the filing of [the] complaint with his signature and bar number and

into an agreement to limit the scope of representation. *See* R. 1.1, Cmt. [5] (explaining that the work required to provide competent representation varies depending on the complexity of the matter, but that “[a]n agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c)”).

II. Using Rule 1.2(c) to Define the Role of Local Counsel

An attorney who wishes to define her role as local counsel should do so through an agreement to limit the scope of representation under Rule 1.2(c). Such a limited scope agreement does not absolve a lawyer from complying with her ethical duties. Rather, it narrows the universe within which those ethical obligations apply, by limiting the lawyer’s role in the matter and specifying the tasks she is expected to perform. In the performance of those tasks, however, the lawyer must still fulfill her ethical obligations, including acting competently and diligently, and communicating with the client about developments that are relevant to the representation. *See generally* Rules 1.1, 1.3 and 1.4.

There are many sensible reasons to limit the scope of local counsel’s role. As explained in Comment [6] to Rule 1.2, “[a] limited representation may be appropriate because the client has limited objectives for the representation.” One purpose of using local counsel is to allow the client to have the attorney of his choice provide the bulk of the legal services, even though that attorney is not admitted in the relevant jurisdiction. In those circumstances, requiring local counsel to duplicate the role of lead counsel would subject the client to unwanted costs and create unnecessary confusion about litigation strategy. A written agreement that clearly limits the role of local counsel can benefit all parties by managing expectations, avoiding misunderstandings about the scope of the lawyer’s responsibilities, minimizing disputes over the allocation of responsibility between lead counsel and local counsel, and managing costs.

It is the lawyer’s obligation to ensure that her role as local counsel is clearly defined and that any limitations on the scope of representation are communicated to the client. Rule 1.2(c) requires that the client give “informed consent” to the limited scope representation. In addition, any limitation on the scope of representation must be “reasonable under the circumstances.”² Below, we discuss how each of these requirements applies in the local counsel context.

later initiated and filed an additional pleading in which he identified himself as the [plaintiff’s] attorney.” In addition, the Committee noted that Mr. Fay “was aware that he was the only counsel of record in [the] case who was licensed to practice law in the District.” Thus, he “was responsible for [the case] in the event that [lead counsel] failed to adequately pursue it.”

² Rule 1.2(c) also requires that the attorney provide notice to the tribunal and/or opposing counsel of the limited scope of the representation “where necessary.” Neither the Rule nor the comments elaborates on when notice is necessary under Rule 1.2(c). The Professional Ethics Committee of the New York County Lawyer’s Association (“NYCLA”) has opined (in the context of a lawyer ghostwriting for a client) that the phrase “where necessary” means that a lawyer must disclose the limited scope of his representation where required by a court rule or order, or in any other situation where nondisclosure constitutes a misrepresentation or other violation of the Rules. *See* NYCLA Op. 742 (2010). We agree with this interpretation. An attorney hired as local counsel is responsible for advising the court and opposing counsel of her limited role.

A. The Client Must Give “Informed Consent” to the Limited Scope Representation

Rule 1.0(j) defines “Informed Consent” as an agreement to a “proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.” R. 1.0(j). As explained in Comment [6] to Rule 1.0, the “communication necessary to obtain [informed] consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent.” Further, the “lawyer must make reasonable efforts to ensure that the client . . . possesses information reasonably adequate to make an informed decision.” R. 1.0, Cmt. [6]. The lawyer is generally required to disclose “the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of the proposed course of conduct” and to discuss the client’s “options and alternatives.” *Id.* Specifically, with respect to Rule 1.2(c), obtaining “informed consent requires the lawyer to ‘disclose the limitations on the scope of the engagement and the matters that will be excluded,’ as well as ‘the reasonably foreseeable consequences of the limitation.’” R. 1.2, Cmt. [6A].

Any agreement to limit the scope of an attorney’s representation carries certain risks for the client. For example, an agreement that limits local counsel’s role to appearing only at routine status conferences may save the client money, but also means that local counsel is probably not double-checking lead counsel’s filings to ensure that they are accurate or otherwise monitoring lead counsel’s conduct. While such a limitation may be reasonable under the circumstances where lead counsel is admitted *pro hac vice* and is signing his own filings, the client may prefer local counsel to have a more expansive role as an added measure of protection. By contrast, local counsel may have an agreement to review the *legal* analysis in lead counsel’s filings, but not independently to verify the underlying facts supporting those papers. Although such a limitation may be reasonable under the circumstances (as discussed further below), local counsel will not be acting as a back-stop against factual inaccuracies in lead counsel’s filings. In each of these circumstances, the attorney should explain the “material risks” and “reasonably available alternatives” before obtaining the client’s consent to the limited scope representations. R. 1.0(j).

Although Rule 1.2(c) does not require the client’s “informed consent” to be in writing, Rule 1.5(b) requires lawyers to “communicate to a client the scope of the representation” and to do so “in writing where required by statute or court rule.”³ Even where a writing is not required, the better practice is to obtain the client’s consent in writing. Preferably, local counsel will enter into an independent written retainer agreement with the client setting forth the responsibilities that local counsel will handle. We recognize, however, that local counsel are often retained by lead counsel, rather than directly by the client. This lack of communication between local counsel and the client raises concern about whether the client is in a position to give “informed

³ New York does have a court rule that requires written letters of engagement in most circumstances. *See* 22 NYCRR Part 1215 (requiring written engagement letter or retainer agreement except where (a) the fee is expected to be less than \$3000; (b) the representation is of the same general kind as previously rendered to and paid for by the client; (c) the representation is a domestic relations matter subject to Part 1400; (d) the attorney is admitted to practice in another jurisdiction, maintains no office in New York, and no material portion of the services are to be rendered in New York.

consent” to the limited representation. *See* N.Y. City 2014-1 (2014) (noting that “[i]f the Lawyer is not communicating directly with the client . . . the Lawyer may not be in a position to determine whether the limits on the representation are ‘reasonable under the circumstances’ or to obtain ‘informed consent’ from the client”). Nevertheless, given the long-standing, customary practice of lead counsel acting as intermediary between local counsel and the client, we believe a written agreement between local counsel and lead counsel may fulfill the requirements of Rules 1.2(c) and 1.5(b), provided lead counsel obtains the client’s “informed consent” to that agreement.⁴

B. The Limitations Must Be “Reasonable Under the Circumstances”

Although Rule 1.2(c) gives lawyers and clients significant flexibility in defining the scope of representation, any limitations must be “reasonable under the circumstances.” As noted in Comment [7] to the Rule, “an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”⁵ Below are some examples of reasonable and unreasonable limitations on the scope of representation for local counsel.

- A local counsel is asked to file a *pro hac vice* motion on behalf of an out-of-state lawyer in a multimillion dollar securities action, but not to perform any other work on the case once the out-of-state lawyer is admitted. In our view, local counsel may reasonably limit her representation to preparing and filing the *pro hac vice* motion. Although she must execute that task competently, she does not assume a broader duty to take further action on behalf of the client.
- A local counsel is asked to review the legal analysis in a summary judgment motion prepared by lead counsel, but to assume that the factual recitations are accurate. In our view, local counsel may reasonably limit her representation to reviewing the legal argument and may exclude any obligation to verify factual information provided by lead counsel. Despite this limitation, however, she may not ignore obvious factual inaccuracies contained in the motion papers.
- A local counsel is asked to sign her name to a complaint prepared by lead counsel and file it with the court, even though she believes the causes of action are not supported by the factual allegations in the complaint. In our view, local counsel cannot reasonably limit the representation to exclude her ethical duty to avoid filing frivolous claims. *See* R. 3.1(a) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”).

⁴ Local counsel should also be mindful of how her fee will be paid. If she is being paid a share of the lead counsel’s fee, she must comply with Rule 1.5(g), which governs the division of fees between lawyers.

⁵ Although a limited scope representation may have the practical effect of limiting the lawyer’s malpractice liability (by virtue of limiting the services the lawyer is expected to provide to the client), a lawyer may not enter into an agreement that expressly limits her legal malpractice liability. *See* R. 1.8(h)(1) (“A lawyer shall not . . . make an agreement prospectively limiting the lawyer’s liability to a client for malpractice”).

Certain ethical obligations may not be limited by contract. For example, a lawyer may not agree to circumvent rules concerning candor to the court or to third parties. *See, e.g.*, R. 3.3 (Conduct Before a Tribunal); R. 3.4 (Fairness to Opposing Party and Counsel). In addition, the lawyer should consider the impact of local court rules, as well as the judge's individual rules and procedures, on the scope of representation. For example, many judges require that an attorney with knowledge of the case appear at all conferences. Accordingly, a local counsel who represents the client at court conferences must have sufficient knowledge of the case to comply with these requirements, regardless of the terms of her retainer agreement.

Having assumed responsibility for certain tasks, local counsel is obligated to keep the client informed of any developments relating to those tasks. R. 1.4(a)(3) ("A lawyer shall . . . keep the client reasonably informed about the status of the matter."). The limited scope agreement should specify who will be responsible for communicating with the client about these tasks. Assuming the agreement delegates that role to lead counsel, local counsel may reasonably rely on lead counsel's representations that he has conveyed the information to the client. Nevertheless, local counsel cannot completely abdicate responsibility for ensuring that the client receives the information. In our view, such a limitation would not be reasonable under the circumstances. Therefore, if local counsel knows or has reason to know that lead counsel is not adequately updating the client concerning the case, she must take steps to remedy the omission, even if it means bypassing lead counsel and communicating directly with the client.

III. Conclusion

Attorneys who act as "local counsel" are subject to the same ethical rules as all lawyers. An attorney who is retained as local counsel may circumscribe her role by entering into an agreement to limit the scope of representation, provided the agreement complies with Rule 1.2(c). It is the attorney's obligation to communicate to the client any limits on the scope of the representation, rather than to rely on undefined terms, such as "local counsel." Any limitations to the scope of representation must be reasonable under the circumstances and the client must give informed consent. Local counsel must also comply with any relevant court rules governing the responsibilities of counsel. Such rules are beyond the scope of this Committee's jurisdiction, which is limited to interpreting the New York Rules.