

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

by David A. Mazie and Ben-David Seligman

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.<sup>1</sup>

**T**hose 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.<sup>2</sup> 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.<sup>3</sup> Given those attitudes, it's no wonder when a client's chosen counsel directs unwanted local counsel to simply sign pleadings without asking questions.<sup>4</sup>

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.<sup>5</sup>

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."<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup>

## 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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").<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

### **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."<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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

billing. One court advocating restrictions upon local counsel's role captured that concern, noting:

[Where] confronted with a duty to monitor lead counsel's handling of the litigation, local counsel would be bound to review all manner of litigation documents and ensure compliance with all deadlines. Out-of-state litigants would be forced to pay a local attorney to review lead counsel's work. Given the skyrocketing costs of litigation, the duplication of effort and increased fees that would result from such a rule foster problematic public policy.<sup>24</sup>

Conversely, a client paying for the services of local counsel would not reasonably desire that counsel's role be limited to the point of uselessness. A client expecting local guidance can be unpleasantly surprised by a local firm that—of its own accord—assumes an unreasonably circumscribed role, to the extent that the local firm becomes, in the words of one New Jersey litigant, a “potted plant.”<sup>25</sup>

In addition to client costs, the right of the client to the counsel of his or her choice also is a concern. One court permitting contractual restrictions upon the scope of local counsel's duty noted:

[A] client's trust and confidence may reside primarily with an out-of-state lawyer. In such circumstances, an active role undertaken by local counsel could appear to erode the intentions of the client...[Where a lawyer is] expressly hired to play only a limited role in a certain matter...to impose liability in such a circumstance would be contrary to the knowledge and agreement of the contracting parties.<sup>26</sup>

The key issue, however, is the client's choice. In order for local counsel's role to be restricted—from at least a malprac-

tice perspective—the limitation must be spelled out clearly in the retainer agreement, after consultation with the client.<sup>27</sup> If the limitation of local counsel's role is not carried out in this manner, the limitation may be ineffective, and local counsel may be deemed jointly responsible with *pro hac vice* counsel for the entire case.

### Conclusion: How Can Local Counsel's Role Be Restricted?

Given the needs of the client, a court may honor certain restrictions upon the scope of local counsel's duty as a means of reducing client costs, and in deference to the out-of-state client's desire to place primary reliance upon the *pro hac vice* counsel whom he or she knows and trusts.<sup>28</sup> However, if only for the sake of its own convenience, a court would *not* be eager to honor restrictions upon local counsel's duties where the restrictions would leave the court to deal with *pro hac vice* counsel who are lost regarding the applicable local laws.

While reasonableness is necessarily decided on a case-by-case basis, the following guidelines are rooted in case law and applicable authorities:

- The client (not *pro hac vice* counsel) must give informed consent to any restrictions upon the scope of local counsel's representation.<sup>29</sup>
- Those limitations should be set forth in a formal retainer agreement between the client and local counsel.<sup>30</sup>
- Local counsel should *not* limit his or her duty to oversee *pro hac vice* counsel *unless* he or she is familiar with New Jersey law, or has the resources to become fully familiar with all applicable laws and procedures.<sup>31</sup>

Beyond those guidelines, one matter is certain: Where a mail-drop local counsel does *not* obtain proper informed consent for his or her restricted role, he

or she acts at his or her own peril. ☺

### Endnotes

1. See Henry Gottlieb, Local Counsel Malpractice Suit Settled by Insurers for \$1.4M, *New Jersey Law Journal*, Dec. 13, 1999, at 6; see also *Ingemi v. Pelino & Lentz*, 866 F. Supp. 156, 162 (D.N.J. 1994) (quoting *Hofman v. Marino Games*, No. 90-267 (D.N.J. Oct. 31, 1990) (Hedges, J.) (providing a general introduction to local counsel's duties to supervise and provide expertise); Allyn Z. Lite, *New Jersey Federal Practice Rules*, cmt. 4d to L.Civ.R. 101.1, at 292-94 (2005 edition) (reviewing local counsel's duties).
2. See R. 1:21-2(c)(4) (formerly R. 1:21-2(b)(4)); L. Civ. R. 101.1(c)(3) (formerly District Court Rule 4(c)).
3. The local counsel requirement was viewed by at least one district court as obsolete 20 years ago. See *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 104-05 (D.N.J. 1985) (calling local counsel requirement “an anachronism,” but nonetheless holding local counsel responsible for the disciplinary violations of lead counsel).
4. The client's choice should not be taken lightly. In instances where a client's “trust and confidence... reside primarily with an out-of-state lawyer,” then “an active role undertaken by local counsel would appear to erode the intentions of the client.” *Armor v. Lantz*, 535 S.E.2d 737, 749 (W. Va. 2000).
5. R. 1:21-2(c)(4) (formerly R. 1:21-2(b)(4) (emphasis added)).
6. See also *Ingemi, supra*, note 1 at 161 (applying Rule 1:21-2 to hold local counsel responsible for the “conduct of the cause”).
7. *White v. British Type Investors, Inc.*, 130 N.J. Eq. 157, 162 (Ch. 1941); see also *McClure v. McClure*, 99 N.J. Eq. 470, 473 (Ch. 1926).
8. *Estate of Vafiades v. Sheppard Bus*

- Svc.*, 192 N.J. Super. 301, 315-16 (Law Div. 1983).
9. See, e.g., *Ingemi*, *supra*, note 1 at 161 (applying both Rule 1:21-2 and District Court Rule 4(c) (now codified as L. Civ. R. 101.1(c)).
  10. L. Civ. R. 101.1(c)(4) (formerly District Court Rule 4(c)) (emphasis added).
  11. Compare Rule 1:21-2(c)(4) with L. Civ. R. 101.1(c)(3).
  12. *Id.*
  13. *Id.*
  14. *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 617 n.2 (D.N.J. 1989) (citing District Court Rule 4(c), now codified as L. Civ. R. 101.1(c)(4)).
  15. *Ingemi*, *supra*, note 1 at 161.
  16. *Id.* (quoting *Hofman v. Marino Games*, No. 90-267 (D.N.J. Oct. 31, 1990) (Hedges, J.)) (emphasis added).
  17. See, e.g., *Itel*, *supra*, note 3 at 104-05 (disciplinary penalties); *Ingemi*, *supra*, note 1 at 159-63 (malpractice liability).
  18. RPC 1.2(c); see also RPC 1.2(a) ("a lawyer shall abide by a client's decisions regarding the scope and objectives of litigation").
  19. See, e.g., *The Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 377 N.J. Super. 493, 509 (App. Div. 2005), *certif. granted*, 185 N.J. 39 (2005) (client may agree "to 'limited' representation under RPC 1.2(c)"); *Lerner v. Laufer*, 359 N.J. Super. 201, 217 (App. Div. 2003), *certif. denied*, 177 N.J. 223 (2003) ("if the service is limited by consent, then the degree of care is framed by the agreed service"); *Strauss v. Fost*, 209 N.J. Super. 490, 494 (App. Div.), *modified on other grounds*, 213 N.J. Super. 239 (App. Div. 1986) ("an attorney and client can limit the scope of representation"). See also *Lerner*, 359 N.J. Super. at 205-06 (reprinting actual retainer agreement for limited representation); *Id.* at 219-20 (critiquing the reprinted agreement).
  20. See *Macawber Engineering, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir. 1995); *Ortiz v. Barrett*, 278 S.E.2d 833 (Va. 1981).
  21. *Id.*; *Macawber* at 257-58; *Ortiz* at 838.
  22. See *Armor*, *supra*, note 4 at 749; 748-49 (discussing *Ingemi*, 866 F. Supp. at 159-62).
  23. See *Lerner*, *supra*, note 19 at 217 ("if the service is limited by consent, then the degree of care is framed by the agreed service").
  24. See *Macawber*, *supra*, note 20 at 257-58.
  25. *Lerner*, *supra*, note 19 at 215; see also, *Ingemi*, *supra*, note 1 at 158 (noting client's reasonable desire to have the services of a "bona fide" New Jersey firm).
  26. *Armor*, *supra*, note 4 at 749 (citing David J. Beck, *Legal Malpractice in Texas* 547, 644 (1998)).
  27. See generally *supra*, notes 18-23 and accompanying text.
  28. See *Macawber*, *supra*, note 20 at 257-58 (discussing costs); *Armor*, *supra*, note 4 at 749 (discussing client choice).
  29. See RPC 1.2(a) and (c); *Ingemi*, *supra*, note 1 at 157 (client's ignorance of firm's limited role); *Id.* at 161 (court's rejection of limited role, where unauthorized by client).
  30. See *Lerner*, *supra*, note 19 at 205-06, 219-20 (actual retainer agreement for limited representation, and court's critique).
  31. See *Ingemi*, *supra*, note 1 at 162 (expressing need for counsel to be familiar with local rules and customs); see also *Armor*, *supra*, note 4 at 749.

**David A. Mazie** is with the firm of Nagel, Rice & Mazie in Roseland. **Ben-David Seligman** was also with the firm at the time this article was written. Both focus on trial practice, including professional liability matters.