

Meeting the Ethical Challenges of Serving as Local Counsel in a Transaction

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You are sitting in your office reviewing a contract when the call comes in. The out-of-state attorney on the other end asks you to serve as local counsel regarding those aspects of a transaction governed by the laws of your jurisdiction or that may need to be attended to in your jurisdiction. After hearing a bit of the background about the deal, you agree to take on the limited representation, subject to a conflict check. If the conflict check is clear, you have just stepped into a minefield of potential ethics and professionalism issues.

Introduction

The unique ethics and professionalism concerns that arise in the context of serving as local counsel in a deal are manifold and interrelated. The primary problems involve the scope of the representation, competent representation, communication with the client, and the unauthorized practice of law. The failure to address even one of these issues can cause a domino effect with respect to the others.

This article will use the Model Rules of Professional Conduct (the “Model Rules”)¹ and the principles of professionalism as a guideline in exploring how to deal with each of the above issues in the context of serving as local counsel in a transaction. Although local counsel must take several steps to address these issues, it will become evident that, through communication, you can drastically reduce the chances of tripping these ethical and professional landmines.

Ethical and Professional Considerations for Local Counsel

As with any representation, local counsel’s responsibilities may be limited in scope by request of the client. If the limitations are extreme, however, you may be in violation of the Model Rules, which state that an attorney may provide such representation only if the limitation is “reasonable² under the circumstances and the client gives informed consent.”³ This issue usually arises because the client is already represented in the transaction as a whole by a lead attorney and does not want to pay another lawyer to “duplicate” work. So, because of the nature of local representation, the client or the client’s lead attorney (who is often local counsel’s primary contact person) may try to limit your representation excessively. Therefore, it is very important that you, as local counsel, explore and clarify the scope of your representation.

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The fact that the client has requested the limited scope of representation may constitute the client’s consent, but does not necessarily constitute the client’s “informed consent” to such representation, as required by Model Rule 1.2(c). “Informed consent” means that the client has consented after a lawyer has explained the risks of and alternatives to the limited representation. Clients, even sophisticated ones, may request limited representation without understanding the consequences. Even if the client’s lead counsel is the person describing the desired representation to you, you should not assume that this out-of-state attorney understands the effects of limiting your representation because there may be consequences that would result under local law that would not be apparent to an out-of-state lawyer. Thus, you should discuss fully with the client or lead counsel the limited scope of representation and its potential consequences and alternatives, even if it was not your idea to limit the representation in the first place.⁴

Moreover, the client may have given vague instructions and thereby failed to convey effectively the intended scope of representation. Exploration of the desired scope of representation can decrease the chances that such a misunderstanding will occur. As a somewhat simplified example, a real estate finance attorney might be asked to review “the mortgage documents.” Reviewing “the mortgage documents” might mean reviewing the mortgage and UCC filings or it might mean reviewing the mortgage and UCC filings, *as well as* the loan agreement, note, and so forth.

If you do not follow up and clarify the scope of representation, you may fail to provide the representation that is needed and that the clients feel they have clearly requested. This, in turn, could be a violation of the Model Rule requiring competent representation, which includes preparation, thoroughness, legal knowledge and skill.⁵ Whether you are prepared and thorough depends on knowing the scope of representation.⁶ If you have misunderstood the scope, your preparation may be inadequate and your representation may not be as comprehensive as it should be. Furthermore, if you accept representation based on a misunderstanding of the scope, you may later discover that you lack the legal knowledge and skills necessary to undertake the broader scope of representation required.

In a similar scenario, which is not uncommon, you, as local counsel, may be asked to review all the loan documents governed by the law of your state, but you may

specifically be asked *not* to review the loan agreement, which is governed by the law of another state. Unfortunately, it is possible (and probably likely) that an analysis of the locally governed documents, such as the mortgage, cannot be completed without a review of the loan agreement, whether it's simply because certain defined terms used in the mortgage have been defined in the loan agreement or whether it's because the loan agreement contains operative provisions or mechanisms that are inextricably linked to the mortgage.

In the foregoing situations, you should ask yourself whether it would be reasonable under the circumstances to review only the mortgage and UCC filings in the first scenario, or not to review the loan agreement in the second scenario. If you respond to yourself in the negative, you should then discuss further with the client or the client's lead counsel, as applicable, the particular scope of representation for local counsel in this transaction, asking specific questions that require detailed answers. This conversation will have one of four results.

If this conversation reveals that the client wants you to limit representation to an unreasonable extent, you should explain that the restrictions make it unethical for you to accept the representation. That explanation may lead to an expansion of the scope of representation to a level that is sufficient for you ethically to engage in the transaction.⁷ If the client insists on the unreasonably narrow scope, the request for representation should be declined, as it would constitute a violation of Model Rule 1.2.

Sometimes, as a result of this conversation, you may realize that it is unclear whether the restrictions on your representation are reasonable under the circumstances. In this case, you should tread cautiously and not allow the business side of legal practice to unduly influence your decision. In words attributed to Supreme Court Justice Sandra Day O'Connor, "Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of a more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth."⁸ Even if the thought of bringing in a new client or a new deal tempts you, if you are unsure whether the limits to the representation are reasonable, you should not accept it or, if your state bar provides ethics advisory opinions, you may request such an opinion on the particulars of your local representation, deferring acceptance or rejection of the representation until you receive the opinion, assuming the transaction and the client can wait for the opinion to be rendered. Alternatively, some state and local bar associations provide an ethics hotline that you can call to obtain an informal ethics opinion immediately or soon after your initial call.⁹

Sometimes, you will think that, although it is a close call,

you may be able to slide in under the wire and accept the representation without violating the ethics rules. However, it may not be appropriate to do so, as a matter of professionalism.¹⁰ Although you may be able to come up with an argument that might prevent you from being in violation of an ethical rule, you may still be violating the spirit of the rule. Observing the spirit of the rule and either declining the representation or getting an expanded scope of representation will protect the client from the risk of inadequate representation. Thus, in such cases, it may be better to err on the side of caution and professionalism.

More than likely, however, the conversation about scope will reveal that the client really wants your representation to be broader than what may have been conveyed to you or interpreted by you from the original, vague request. At this point, it is advisable to memorialize the agreed upon scope of representation in writing, in as much detail as possible, so that there can be no misunderstanding as to what you are supposed to do in your capacity as local counsel. Thus, you can minimize the potential that your representation will be unethically limited in scope or will be executed incompletely and, thereby, incompetently in violation of the Model Rules.

A similar problem can occur when the scope of the representation is reasonable, but the client or their lead counsel limits the amount of information they give you about the transaction as a whole. Again, maybe the client does not want to be charged for legal work that the client believes lead counsel has already provided.

Alternatively, the omission may be inadvertent. Lead counsel may be involving you at a late stage in a deal, one that may even be about to close. Thus, lead counsel may be short on time and so immersed in the transaction that he may inadvertently assume that everyone around him knows as much about the deal as he does. You, on the other hand, may need to know the inadvertently or purposely omitted information in order to represent the client competently. Local counsel may need a lot of the background of a transaction in order to come to the appropriate conclusions on the matters of local law that affect that transaction.

Because it involves omission of information, you may find this issue particularly difficult not only to address, but also to identify. How can you figure out that you need to know something if you do not even know of its existence in the first place? Communication with the client, which is required by Model Rule 1.4, can help reduce the risk that important information will be omitted, thereby reducing the risk that you will fail to provide competent representation.

Local counsel should ask several broad, open-ended questions about the deal, which will help bring information to light that might otherwise be omitted. But that is only half the battle. The other half requires you to use effective listening skills. You should paraphrase what you hear when possible to make sure you have understood correctly. Sometimes paraphrasing what has been said may highlight

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a misunderstanding that neither party knew existed. At other times it may prompt the lead attorney to give you additional information about the transaction that otherwise would not have been disclosed.

Moreover, you must also be aware of your own assumptions and should clearly describe them to the client or to lead counsel, so that your conclusions based on those assumptions are not erroneously applied to a reality that differs from those assumptions. In addition, if you find that you are making numerous assumptions in coming to your conclusions, this may be a sign that information pertinent to your representation has not been conveyed to you and that you should go back and ask additional questions.

Finally, accepting a request to serve as local counsel under certain circumstances may result in a violation of Model Rule 5.5 regarding the unauthorized practice of law. Under this Model Rule, an attorney may not assist another person in engaging in the unauthorized practice of law. Depending on the scope of the representation that the client or out-of-state lead counsel requests of local counsel, local counsel may end up assisting lead counsel in doing just that.

The new multijurisdictional practice of law rules instituted in 2002 somewhat alleviate this concern because they allow an attorney admitted in another state to provide legal services temporarily in a state in which he is not licensed if that representation is reasonably related to the lawyer's practice in the jurisdiction where he is licensed.¹¹ Although some states have not adopted this new multijurisdictional practice rule and others have adopted it in limited form,¹² in many states, out-of-state, lead attorneys now have quite a bit of leeway to provide legal services even if they are not admitted to practice there.

However, the facts of each transaction will determine whether lead counsel's representation is or is not reasonably related to his practice in his jurisdiction. For example, a real estate lawyer in a border city in northern Florida may have a long-standing client whose main office is in Georgia, but who has substantial contacts in Florida by virtue of having several branch locations in Florida and the like. Now, suppose the Florida lawyer is representing this existing client in a real estate closing in Georgia, for which the lawyer has prepared the documentation in his office in Florida, but attends the closing in Georgia. At the closing celebration dinner, the client introduces him to a friend who asks the lawyer to handle a real estate purchase and loan/mortgage transaction for her in Florida that she is in a hurry to close. This new client owns a small, local business in southern Georgia and has no contacts with Florida at all. The lawyer decides to stay in Georgia, where he is not licensed, for another week to prepare the paperwork for the closing of the real estate acquisition, and he contacts local counsel in Georgia to handle the financing aspects of the transaction (or a part thereof).

Although he is not licensed in Georgia, the lead lawyer's representation of his long-standing client by preparing doc-

uments in Florida, where he is licensed, for a closing that he attends in Georgia is probably reasonably related to his home practice, such that it would fall under the permitted types of multijurisdictional practice of law. The lawyer's decision to stay in Georgia to handle the new transaction for the new client, however, might not meet the standards of Model Rule 5.5(c)(4) because she is not an existing or former client, and she is not a resident of Florida and does not have any substantial contacts there.¹³ There is a spectrum here that progresses from circumstances that are unrelated to the lawyer's home practice, to those that are related but not *reasonably* related, and, finally, to those that are reasonably related. Thus, local counsel will need to know the facts underlying lead counsel's representation in a transaction in order to determine where lead counsel's representation falls on that spectrum. Again, communication is key. Discussing the background of the transaction with the client or lead counsel can elucidate this type of information.

If you discover that the broader transaction is not reasonably related to lead counsel's practice, however, you (and lead counsel) might still be prevented from violating the unauthorized practice of law provisions by the fact that an out-of-state attorney is also allowed to practice in the state temporarily if the representation is undertaken jointly with an attorney licensed in the state.¹⁴ You are probably thinking that this is always the case when out-of-state attorneys ask you to help with a transaction as local counsel, but

it may not be so. Model Rule 5.5(c)(1) requires that the local attorney "actively participate[] in the matter" in order for the out-of-state attorney's provision of services to be acceptable.¹⁵ Thus, if the scope of representation requested by out-of-state counsel is excessively narrow, and you are, therefore, not actively involved in the transaction, you would be assisting the out-of-state attorney in the unauthorized practice of law. Out-of-state counsel may provide legal services in a jurisdiction in which he is not admitted "so long as the 'local counsel' has real responsibility for the representation. The local counsel cannot be engaged merely as a conduit."¹⁶ For example, if the local lawyer's representation is limited to the loan portion of the transaction, and the Florida lawyer is handling the purchase of the real property on his own, then perhaps the local Georgia lawyer is not actively participating in the purchase transaction and is, thereby, assisting the Florida lawyer in the unauthorized practice of law in Georgia. This is probably an even greater risk if the local Georgia lawyer has been asked to limit his representation only to certain parts of the loan transaction. Another example, the impropriety of which seems obvious but about which we have all heard stories, is local counsel who does not review documents drafted by lead counsel even though the documents are attributable to (or even signed by) local counsel. Clearly, as local counsel, you should review those documents in order to be an active participant, rather than merely a conduit.¹⁷ There must be a "genuine co-counsel relationship," rather than a relationship in which lead coun-

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sel is providing all the legal services.¹⁸ Otherwise, you may be assisting lead counsel in the unauthorized practice of law.

Thus, although the new rules on multijurisdictional practice can give local counsel more comfort than before, the possibility that you may end up assisting lead counsel in the unauthorized practice of law still exists. Attorneys serving as local counsel should consult the rules of professional conduct in their jurisdictions and be vigilant and diligent in communicating with lead counsel about the nature of the transaction and representation in order to avoid making this ethical foot fault.¹⁹


Conclusion

The morass of ethics and professionalism issues that arise in the context of serving as local counsel may make you wish that you never get a call like the one described at the beginning of this article. But it really is possible to navigate this minefield successfully and ethically with one basic tool that is required by the Model Rules and by the tenets of professionalism: communication. The key to most, if not all, of the challenges described herein is to communicate clearly with your client or your client's representative lead counsel. Through effective communication, attorneys serving as local counsel in a transaction can minimize the ethical and professional risks that arise in providing their legal services.

Endnotes

1. The reader should check the rules of professional conduct in effect in his or her particular jurisdiction when applying this article to his or her particular practice.
2. The term "reasonable," which will arise in other contexts in this article is defined in the Model Rules as follows: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2004).
3. *Id.* at R. 1.2(c) (2004) (footnote added); *see also id.* at R. 1.4(a)(5) (stating that an attorney must consult with the client about ethical restrictions "when the lawyer knows that the client expects assistance not permitted by the Rules . . .").
4. *See generally* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 38 (ABA Center for Professional Responsibility ed., 5th ed. 2003) (hereinafter referred to as "ANNOTATED MODEL RULES").
5. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).
6. *See id.* at R. 1.2 cmt. 7; Anthony Zapata, *Legal 'Ghostwriting' in Indiana: An Analysis*, 49 RES GESTAE 20, 22 (Sept. 2005).
7. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(5); ANNOTATED MODEL RULES at 57.
8. *See* THE MARYLAND JUDICIAL TASK FORCE ON PROFESSIONALISM – REPORT AND RECOMMENDATIONS, at 15 (Nov. 10, 2003), available at <http://www.courts.state.md.us/publications.html> (last visited Nov. 18, 2005) (citing CHIEF JUSTICES' COMMISSION ON PROFESSIONALISM TO THE SUPREME COURT OF GEORGIA, § 10, at 5 (1996)).
9. *See, e.g.,* the Alaska Bar Association, the State Bar of California, The Florida Bar, the Maryland State Bar Association, the State Bar of Michigan, the Association of the

Bar of the City of New York, the Oklahoma Bar Association, the Pennsylvania Bar Association and the Virginia State Bar.

10. *See* Philip D. Weller, *Report of the ACREL Working Group on Ethics and Professionalism*, 2005 A.L.I.-A.B.A. MODERN REAL ESTATE TRANSACTIONS 3297, 3302 (stating that "professional ethics prescribe what a lawyer must do while professionalism prescribes what a lawyer should do"); *see also* MODEL RULES OF PROF'L CONDUCT Preamble (2004) (stating that the "difficult issues of professional discretion" that arise "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules").
11. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2004).
12. *See, e.g., State Implementation of ABA Model Rule 5.5* (ABA Commission on Multijurisdictional Practice, Oct. 2005) *available at* http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf; CAL. MISC. RULES CODE § 967(b)(1) (West 2005) (stating that an out-of-state transactional attorney can provide legal services temporarily in California if "a material aspect" of the transaction is taking place in a jurisdiction where the attorney is admitted to practice).
13. *See generally* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) cmt. 14; ANNOTATED MODEL RULES at 486-87.
14. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2004).
15. *Id.*
16. Philip L. Pomerance, *Multijurisdictional Practice and the Health Lawyer: Will Your Practice Benefit from the New ABA Model Rules of Professional Conduct?*, 37 J. HEALTH L. 113, 123 (Winter 2004); *see also* Ethics Advisory Committee of the South Carolina Bar Advisory Opinion 93-35 (1993) (stating "[i]f the out-of-state lawyer assumes primary responsibility for representing the client, and the South Carolina lawyer's involvement is merely perfunctory, the South Carolina lawyer may be tacitly permitting the unauthorized practice of law by the out-of-state lawyer").
17. *See generally* Gerald Lebovits, *Legal-Writing Ethics – Part I*, 77 N.Y. ST. BAR J. 64, 52 (Oct. 2005) (stating that local counsel may face sanctions for failing to review another attorney's work); *Long v. Quantex Resources, Inc.*, 108 F.R.D. 416, 417 (S.D.N.Y. 1985) (stating that the signature of the lawyer on court documents certifies that he has read the documents and holding local counsel liable under Rule 11 for signing motion without having reviewed it).
18. ABA Commission on Multijurisdictional Practice of Law Report to the House of Delegates, No. 201B at 4 (Aug. 2002).
19. *See generally* Peter M. Panken and Mirande Valbrune, *Representing Nationwide Clients Where They Do Business – But You Are Not Admitted – Do Good Fences Make Good Neighbors? A Review of Statutory and Judicial Authority As Well As Recent Developments in the Regulation of Multijurisdictional Practice of Law*, 2005 A.L.I.-A.B.A. CURRENT DEV. IN EMPLOYMENT L. 731, 753-54. 

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