Ethics Matters

By John Gaal

Q I have been asked by a former law school classmate from out of state to serve as "local counsel" on a litigation matter that she is handling. It involves an area of the law that I am not really familiar with, but I don't really expect to have any substantive responsibility and am only "lending" my name to her pleadings so that she can satisfy the requirement for local counsel involvement. Given these circumstances, do I need to have any ethical concerns in helping her out?

A You sure do, although if you set up the arrangement appropriately you can certainly limit your exposure. For starters, lawyers who serve as "local counsel" are subject to all of the same ethics rules that apply to any other lawyers. In other words, you do not get a pass simply because you are designated as "local counsel." However, as outlined in a 2015 ethics opinion issued by the Committee on Professional Ethics of the Association of the Bar of the City of New York ("Committee"), Formal Opinion 2015-4, there are steps you can, and should, take to protect you and your f rm in these circumstances.

The most important step is to enter into an explicit agreement, preferably directly with the client, which limits the scope of your representation in accordance with everyone's expectations, rather than simply rely on the ambiguous designation of "local counsel." Indeed, it is your obligation to communicate clearly with the client any limitations on the scope of your representation. To be effective, those limitations must be both reasonable and agreed to by the client through an informed consent. In the absence of doing so, you are at risk of sharing full responsibility with your former classmate for the conduct of the matter (e.g., responsibility for the substance of pleadings, meeting discovery and other deadlines, etc.), even though you are not expecting to play any substantive role in how the matter is handled. (Of course, in addition to entering into an explicit, written agreement with the client outlining your responsibilities, you must comply with any requirements imposed on local counsel by applicable court rules.)

Limited scope representations, such as "local counsel" arrangements, are permitted under Rule 1.2(c) of New York's Rules of Professional Conduct ("Rules"). While these arrangements do not allow a lawyer to avoid their ethical obligations, as explained by the Committee, they can "narrow 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." Needless to say, in connection with those tasks, which are identif ed as falling to you in your local counsel role, you are expected to act competently and diligently, and to communicate appropriately with the client about relevant developments (see Rules 1.1, 1.3 and 1.4).

The Comments to Rule 1.2 recognize a number of reasons why a client may wish to limit the scope of representation, not the least of which is to control costs. Specif cally in the context of a local counsel arrangement, the Committee recognized that a limited representation approach can satisfy the client's interest in having the bulk of legal services provided by the non-admitted, out-of-state lawyer of their choice without incurring the cost of duplicating the role of lead counsel with a locally admitted lawyer.

As noted, to be effective, a limited scope arrangement must carry the client's "informed consent." Informed consent, generally, requires making sure that the client understands the material advantages and disadvantages of the proposed course of action. See Rule 1.0(j) and Comment 6. In the context of a limited scope arrangement, this more specif cally means "disclos[ing] 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." Rule 1.2, Comment 6A. Formal Opinion 2015-4 highlights some of the client risks that may need to be explained. For example, while an agreement that limits local counsel's role to only appearing at routine status conferences may result in cost savings for the client, the client is not getting a second pair of eyes to substantively monitor lead counsel's conduct. Simi-

Ethics Matters is provided by the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section. The Committee is pleased to mark the return of this column after a several year hiatus and we hope to continue it on a quarterly basis. Specific columns are authored by various members of the Committee. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact either Co-Chair of the Committee, John Gaal at jgaal@bsk.com, or Jae Chun at jchun@friedmananspach.com.

larly, if local counsel is only reviewing the legal analysis contained in lead counsel's work, and not independently verifying the underlying facts, the client is again losing the benef t of that second pair of eyes. In the particular circumstances, those may be reasonable offsets to the cost savings, but a lawyer entering into a limited scope engagement with a client has an obligation to make sure that the client understands those trade-offs.

While the preferable way to secure this informed consent is through communication directly with the client, the Committee has concluded that "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 fulf ll the requirements of Rules 1.2(c) and 1.5(b), provided lead counsel obtains the client's 'informed consent' to that arrangement."

Although the Rules provide substantial latitude in allowing limitations on the scope of representation, those limitations must nonetheless be reasonable. "[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation." Rule 1.2, Comment 7. The Committee's Opinion goes on to provide some examples of reasonable, and unreasonable, limitations:

- It may be reasonable for local counsel to f le a pro hac vice motion on behalf of an out-of-state lawyer in a large litigation and not perform any other work on the case once that out of state lawyer is admitted;
- Local counsel may reasonably limit her representation to reviewing the legal argument in a summary judgment motion prepared by lead counsel, assuming all factual representations to be accurate, and exclude any obligation to verify factual information (although even then local counsel may not ignore obvious factual inaccuracies);
- Local counsel may not agree to sign her name to a complaint prepared by lead counsel and f le it with the court, even though she believes the claims are not supported by the facts, because she may not "exclude by agreement" her ethical obligation to not f le frivolous claims;
- Local counsel may not agree to circumvent ethical rules requiring candor to the court or third parties, nor other relevant court rules (e.g., if court rules require counsel appearing at a court conference to have "knowledge" of the case, local counsel appearing at those conferences must have suff cient knowledge to satisfy that court rule, regardless of the terms of any limited scope engagement).

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Also, because a lawyer has an obligation to keep a client informed of any developments relating to that representation, Rule 1.4(a)(3), a limited scope engagement by local counsel should be clear on who will have the communication obligation with respect to the covered tasks. While the Opinion recognizes that local counsel can rely, generally, on lead counsel's representation that relevant information is communicated with the client, local counsel may not completely abdicate that communication responsibility and, at a minimum, if local counsel knows or has reason to know, that lead counsel is not providing required communications to the client, local counsel must take steps to remedy that situation.

Serving as "merely" local counsel does not, in itself, absolve you of considerable ethical obligations. If you are considering serving as local counsel in a matter, you should carefully review Formal Opinion 2015-4. Not only do you have an ethical obligation to understand what you may and may not do in the context of such an engagement, but you should adequately understand, and appropriately limit, your own exposure.[1]

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1. If your involvement in the matter will result in a fee share arrangement with other counsel, instead of your own direct fee arrangement with the client, you must make sure you understand the requirements of Rule 1.5(g), which imposes very specif c obligations in the context of fee sharing arrangements.

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