



ISBA Professional Conduct Advisory Opinion

Opinion 24 – 01

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SUBJECT: Court obligations; Scope of Representation.

DIGEST: An Illinois lawyer acting as local counsel for an out-of-state lawyer shares the same duties to the client as the lawyer acting as lead counsel. While local counsel and the client may agree to limit the role of local counsel upon informed consent, that lawyer remains subject to the Illinois Rules of Professional Conduct. A lawyer may only enter a general appearance in an Illinois state court criminal matter and is subject to the rules and orders of the court, including any orders requiring local counsel's appearance at any or all court proceedings.

REFERENCES:

Ill. R. Prof'l Conduct 1.1
Ill. R. Prof'l Conduct 1.3
Ill. R. Prof'l Conduct 1.4
Edelstein, As Local Counsel: How to be Effective and Not Commit Malpractice, ABA Practice Points, 1/17/17
People v. Greer, 79 Ill.2d 103 (1980)
Pratt-Holdampf v. Trinity Medical Center, 338 Ill.App.3d 1079 (3rd Dist. 2003)
Utah State Bar Opinion No. 17-04 (2017)
NYCBA Formal Opinion 2015-4 (2015)
Best Practices, Michigan Bar Journal, December 2020
Ill. R. Prof'l Conduct 1.2(c)
N.Y. State 856 (2011)
N.Y. State 1215 (2011)
People v. Custer, 2019 IL 12339
People v. Hobley, 159 Ill.2d 272, 306 (1994)
People v. Sims, 167 Ill.2d 483 (1995)
Illinois Supreme Court Rule 137 (1994)
BVM Olenti, Inc. v. Huttinger, 2012 IL App (2d) 110918-U
State Bar of Georgia FAO 05-10 (2006)

Illinois Supreme Court Rule 707
Cruzat v. Board of Trustees, 126 Ill.App.3d 717 (1st Dist. 1984).
In re Barinholtz, ARDC Comm. No. 20210PR00070
Ill. R. Prof'l Conduct 8.4(d)
James v. National Financial LLC (2014 Del. Ch. LEXIS 254)
Del. Ch. Ct. R. 170
Hsu v. Great Seneca Fin. Corp., 9 A.3d 476 (Del. 2010)
Illinois Supreme Court Rule 13(c)(6)

FACTS

An Illinois lawyer represents a client in an Order of Protection matter. An out-of-state lawyer requested that lawyer to serve as local counsel for that same client in a felony criminal case pending in Illinois.

QUESTION

What are the ethical duties of an Illinois lawyer acting as local counsel for an out-of-state lawyer in a criminal matter pending in an Illinois court? Must local counsel appear at all hearings, including trial? What are the responsibilities and liabilities of local counsel for decisions made by out-of-state counsel?

OPINION

An Illinois lawyer may enter into a limited scope agreement with a client to serve as local counsel in a criminal matter. The duties of local counsel can include full co-counsel responsibilities or may be limited in scope. The scope of the representation will be determined by the lawyer-client agreement. There may also be an agreement between lead counsel and local counsel defining the roles of each. The ethical duties that an Illinois lawyer serving as local counsel owes a client are identical to those of out-of-state lead counsel. The Illinois Rules of Professional Conduct permit limited scope representation in all matters, including criminal cases. While the lawyer and the client may agree to a limited scope representation, with informed consent given by the client, there is no provision in any statute, Supreme Court Rule or Illinois Rules of Professional Conduct that permits a lawyer, acting as local counsel in a criminal matter in an Illinois state court, to enter a limited scope appearance in any judicial proceeding. A lawyer acting as local counsel in an Illinois state court criminal matter may only enter a general appearance. Any Illinois lawyer acting as local counsel in a criminal matter in an Illinois state court must keep in mind that while the representation agreement may seek to limit the lawyer's duties to the client, that agreement cannot limit the lawyer's duties to the court and the court may require participation by local counsel not anticipated in the limited scope agreement. This committee's opinion is drawn from the Illinois Supreme Court Rules, Illinois Rules of Professional Conduct, any applicable Illinois case law, ARDC decisions as well as opinions from courts and bar associations from other states. The rules of the other states that are cited in this opinion are based on the

ABA Model Rules, as are the Illinois rules. These opinions, while not binding, are nevertheless helpful to this committee in writing this opinion.

Illinois rules permit a lawyer to enter into a limited scope representation agreement with a client.

An Illinois lawyer who wishes to act as local counsel to an out-of-state lawyer in a criminal matter taking place in the Illinois state court system may do so subject to all of the ethical duties and rules governing the lawyer-client relationship in Illinois. Prior to accepting the representation, the lawyer must first determine if he or she is competent to serve as counsel in the matter. Ill. R. Prof'l Conduct Rule 1.1. Local counsel is required to provide competent representation and act with reasonable diligence, Rules 1.1, 1.3, 1.4. See also Edelman, *As Local Counsel: How to be Effective and Not Commit Malpractice*, ABA Practice Points, 1/17/17. In the context of Illinois criminal cases, a lawyer is deemed to have rendered incompetent representation if the "incompetence produced substantial prejudice to the defendant without which the result of the trial would probably have been different." *People v. Greer*, 79 Ill.2d 103 (1980). Should lead counsel be disqualified or withdraw from representation, local counsel may be required to withdraw unless he or she is prepared to act as lead counsel. In *Pratt-Holdampf v. Trinity Medical Center*, 338 Ill.App.3d 1079, 1086 (3rd Dist. 2003) the court granted local counsel's motion to withdraw where lead counsel withdrew, after that lawyer represented to the court that he did not have the expertise to pursue a medical malpractice action without experienced lead counsel. The Utah State Bar, in Opinion No. 17-04 (2017), opined that acting as local counsel "is not a minor or perfunctory undertaking." The Utah Bar noted that while local counsel need not duplicate the work of lead counsel, local counsel "has a duty, however, to take reasonable steps to ensure that the *pro hac vice* attorney follow the Utah Rules of Professional Conduct, even if that entails some duplication of effort."

In *NYCBA Formal Opinion 2015-4*, the New York City Bar Association concluded that lawyers acting as local counsel are held to the same ethical standard as lead counsel as the rules do not make any distinction between the two. This would include, but not limited to: providing competent and diligent representation (Rules 1.1 and 1.3) and keeping the client reasonably informed (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. See also *Best Practices*, Michigan Bar Journal, December 2020, p. 46. Consequently, an attorney who agrees to act as local counsel may be subjected to obligations and risk that she does not anticipate or intend to assume." Since there is no distinction between lead and local counsel in the Illinois rules, the same analysis would apply to Illinois lawyers acting as local counsel in criminal matters.

The lawyer-client agreement should provide for the expected duties of local counsel. Under Ill. R. Prof'l Conduct Rule 1.2(c), a lawyer may limit the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." The agreement should identify the scope of the duties expected of local counsel. Comment 6 to Rule 1.2 states that "[a] limited representation may be appropriate because the client has limited objectives for the representation" and "may exclude actions that the client thinks are too costly

or that the lawyer regards as repugnant or imprudent.” The limitation must be reasonable under the circumstances. What will be reasonable depends on the circumstances of the particular case. See Ill. R. Prof’l Conduct Rule 1.2, Comment 7. Those duties may range from full co-counsel with the out-of-state lawyer or may be limited to specific tasks. The request asked if local counsel in a criminal matter is required to appear at all hearings and at trial. The scope may be limited so long as the client provides informed consent and the “limitation is reasonable under the circumstances.” Local counsel, in consultation with the client and lead counsel, must define the role of local counsel in this criminal matter. Local counsel must also be mindful of the expectations of the particular court where the matter will be litigated as the court may require local counsel to appear regardless of what is provided for in the lawyer-client agreement.

The New York State Bar Association, in *N.Y. State 856* (2011), addressed the issue of what is reasonable under the circumstances in criminal cases. That opinion concluded in applying Rule 8.4(d), “the scope of representation must be sufficiently broad to enable the lawyer to render competent service.” While concluding that, while the rules allow for limited scope representation in criminal cases, the opinion noted that it is a rare case that a limited scope representation agreement would be permitted in a criminal matter. The limited scope agreement may not limit the duty any court may impose on the lawyer, including attendance at any or all court proceedings.

In *N.Y. State 1215* (2011), it was opined that the lawyer agreeing to enter into the limited scope agreement must also disclose the “reasonably foreseeable consequences of the limitation.” Illinois lawyers who agree to act as local counsel in criminal matters must understand that, unlike lawyers filing a limited scope appearance in civil cases (Illinois Supreme Court Rule 13(c)(6)), there is no corresponding rule applying to Illinois criminal cases. Those consequences may include the requirement for local counsel to appear in court and take on other responsibilities that may be beyond the scope of the limited scope representation agreement.

Ill. R. Prof’l Conduct Rule 1.4 requires all lawyers in the matter, which would include local counsel, to communicate with the client to keep the client “reasonably informed” about the matter, the lawyer is required to explain the matter to the client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Ill. R. Prof’l Conduct Rule 1.4(b). Local counsel is obligated to the client, until the entire proceedings are concluded, to provide information reasonably necessary to allow the client to make decisions regarding the case. The duties of local counsel to the client for strategic decisions may be stated in the agreement. However, local counsel may have a duty, under Rule 1.4, to independently advise the client in the event that lead counsel is not reasonably informing the client of the status of the case and local counsel has knowledge that lead counsel is disregarding this duty. Generally, Illinois lawyers are not held to be ineffective solely for strategic decisions in criminal matters. *People v. Custer*, 2019 IL 12339, ¶ 39; *People v. Hobley*, 159 Ill.2d 272, 306 (1994); *People v. Sims*, 167 Ill.2d 483 (1995).

There are no requirements under Illinois statutes or rules requiring local counsel to sign any pleading in the capacity of local counsel. Once an out-of-state lawyer is admitted *pro hac vice*

for a specific matter, that lawyer is assigned an ARDC number which grants that lawyer the privilege of appearing before the appropriate court as well as the filing of any pleadings. If local counsel signs the pleadings, he or she must be familiar with them and investigate them to the extent required by this good faith requirement. This committee recognizes local counsel should not be required to duplicate the work of lead counsel. That aspiration, however, does not negate the duty of the Illinois lawyer, who signs a pleading, under Supreme Court Rule 137 or the Rules of Professional Conduct. "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact..." Illinois Supreme Court Rule 137 (1994).

In *BVM Olenti, Inc. v. Huttinger*, 2012 IL App (2d) 110918-U, ¶ 55 the court held that "local counsel *does* act incompetently *if* he files and signs a complaint that has been prepared by an attorney licensed in a different state and he has **no** substantive knowledge of the contents of the complaint he has signed. Such an action would be a violation of the Illinois Rules of Professional Conduct...Under such circumstances local counsel is not an 'ignorant surrogate.'" Id. at ¶. 55. This does not suggest that liability will be imposed on the Illinois lawyer for the actions of the out-of-state lawyer. The opinion simply warns Illinois lawyers that if they sign a pleading in an Illinois case drafted by another lawyer, they are subject to the same rules as if that lawyer actually drafted the pleading. This is consistent with the requirements of Supreme Court Rule 137 and Ill. R. Prof'l Conduct 1.1, 1.3 as well as other citations in this opinion. Because an Illinois lawyer is subject to discipline only for his or her own actions and lawyers should keep these principles in mind when asked to sign a pleading by out-of-state counsel. While the *BVM Olenti* order is not binding precedent because it is a Supreme Court Rule 23 order issued prior to January 1, 2021, its content, along with the other opinions cited here provide guidance for Illinois lawyers who agree to act as local counsel and is consistent with the general principles and other authorities cited in this opinion. This committee's opinions are drawn from a variety of sources, including those from outside Illinois, which are not binding, but are nevertheless useful in our analysis.

The State Bar of Georgia, in *Formal Advisory Opinion No. 05-10* (2006) *Opinion No. 05-10* addressed the issue of whether local counsel could be disciplined for discovery abuses committed by either in-house or out-of-state counsel. The State Bar of Georgia, in opined that "the typical acts required of local counsel such as moving of admission *pro hac vice* or the signing of pleadings, always carry with them affirmative ethical obligations...the signing of pleadings and the conduct of the discovery procedure of which the pleadings are a part." In Illinois, lawyers acting as local counsel who sign pleadings in violation of Supreme Court Rule 137 may be subject to sanction by the court or claims for violations of the Illinois Rules of Professional Conduct. Any violation must be predicated on the acts of local counsel. The signing of pleadings by local counsel could be judged to be a direct act by that counsel, even acting in the limited capacity as local counsel. However, at least one Illinois court has ruled that Illinois Supreme Court Rule 707 "does not mandate the requirement that a sponsoring attorney investigate the credentials of an out-of-state attorney." *Cruzat v. Board of Trustees*, 126 Ill.App.3d 717, 720 (1st Dist. 1984). The court ruled that since Rule 707 did not state that a local lawyer was not required to sign the *pro hac*

vice petition, that lawyer could not be sanctioned for any violations committed by the out-of-state lawyer who filed the petition but was not licensed to practice law. *Id.*

The Georgia opinion held that local counsel's "culpability" for any discovery abuses would be based on local counsel's knowledge of the abuse by local counsel or whether local counsel ratified the violative conduct of lead counsel. The opinion addressed local counsel's "actual knowledge," "willful blindness," and "ratification" of lead counsel's actions. The Georgia opinion further stated that when the "relationship between lead and local counsel is indistinguishable, the usual ethics responsibilities apply."

The opinion then addressed the categories of potential culpability cited above. Actual knowledge speaks for itself. Local counsel engages in "willful blindness" if the lawyer is suspicious of lead counsel's violations and attempts to "avoid requiring actual knowledge of the conduct...[a]voiding actual knowledge displays the same level of culpability as actual knowledge." To avoid the risk of becoming liable under the "willful blindness" standard, local counsel "should treat any reasonable suspicion as sufficient to prompt inquiry of the in-house or out-of-state counsel." *Id.* What constitutes ratification is "difficult to determine in the abstract." The opinion advised that local counsel "should avoid any conduct that does not actively oppose the violation." It must be emphasized that the opinion predicated any violation by local counsel would be based solely on his or her actions, not of the actions or culpability of lead counsel. Local counsel's culpability would "[depend] upon the degree of local counsel's involvement in the discovery process."

In *In re Barinholtz*, ARDC 2010PR00070 (Review Bd., July 12, 2013), Barinholtz was charged for advancing a claim the lawyer knew to be unwarranted under existing law and for bringing a proceeding without basis and that is frivolous. Barinholtz was asked to serve as local counsel to file an objection to a class action settlement against Walmart. He performed some independent investigation into the matter and held conversations with the lead counsel regarding the foundation of the objection to be filed. Barinholtz, then agreed to serve as local counsel for the filing of the objection. During a deposition in the case, Barinholtz learned that lead counsel had associated with local counsel in other states to interpose the same objections, but without specific factual bases to support the objections. Despite discovering these facts, Barinholtz neither withdrew nor took any other action. The trial court denied the motion to intervene, finding the proposed objections to the settlement unfounded and identical to objections filed by the lead counsel in other states, all of which were unfounded. The Hearing Board and Review Board of the Attorney Registration and Disciplinary Commission found that Barinholtz violated Rule 8.4(a)(5) for engaging in conduct prejudicial to the administration of justice and the Review Board reprimanded him. Again, it must be stressed that the discipline imposed was based on Barinholtz' own actions in regard to the matter, not the lead counsel's actions.

At least one other court has sanctioned local counsel for the conduct of the out-of-state counsel. *James v. National Financial LLC* (2014 Del. Ch. LEXIS 254). "[T]he Delaware lawyer who appears in an action always remains responsible to the Court for the case and its presentation." *Id.* at Par. 28. "The admission of an attorney *pro hac vice* shall not relieve the moving [local]

attorney from responsibility to comply with any Rule or order of the Court.” Del. Ch. Ct. R. 170. *See also Hsu v. Great Seneca Fin. Corp.*, 9 A.3d 476 (Del. 2010). While the *James* court did not find that the Delaware lawyer directly committed the discovery violations, that lawyer was nevertheless liable for sanctions for failing to play an active role in discovery. The court found that the Delaware lawyer was liable for sanctions for acting as a mail drop, despite court rules and previous admonitions of the court regarding the discovery issues.

Illinois courts may impose duties on local counsel not provided for in the limited scope representation agreement.

The lawyer entering into a limited scope representation agreement may not be able to limit his or her participation in court despite any limitation contained in the agreement. Illinois Supreme Court Rules do not provide for the entry of a limited scope appearance in criminal cases. Any Illinois lawyer serving as local counsel in a criminal matter must file a general appearance in accordance with the Supreme Court Rules and any applicable circuit or other local rules. Lawyers acting as local counsel in Illinois in criminal matters must consider whether the judge presiding in the matter that may impose additional duties on the lawyer which exceeding the limited scope agreement and the expectations of both the client and the lawyer. While local counsel and the client may have contemplated a minimal role of the Illinois lawyer in court, or no role at all in the actual proceedings, the judge presiding over the matter may reach a different conclusion and require participation by the Illinois lawyer over and above what was contemplated in the limited scope representation agreement. The judge may determine that the lawyer’s participation may be required, despite the limited scope agreement, to avoid conduct that is prejudicial to the administration of justice pursuant to Ill. R. Prof’l Conduct 8.4(d). The lawyer acting only as local counsel should, at the outset of the case, inform the court that they have been retained in that limit capacity and request that this be noted in the record. Should the out-of-state counsel later withdraw from the representation, this may provide a basis for the local counsel to withdraw as well, at the court’s discretion, because the record will reflect that full representation was not contemplated by either local counsel or the client.

In determining whether a limited scope representation agreement is reasonable, the lawyer must consider whether the particular court will permit a limited role as the agreement with the client cannot limit the duties a court may impose on local counsel. As noted previously in this opinion, the *pro hac vice* lawyer will be provided with his or her own ARDC number for the purposes of entering an appearance, filing pleadings and appearing before the court. While there are no rules requiring local counsel to appear at any court appearance including the trial of the criminal, that lawyer’s presence would be required under the rules if: 1) required by the client in the engagement agreement; 2) specifically required by the court, or; 3) it would be unreasonable under the circumstances or prejudicial to the administration of justice for local counsel not to act as second chair at any hearing or trial. *See N.Y. State 856* (2011) and *N.Y. State 1215* (2011).

CONCLUSION

Under the Illinois Rules of Professional Conduct, a lawyer may limit his or her representation in any matter, criminal or civil, so long as the client provides informed consent and such limited representation is reasonable under the circumstances. Local counsel owes the same ethical duty to the client as does lead counsel, including but not limited to those of competency and diligence. Local counsel has the duty along with, but independent of, lead counsel to provide information to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, including information that lead counsel is not reasonably informing the client of the status of the case. An Illinois lawyer acting as local counsel is responsible only for his or her conduct under the Illinois Rules of Professional Conduct, including strategic decisions made during the course of the matter.

Local counsel may only enter a general appearance in a criminal matter pending in an Illinois state court as there is no Illinois Supreme Court rule which permits limited-scope appearances in criminal cases as is provided for in civil matters. There is no rule that requires local counsel to attend any court hearing or trial. A court may impose additional duties on the local counsel as there is no provision for limited scope appearances in criminal matters in Illinois. The Illinois lawyer must consider whether or not a limited-scope appearance is reasonable under the circumstances, including but not limited to local court rules and the expectations or directives of the court for local counsel to appear at any hearing, including trial. This opinion is limited to the rules as applied to matters arising in Illinois state courts only and does not address as the rules governing appearances in any federal court located in Illinois.

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