

February 2018 WSBA *NWLawyer Ethics & the Law Column*

**Local Custom:  
Local Counsel in an Era of National Litigation**

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With many kinds of litigation becoming more national in scope, the role of local counsel has also evolved. Gone are the days when a long-lost college roommate may contact you simply because you are the only Washington lawyer the former roommate knows for what will likely be the only matter the former roommate ever has in Washington. In today's more homogenized market, firms often have specialized expertise with a national reach and have long-standing relationships with local firms throughout the country. The national firm typically brings the substantive expertise and principal client contacts and the local firm contributes its knowledge of local courthouse personalities and procedures.

In this column, we'll look at three facets of being local counsel from the risk management perspective. First, we'll examine the mundane but central task of knowing the *pro hac vice* requirements in both Washington state and federal civil trial courts. Second, we'll address how local counsel can document their own role when they are being hired primarily for their local expertise. Finally, we'll discuss the practical importance of documenting the compensation arrangement involved.

***Pro Hac Vice Requirements***

Washington's *pro hac vice* rules vary depending on whether the litigation involved is in state or federal court.

*Pro hac vice* admission in state court is a two-step process—with both facets governed by APR 8(b). Local counsel must first file a motion to admit the out-of-state lawyer with the court concerned. The form is specified by the rule and a template is available on the WSBA web site. The out-of-state lawyer must certify that the lawyer is a member in good standing of the lawyer's "home" jurisdiction and that the lawyer has read the Washington RPCs. Local counsel must also certify that he or she is an active WSBA member, will be responsible for the conduct of the out-of-state lawyer and will be present at all proceedings unless excused by the court. At the same time the motion is submitted to the court, local counsel must also forward a copy to the WSBA along with a specific cover sheet (the template for which is also available on the WSBA web site) and the requisite fee.

*Pro hac vice* admission is "one stop" in federal court—but with unusual geographic twists. *Pro hac vice* admission is regulated by LCR 83.1(d) in the Western District and LR 83.2(c) in the Eastern District. Both require that local counsel be a member of the bar of the court concerned and that the out-of-state

lawyer involved is a member in good standing in the lawyer's "home" jurisdiction and that no disciplinary proceedings are pending against the lawyer. In the Western District, local counsel "must have a physical office within the geographic boundaries of the Western District of Washington[.]" At least on its face, therefore, a lawyer officed in Spokane could not be local counsel for a federal court case in Seattle even if the lawyer is a member of the Western District bar. In the Eastern District, local counsel must have "an office in this state." Again, at least on the face of the rule, a lawyer officed in Coeur d'Alene could not be local counsel for a federal court case in Spokane even if the lawyer is a member of the Eastern District bar. It is possible to ask for a waiver of the physical office requirement, but the decision is discretionary with the court concerned.

Like any other motion, *pro hac vice* applications must be served on opposing counsel under the applicable state and federal rules. Although rare, opposing parties have standing to both oppose *pro hac vice* motions and to seek revocation of *pro hac* status as the functional equivalent to disqualification. *Hallman v. Sturm Ruger & Co., Inc.*, 31 Wn. App. 50, 639 P.2d 805 (1982), discusses state law on these points and *Cole v. U.S. District Court of the District of Idaho*, 366 F.3d 813 (9th Cir. 2004), does the same for federal courts in the Ninth Circuit.

***Documenting Your Role***

With any representation, it is important to document the scope of the lawyer's role as a matter of risk management. With local counsel, two factors can often sharpen that need even further. First, local counsel today are often hired for their insights on the particular practices and personalities in the venue concerned rather than overall responsibility for the case. Second, national counsel most often have the direct contact with the client and are effectively the lawyers "calling the shots" in conjunction with the client.

Under *Evans v. Steinberg*, 40 Wn. App. 585, 699 P.2d 797 (1985), and *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006), co-counsel are generally precluded from suing each other for legal malpractice involving a jointly represented client. But, if an error occurs in a facet of the case that is well beyond local counsel's role—or even knowledge—an engagement agreement with the client clearly articulating the local counsel's role can provide a practical defense to a claim by the client.

RPC 1.2(c) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The utility of this rule and an accompanying letter as a protective

device may vary depending on whether the matter involved is in Washington state or federal court.

In state court, APR 8(b), in pertinent part, makes local counsel “the lawyer of record.” The rule also makes the local counsel “responsible for the conduct thereof,” but the accompanying *pro hac vice* motion template defines this responsibility as applying to the “applicant”—in other words, the out-of-state lawyer—rather than the case as a whole. This approach is consistent *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980), where the Supreme Court defined the role of local counsel in this context:

“There are two legitimate judicial needs which are involved in considering a *pro hac vice* application: (1) reasonable assurance that the attorney is competent and will conduct himself in an ethical and respectful manner in the trial of the case, and (2) reasonable assurance that local rules of practice and procedure will be followed. The association of local counsel is designed to secure the second of these aims.”

In federal court, Western District LCR 83.1(d)(2) and Eastern District LR 83.2(c)(1) each defines the role of local counsel more broadly than their state counterparts. The Western District rule requires that “local counsel attest . . . that he or she is authorized and will be prepared to handle the matter, including the trial thereof, in the event the applicant is unable to be present on any date scheduled by the court.” The Eastern District rule requires that local counsel

“shall meaningfully participate in the case.” Although a letter defining the scope of local counsel’s role remains a prudent practice, it may not have the same protective effect in a federal case as in state litigation in light of these certifications.

***Fee Arrangements***

Another important area to confirm at the outset is the fee arrangement. There are several common approaches, but with each, documenting them up front can help avoid problems later.

With hourly fees, two approaches predominate.

First, the local counsel can simply bill the client directly. This is a typical approach in defense litigation when the local counsel already has a relationship with the client.

Second, the local counsel may submit its bill through the national counsel. In this approach, local counsel services are treated as the functional equivalent of a litigation expense for billing purposes. Billing legal fees as expenses is discussed generally in ABA Formal Opinion 00-420.

With contingent fees, two approaches also predominate.

In some instances, local counsel services are simply treated as a litigation expense by the out-of-state lawyer.

In others, the local counsel may split the overall fee (if successful) with the out-of-state lawyer. Washington RPC 1.5(e) allows lawyers from different firms to split fees as long as the client approves and the overall fee is reasonable. RPC 1.5(e) also requires that “the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation[.]” Contingent fees must be in writing under RPC 1.5(c)(1) and either that agreement or a written supplement should document any percentage split accorded to local counsel. Lacking a written agreement, in the event of a dispute later with the out-of-state lawyer over the fee, the local counsel may be limited to *quantum meruit* recovery.

## **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon

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