

Focus On

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Local Counsel: Take the Job Seriously, or Don't Take the Job

WITH THE ADVENT of electronic filing, it is easier than ever for out-of-town counsel to minimize the involvement of local counsel, and, when you are busy with so many other cases, it is tempting to allow it. But we permit such practice at our peril and that of our clients.

We were recently involved as local counsel in a case in which, after several months, out-of-town counsel asked us to reduce our involvement to a minimum in order to keep expenses down. Satisfied that they had grasped our local practices, we reduced our substantive work on the case to a minimum while still continuing to monitor the progress of the case. We were not involved in communications with opposing counsel nor did we attend the trial. Near the end of the trial in that case, the court clerk called our office to tell us that local counsel's presence was required. In open court (but outside the presence of the jury), the judge made the following observations to out-of-town counsel about their behavior during the trial:

[I]n this case I've seen repeated instances of unprofessional conduct requiring my intervention. ... It has involved ... the rather constant low-level what I call bush league gamesmanship, playing around with witness lists and that sort of thing, things like taking pieces of paper on which you hadn't written anything, crumpling them in the microphone while your opponent is speaking and throwing them in the trash. It's involved the deliberate misuse of large demonstrative exhibits. On at least one occasion when it was blocking your opponent's view and she asked you to remove it, you said you still needed it. You never came back to use it again. When I asked you about that, you gave a patently phony explanation, so lacking in credibility that several jurors laughed at you.

[Your conduct] has involved unprofessional cross-examination. ... You interrupted a witness ... and told her that you weren't trying to be rude, and the entire jury broke into laughter. ...

And at the end of the day Friday, it involved the squeaky toy—really just beyond the pale—

where in what could have been a boring and for me otherwise productive part of the trial, you took one of the large models of [the product], and while counter-designations were being read by your opponent to your reader, you played with it to make a squeaking sound repeatedly. I didn't notice it at first or didn't notice where it was coming from. I had to ask you in front of the jury to put it down. At that point I noticed that a juror had a question, and her question was whether I would please get you to quit making that squeaky sound.

In light of this kind of behavior—as well as one additional incident—the judge revoked the offending attorney's pro hac vice admission, stating, “I'm going to require local counsel, some member of local counsel, to be here at counsel table for the remainder of the trial. I can't rely on instructions or admonitions to cause you to behave properly.” This case demonstrates a worst-case scenario, of course, but it can happen to anyone faced with a client trying to minimize the expense of using multiple law firms as well as trial counsel who want to handle the case independently.

Unlike you, a member of the local bar who interacts regularly with the presiding judge and with opposing counsel, your out-of-town co-counsel is just visiting. Their conduct in your jurisdiction is less likely to bear on their reputation back home, and they are less concerned with their reputation in your courts. Even though safeguarding your reputation is reason enough to be vigilant, recent cases from around the country suggest that even more may be at stake. For example, local counsel was held jointly liable for out-of-town counsel's violations of Federal Rule of Civil Procedure 11 in *Val-land Farms Inc. v. Third National Bank in Knoxville*, 937 F.2d 1110 (6th Cir. 1991). There, the Sixth Circuit decided that local counsel was jointly responsible for sanctions relating to a frivolous claim in a complaint, even though local counsel had only signed the complaint. The court pointed out that the text of Rule 11 “does not provide a safe harbor for lawyers who rely on the representations of outside counsel” and noted, “If [attorneys], acting as local counsel, signed [plaintiff's] complaint relying entirely on the representations of [out-of-town counsel], so much the worse for them.” *Id.* at 1118. See also *Ideal Instruments Inc. v. Rivard Instruments*, 243 F.R.D. 322 (N.D. Iowa 2007) (citing the same and imposing Rule 11 sanctions on local counsel).

Similarly, in *Schottenstein v. Schottenstein*, 230 F.R.D. 355 (S.D.N.Y. 2005), the New York district court found that, even though local counsel relied on out-of-town counsel's assurance that the asserted claims were bona fide before signing the complaint, local counsel still violated Rule 11, because "[s]ubstituting another lawyer's judgment for one's own does not constitute a reasonable inquiry" as required by the rule. In a recent decision by the district court in Washington, D.C., the court discharged local counsel from liability for Rule 11 sanctions in a case in which local counsel merely made "final stylistic edits" to the declaration at issue. *Lucas v. Spellings*, 408 F. Supp. 2d 27, 28 (D.D.C. 2006). The court was quick to warn, however, that "Rule 11 impose[s] its obligations upon any lawyer who signs a 'pleading, written motion or other paper'" and that, by signing documents, local counsel make all the certifications contained in Rule 11, "regardless of [his or her] actual role."

To minimize these risks, we have learned to scrutinize initiating documents—such as complaints and counterclaims—before signing and filing them. We have also discovered that two aspects of local counsel's practice must be non-negotiable: involvement in the meet-and-confer process and monitoring of the tone of court documents and arguments at trial.

Getting Involved in the Meet-and-Confer Process

Litigation in Oregon courts is typically aggressive, as it should be, but because of the state's smaller bar, the level of decorum and congeniality appears to be greater in Oregon than in other parts of the country. District of Oregon Local Rule 7.1(a) requires parties to meet and confer before *any* motions are filed, and the court routinely refuses to accept motions that fail to include a certification of compliance. To comply with such requirements as local counsel, we must make sure that out-of-town attorneys have *actually* met and conferred, rather than assume that they have done so because a draft motion includes the compliance certification. But the best practice is to go one step further and handle the meet-and-confer process yourself. More often than not, you will be conferring with attorneys you have met and with whom you have an ongoing professional relationship. Two local attorneys are thus more likely to be making a meaningful effort to reduce filings and unnecessary conflict between the parties and can often resolve issues that would otherwise result in expensive motions.

Monitoring the Tone in Court Documents and Argument

Another important role for local counsel to play is to advise out-of-town counsel on the tone to be used in representations and arguments to the local district court. When out-of-town counsel is used to a large city practice, aggressive and even inflammatory language—potentially offensive to local judges and opposing counsel—may otherwise go unnoticed. We

were involved in a case in which a filing by opposing counsel referred to our side as "liars and perjurers." Although the comment was surprising and off-putting at the time, we later were able to use it in support of a petition for treble damages and attorneys' fees—awards for which the conduct of counsel can be a deciding factor. Years later, we learned that the "liars and perjurers" language slipped past local counsel, because the document had been presented to him late in the afternoon on the day the document was due. Out-of-town counsel must recognize that advice relating to the tone they take with the court is essential to effective local practice, is in the best interests of their clients, and cannot be effectively rendered by skimming filings an hour prior to the filing deadline. It is thus critical for local counsel to have ample time to review any documents to be filed with the court, and—as illustrated above—presence at hearings and particularly at trial is absolutely necessary.

Typically, problems with representation by local counsel do not arise from your failure to give advice to out-of-town counsel; the problem is getting out-of-town counsel to listen to your advice. We take care to emphasize at the outset that we have been hired as local counsel for our judgment and expertise in matters relating to local practice and that following our advice is most likely to minimize missteps and prejudice, leading to a good result for the mutual client. We also recommend keeping the squeaking, interrupting, and paper crumpling to a minimum! **TFL**

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