

When Duty Calls Long Distance

Local counsel are also vulnerable in malpractice suits against lead attorneys

BY LUCILLE T. SGAGLIONE

Amid all the attention given to the nature, formation and scope of the lawyer-client relationship, a permutation that has received relatively little consideration is the connection between lead counsel and local counsel.

Generally, "lead counsel" is the lawyer or firm retained by a client to conduct and manage the representation (usually a case in litigation). On behalf of the client, lead counsel retains "local counsel" to provide services in close proximity to the court where the case is being handled. Local counsel customarily has little or no direct contact with the client.

In terms of professional liability, therein lies the danger to local counsel.

Local counsel frequently is engaged in a rather general telephone conversation initiated by a lawyer practicing in another jurisdiction who probably has had little, if any, professional or personal contact with the lawyer being retained.

Each party to the discussion believes he or she understands the scope and nature of their agreement, while, in truth, very little may actually have been said about it or their respective obligations to the client. Even if these topics are discussed, often there is no engagement letter.

Typically, the lawyers go forward believing, on the basis of this initial oral communication, that they are acting in concert for the benefit of the client.

In most instances, they are right—the case is resolved and the lack of delineation of duties produces no difficulties for the lawyers or the client.

But should the client be dissatisfied with the progress or outcome of the case, a dispute easily can arise between the lawyers over who was responsible for various actions and errors.

The client may commence a malpractice lawsuit against lead

counsel that names local counsel as a co-defendant. In other cases, lead counsel who has been sued for malpractice will join local counsel as a party through third-party indemnity or contribution claims.

In any event, if the parties are found to be jointly and severally li-

ent and lead counsel to define your duties.

- Execute a written retainer agreement with the client specifying the nature and scope of your undertaking.

- Execute a memorandum of understanding with lead counsel detailing your respective duties, and have it agreed to by the client.

- If you are retained for a limited purpose, be sure that purpose is stated expressly in all retainer and letter agreements.

- In writing, explain to the client the limitations on your employment, and obtain the client's express approval of these limitations.

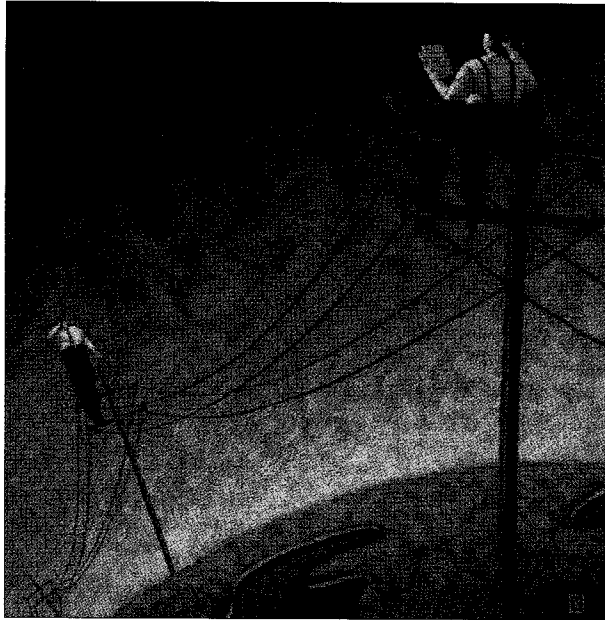
- Do not undertake any activities beyond the scope of your defined duties. A court may infer from such

actions that the limitations were waived.

- Review local court rules to determine the specific duties of local counsel, and be sure to comply with them.

Even when you have taken precautions as local counsel, you still may share the misfortunes of lead counsel in a legal malpractice suit. Most courts are likely to find that, as between a lawyer and client, it was the lawyer's duty to recognize the client's needs and to represent them effectively regardless of whether the lawyer was designated as lead or local counsel.

Furthermore, a lawyer's artificial limitations on his or her duties typically will be viewed with skepticism and may be held to be ineffective. Courts have held that a lawyer cannot ignore circumstances that require the lawyer to protect the client's interest merely because the particular legal needs of the client fell outside the scope of the assignment from lead counsel. ■



able, and local counsel's insurance limits of liability for errors and omissions exceed those of lead counsel, a very uneven result will obtain.

Defining the Representation

To be held liable for malpractice, a lawyer first must have a duty to act. Because the duty to act arises from the nature of the lawyer-client relationship, the key issues for a lawyer retained as local counsel are:

What was the scope of local counsel's engagement? To whom did local counsel owe a lawyer's duty? Did local counsel have any implied duties, in law or in fact, to monitor the case?

A court will consider these issues when addressing counsel's liability for acts of legal malpractice.

Accordingly, a lawyer serving as local counsel should consider the following steps:

- Conduct a complete and frank discussion with both the cli-

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