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Spring Convention registration inside.

If You Are Local Counsel in Utah, You Should Read This

by Keith A. Call

A year and a half ago, I wrote about the ethics of serving as local counsel. See Keith A. Call & Robert T. Denny, *Serving as Local Counsel*, 29 UTAH B.J. 48 (July/Aug 2016). Since that time, the Utah law of local counsel has had a major shakeup.

In September 2017, the Utah Bar Ethics Advisory Opinion Committee (EAOC) gave Utah lawyers important new guidance. Any Utah lawyer who serves as local counsel should read this opinion. See Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04 (Sep. 26, 2017). Here are a few highlights.

Acting as Mail Drop is Insufficient

Sometimes out-of-state counsel seeks to retain local counsel for no other reason than to “rent” a Utah Bar license with a Utah address. Perhaps the most important take-away from the new EAOC opinion is that acting as a mere mail drop will not fulfill your ethical duties as local counsel.

Quoting Rule 5.5(c) of the Utah Rules of Professional Conduct, the EAOC opines that local counsel must “actively participate[] in the matter.” Op. 17-04, ¶ 6. Based on this standard, the EAOC concludes, “Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. *Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney.*” *Id.* ¶ 2 (emphasis added).

So, to the extent Utah local counsel have acted only as a mail drop in the past, the EAOC has made it clear this practice should stop.

Know the Case

By rule, Utah local counsel must sign the first pleading signed in any case filed in Utah district courts. See Utah R. Jud. Admin. 14-806(f)(4). According to the EAOC, only licensed Utah local counsel should electronically file any documents in Utah district courts. Op. 17-04, ¶ 12 (citing Utah R. Jud. Admin. 4-503).

Local counsel is therefore responsible to make sure the pleadings and other documents comply with Rule 11. “Local counsel must...investigate the merits of the case to the extent necessary to be satisfied that the substance of the documents, both legal and factual, prepared by the pro hac vice attorney complies with Rule 11 and Utah law generally before filing them with the district court.” *Id.* The opinion further suggests that this is a personal, non-delegable duty. See *id.*

Local counsel must also “keep reasonably informed about the case as it progresses” and “monitor the pro hac vice attorney closely enough to know whether the pro hac vice counsel is following [pertinent law, rules, procedures and customs].” Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04, ¶¶ 9, 13 (Sep. 26, 2017). The opinion suggests that one way to do this is for the client and pro hac vice lawyer to copy local counsel on all substantive written communications and to include him or her in all substantive attorney-client meetings. *Id.* ¶ 9.

Use Independent Judgment

Local counsel should not simply defer to pro hac vice counsel. Instead, “local counsel has a duty to advise the client of local counsel’s independent judgment that differs from that of the pro hac vice attorney.” Moreover, local counsel must “take action to protect the client’s interests, even where local counsel has agreed not to have any direct contact with the client.” *Id.* ¶ 15.

Of course, it will be impossible to use independent judgment if

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you are not actively involved with the case. The EAO opinion clearly requires local counsel to be actively engaged.

Some Duplication Will Be Required

The EAO recognized that one goal of the pro hac vice attorney – and the client – may be to reduce or eliminate duplication of work by local counsel. The opinion states that “local counsel does not have to duplicate the work already performed by the pro hac vice attorney so long as the pro hac vice attorney is complying with the Utah Rules of Professional Conduct.” *Id.* ¶ 8. Yet, it is hard to imagine how the local counsel can fulfill their obligations described elsewhere in the opinion without significant duplication. Indeed, the opinion specifically states that local counsel must ensure pro hac vice counsel is complying with the rules, “even if that entails some duplication of efforts.” *Id.* ¶ 9.

Without question, fulfilling local counsel’s obligations as described in the opinion will usually require significant duplication of effort.

Limiting Communication to Pro Hac Vice Counsel

The EAO recognizes that the Rules of Professional Conduct allow a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04, ¶ 10 (Sep. 26, 2017) (quoting Utah R. Prof’l Conduct 1.2(c)). It is therefore possible for the client to agree

that local counsel will only communicate with the pro hac vice attorney and that local counsel may rely on what the pro hac vice attorney tells them. *Id.* In such cases, you should carefully memorialize this in your engagement letter *with the client*.

Remember, however, that local counsel remains responsible to make sure pro hac vice counsel is complying with all applicable rules and is representing the client’s best interests. If you determine, using your independent judgment, that the pro hac vice attorney is not representing the client properly, you have to inform the *client* no matter what. *See id.* ¶ 15.

Read Opinion 17-04 and Send it to Pro Hac Vice Counsel

In my view, Opinion 17-04 represents a potential tectonic shift in the nature of local counsel practice in Utah. Love it or hate it, the opinion is full of important guidance that, if followed, will dramatically change the way local counsel in Utah operate.

In addition to making sure the client understands your role through a carefully crafted engagement agreement and other communications, I suggest you send this opinion to any out-of-state lawyer who asks you to serve as local counsel. It will help them understand the importance of having you “actively participate in the case.”

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case.