

Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2020-01

Topic: Lawyer's Responsibility When Acting As Local Counsel For A Client In Association With Pro Hac Vice Counsel

Rules Implicated: The Entirety Of Rules 16-100 Et Seq. Nmra (2020); With Special Emphasis On Article 1: Lawyer-Client Relationship Rules

Disclaimer: The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued ("Rules"). One way in which the Committee attempts to advise lawyers is through "formal opinions," which are published. In issuing formal opinions, the conclusions are based upon any facts that are referenced in the opinion. Lawyers are cautioned that should the Rules subsequently be revised, or different facts be presented, a different conclusion may be appropriate. The Committee does not opine on matters of substantive law although concerns regarding substantive law are sometimes raised in the opinions. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the question presented.

Question Presented:

What are a lawyer's duties to the client under the Rules of Professional Conduct when they are acting in the capacity as local counsel for that client in association with a pro hac vice lawyer?

Summary Answer:

A lawyer who enters an appearance in a matter as local counsel in association with another lawyer who is admitted pro hac vice has the same duties under the Rules as in every matter in which the attorney appears.

Analysis:

Under a straightforward reading of the Rules of Professional Conduct, there is no differentiation between representing a client through a pro hac vice arrangement or through direct engagement.

The pro hac vice arrangement is a creation of the Rules of Procedure, which make it clear that local counsel is considered to have entered an appearance in the matter as an attorney of record along with the out-of-state attorney, who is only permitted to practice in association with this local counsel – a member in good standing with the bar.

Specifically, Under Rule 24-106 NMRA an attorney not admitted in New Mexico may practice law after complying with required conditions and only "in association with an active member in good standing as a member of the State Bar of New Mexico." Pursuant to Rule 1-089.1 NMRA, the local counsel must be present at every hearing "unless excused by the court," and is

considered to have signed every pleading and is subject to Rule 1-011 for everything submitted to the court. Therefore, a lawyer acting as local counsel implicitly certifies to the court that they "ha[ve] read the pleading, motion, or other paper; that to the best of the [their] knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Rule 1-011(A) NMRA.

Nothing in the Rules of Procedure differentiate between the level of participation or professionalism expected from local counsel and that of other counsel involved in a matter. To the contrary, they express the clear expectation that once counsel has entered their appearance, they are guided by universally applicable principles.

Although unpublished and therefore not authoritative, *Khalsa v. Puri* provides the example of how the expectations for "local counsel" are no different than for "counsel." In that case, the defendant had filed for a writ of certiorari with the New Mexico Supreme Court, which it granted. No. S-1-SC-36192 (Nov. 27, 2017); 2017 WL 9833745 (unpublished). The court set oral arguments for September 26, 2017 but canceled them when local counsel did not appear with pro vac vice counsel, in violation of Rule 12-302(E). *Id.* While the New Mexico Supreme Court ultimately decided to quash the order to show cause, it did award attorney's fees to opposing counsel as compensation and for the Rule 12-302(E) violation of local counsel. *Id.*

While it does not appear to be a case involving a pro hac vice arrangement, *In Re Estrada* provides an example where a less-experienced subordinate attorney was held accountable under the Rules of Professional Conduct, even though directed in her conduct by out-of-state counsel controlling the litigation. 2006-NMSC-047; 140 N.M. 492. At the client and out-of-state counsel's urging, the lawyer allowed a forged prescription to be submitted, violating her duties to the judiciary and the administration of justice. Specifically, the court found that she had repeatedly violated "Rules 16-102(D) and 16-301 by pursuing a meritless defense and assisting her client in conduct that misled the court." *Id.* ¶27, 140 N.M. at 502. The court did not find the subordinate role compelling, noting that "under Rule 16-502(A) NMRA, '[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.'" *Id.* ¶26, 140 N.M. at 502. Finally, the Supreme Court admonished that: "It should be clear to Members of the New Mexico Bar and those who provide or offer to provide legal services here, that such conduct will not be tolerated." *Id.* ¶27, 140 N.M. at 502.

From the Rules of Procedure and these two cases, we are brought squarely back to the Rules of Professional Conduct. Those rules start by directing that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 16-101 NMRA. Beginning with that rule, and going forward, a New Mexico lawyer who enters his or her appearance on behalf of a client – as sole

Ethics Advisory Opinion

or local counsel – is thereafter bound by the identical duties to the client, the courts, and the administration of justice.

The Fifth Circuit, applying the Louisiana Rules of Professional Conduct and discussing the “duty of care,” provides an on-point example in *Curb Records v. Adam and Reese L.L.P.*, 203 F.3d 828, 1999 WL 1240800 (5th Cir. 1999)(unpublished). In that case, a California firm hired local counsel and stated that his sole function was to “file[] and forward pleadings, discovery and orders” and that he was not to have any contact with the client. *Id.* at *1. With this understanding of his role, local counsel did not inform the client of a series of discovery defaults by the California firm, which resulted in sanctions and ultimately an unfavorable settlement. The district court, relying solely on contract principles, did not find that local counsel committed malpractice. *Id.* at *3. However, the Fifth Circuit, after a thorough analysis of lawyers’ duties under their Rules of Professional conduct concluded:

[I]n a situation in which it is clear to a reasonable attorney that substantial prejudice will occur to the client as a result of lead counsel’s malfeasance or misfeasance, we think that the duty of care under Louisiana law requires local counsel to notify the client of lead counsel’s actions or inaction, irrespective of instructions, excuses, or strategies of lead counsel.”

Id. at *6 (emphasis added). In other words, no pro hac vice agreement between attorneys can serve to alter local counsel’s duties imposed by the Rules of Professional Conduct.

Other ethics advisory committees, including Utah’s, have looked at this precise question. In its Opinion 17-04 (Sept. 26, 2017), Utah did not mince words, clearly concluding after a similar analysis that:

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. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the Utah court proceedings.....[I]f local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client’s interests, or the administration of justice, local counsel must communicate local counsel’s independent judgment to the client, and, if necessary, to the court or tribunal.

Emphasizing this point even further, Wyoming recently added the following language to their rule governing pro hac vice admissions: “Local counsel shall be deemed to have ratified all conduct of pro hac vice counsel and shall be responsible for pro hac vice

counsel’s violation of the Rules of Professional Conduct.” Rules Governing the Wyoming State Bar and the Authorized Practice of Law, Rule 8(3)(e) (effective December 1, 2019).

Finally, while our Rules allow for limited entries of appearance, Rule 16-102(C) NMRA and Rule 1-089(A) NMRA, it is the opinion of the Committee, in light of the foregoing discussion, that such limitation would have to be entered into by the client with all counsel; local counsel cannot limit their representation to be more restrictive than pro hac vice counsel with whom they are associating.

Conclusion:

For the reasons set forth above, the Committee concludes that a lawyer who enters an appearance in a matter as local counsel in association with another lawyer who is admitted pro hac vice, has the identical duties under the Rules of Professional Conduct to the client and to any court that exist in every matter in which the lawyer appears.

Endnotes

1 Rule 1-089.1(A) NMRA Nonadmitted counsel.

Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or country, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. The affidavit shall be filed with the first paper filed in the court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel shall be deemed admitted subject to the other terms and conditions of this paragraph. A separate motion and order are not required for the participation of nonadmitted counsel. New Mexico counsel must sign the first motion or pleading and New Mexico counsel’s name and address must appear on all subsequent papers or pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 1-011 NMRA. For noncompliance with Rule 24-106 NMRA or this rule, or for other good cause shown, the court may issue an appropriate sanction including termination of the attorney’s appearance in any proceeding.

2 Similarly, in appellate court, “[a]n attorney or firm shown as participating in the filing of any brief, motion, or other paper shall, unless otherwise indicated, be deemed to have appeared in the cause.” Rule 12-302(B) NMRA.

3 Although New Mexico has not incorporated pro hac vice language into its Rule 16-501 NMRA, the rationale of the Utah Rule is persuasive.