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Working With Local Counsel: Getting the Hometown Advantage

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A critical communication slipped through the cracks in a death penalty case recently decided by the U.S. Supreme Court, *Maples v. Thomas*, 132 S. Ct. 912, decided Jan. 18, 2012. The critical communication was between local counsel and New York counsel in an Alabama state court case. The communication failure came close to allowing the execution of a death row inmate because of a failure to file a critical appeal, highlighting the importance of close coordination between New York counsel and local counsel in both civil and criminal cases.

The facts of the case should send shock waves throughout the New York bar. Cory R. Maples was found guilty of murder and sentenced to death in Alabama. Two pro bono New York lawyers sought post-conviction relief in Alabama state court, alleging ineffective assistance of counsel. Those two lawyers, as required by Alabama law, engaged an Alabama lawyer, John Butler, as local counsel. Butler made clear that he would move their admission pro hac vice, but would not undertake any substantive involvement in the case.

While Maples' post-conviction petition was pending, both New York lawyers left their firm, and their new employment disabled them from representing Maples. They did not inform him of their departure or inability to serve further as his counsel. In disregard of Alabama law, neither sought the trial court's leave to withdraw as counsel. No other attorney entered an appearance, moved to substitute counsel, or otherwise notified the court of the change in Maples' representation.

The trial court entered an order denying Maples' petition. Notices of that order were mailed to the New York firm, which returned them unopened, because the two pro hac lawyers were no longer employed there. Butler also received a copy of that order, but did

not act on it. Maples was unaware that his appeal period was running. His appeal period ran out.

A month later, an Alabama assistant attorney general sent a letter directly to Maples, informing him that he missed the deadline to appeal, and that he had four weeks to file a federal habeas petition. The Alabama court denied a motion to reissue its order, which would have restarted the appeal period.

The Alabama Court of Criminal Appeals then denied a writ of mandamus that would have enabled Maples to file an untimely appeal; the Alabama Supreme Court affirmed. Maples then sought federal habeas relief. The District Court denied that relief, and a divided panel of the U.S. Court of Appeals for the Eleventh Circuit affirmed, in *Maples v. Allen*, 586 F.3d 879 (2009), because Maples failed to file a timely appeal.

The U.S. Supreme Court ruled in Maples' favor, Justice Ruth Bader Ginsburg writing for the majority, with Justices Antonin Scalia and Clarence Thomas dissenting. Ginsburg's rationale was that Maples could not be charged with the acts or omissions of attorneys who had abandoned him, and could not be faulted for failing to act on his own behalf when he lacked reason to believe his attorneys of record were not, in fact, representing him.

Justice Samuel Alito aptly described this near-catastrophe as "a veritable perfect storm of misfortune." This saga is an extreme example of just some of the things that can go wrong when pro hac counsel and local counsel do not work together effectively. Local counsel must be much more than just a mail drop—and should, instead, provide a hometown advantage.

Forming a Relationship

At the inception of the relationship with local counsel, lead counsel must establish clear lines of responsibility. If counsel in the Maples case had done so, Maples would not have suffered the angst of the prospect of his untimely death, and his lead and local counsel would have been spared sleepless nights, to say the least.

In both criminal and civil cases, lead counsel must discuss and resolve with local counsel many practical issues, such as: Who will respond to court notices and orders? Who will communicate with the client and draft pleadings? What procedure will be in place for

local counsel to review drafts of proposed filings, and who will do research on issues as they arise?

When local counsel is retained, both counsels should reach a clear understanding of the terms of the agreement, including whether the agreement is with the client or with pro hac counsel. One risk is that the client does not establish a relationship with local counsel, and thus minor billing or other issues can take on a greater significance than they deserve.

Maximizing the benefits of local counsel's involvement is limited only by creativity. Even though the focus here has been on representation of plaintiffs, the issue is equally important in representation of defendants, albeit on the flip side (e.g., brainstorming affirmative defenses rather than causes of action).

Lead counsel can benefit from local counsel in many ways. Local counsel should assist in pro hac vice applications, assuring compliance with local requirements, not all of which are obvious. For example, in the U.S. District Court for the District of Connecticut, an attorney cannot be admitted pro hac without signing an affidavit including the affirmation, among others, that the applicant has fully reviewed and is familiar with the local procedural and ethical rules. See L. Civ. R. 83.1(d)(4).

In civil actions, local counsel should review the form of lead counsel's draft complaint and other draft pleadings, providing guidance about compliance with the proper format in the local jurisdiction. In addition, local counsel should review the substance of the draft complaint to determine whether each count properly sets forth a cause of action in that jurisdiction and is properly pled, based on the law in that jurisdiction and local practice. For example, some Connecticut judges have held that an allegation "on information and belief" is improper.

Local counsel can suggest to lead counsel other possible causes of action not in the draft complaint and can provide guidance about long-arm jurisdiction, unique to each state, help find the right process server and provide inside information about judges and their unique chambers practices. For example, Connecticut has no statute regarding long-arm jurisdiction over foreign limited liability companies, but case law has developed as to this issue.

Here are a few additional suggested guidelines. Local counsel can provide lead counsel:

- Guidance about types of relief that may be available in the jurisdiction, statutory and otherwise, and the likelihood of recovery as to each—for example, in Connecticut, punitive damages are no more than legal fees, unless otherwise provided by statute;
- Guidance about interlocutory remedies, such as injunctions, beyond what is in the rules, to answer such questions as: What is the likelihood of getting a temporary restraining order? What must be filed with injunction papers? If affidavits are required, how thorough must they be? How long before a temporary injunction hearing? What is the likelihood of going forward when scheduled? How likely is it that the judge will provide temporary relief?
- Guidance about implementation of local rules in the jurisdiction—for example, the U.S. District Court for the District of Connecticut has unique rules regarding motions for extension of time, interrogatories and document requests, depositions, discovery disputes, and summary judgment procedure.
- Guidance about securing any judgment by a prejudgment remedy, as is available in Connecticut;
- Research unique to the forum state, including benefitting from local counsel's brief bank on issues unique to that jurisdiction;
- Staff for logistical support;
- Review and comment on drafts of pleadings and memoranda to be filed with the court.

An ancillary benefit, of course, is avoiding legal malpractice. What if Maples had been executed? No lawyer would want to be a defendant in that malpractice lawsuit. Even if the client's life is not at stake, coordination with local counsel is vital not just to avoid malpractice; it is vital for success.

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