

## LOCAL COUNSEL: SELECTION AND USE TO OBTAIN AN ADVANTAGE

Steven S. Kaufman, Esq.  
Sara A. Smoter, Esq.  
Kaufman & Company, LLC<sup>1</sup>

When engaging local counsel, you and your client must think of the selection as a critical decision that can have significant positive or negative impact on the case. The selection and management of local counsel must be viewed as a crucial strategic element of both the quality of the representation of the client in the matter, as well as the service the client needs in order to be successful. The process of selection and management of local counsel should be approached deliberately and early in the process of litigating a case in a jurisdiction where the lead counsel is not officed. This article approaches the seriousness of the task with a broad range of recommended best practices.

One of the most critical decisions you will make is how to effectively use local counsel when you are before the court in a live court proceedings. Depending upon the judge and the individual local counsel, sometimes it makes sense for the local counsel to have a much greater regular presence when appearing before the judge. Other times, an easy segue takes place early in the case when the lead counsel is able to take on the primary role in the courtroom. Then, the local counsel is there as a back-up or simply for “local face” purposes. This decision as to the role will, in large part, depend upon who the judge is, what jurisdiction you are in, and how to most effectively use the talent that you have in your local counsel. This is a case-specific decision that will be made once you have selected your local counsel. However, if you are before a particular judge and in a jurisdiction where you think it is critical to have a regular courtroom presence of your local counsel, that will inform the criteria in your selection process and how that local counsel will function as part of your legal team.

There are significant opportunities for a local counsel relationship to add meaningful value to the representation of clients. This article will deal with the nuts, bolts, best practices, and common pitfalls in the selection and use of local counsel.

### **A. Maximizing Your Effectiveness in the Selection of Local Counsel**

The effectiveness and success in the selection of local counsel depends upon your diligence in methodically conducting the selection process. The following timetable of effort is critical to your success. There are a variety of considerations that go into choosing local counsel:

- Identify the characteristics of the attorney needed;

---

<sup>1</sup> Steven S. Kaufman is Managing Partner of Kaufman & Company, LLC, a business litigation boutique with a national practice with offices in New York, Chicago, Cleveland, and Washington, DC. Sara Smoter is an Associate at Kaufman & Company. The firm focuses on complex commercial litigation matters, including financial services, real estate, intellectual property, and professional/fiduciary liability.

- Determine the timing of the selection process;
- Decide who should make the selection;
- Conduct the actual selection process;
- Verify the reputation, experience, qualifications, and capability of the attorney; and
- Ensure that the attorney's style and approach fit the company's goals and personality.

You must understand that you are selecting an individual lawyer, not a law firm, to serve as local counsel. The focus of the effort should be on identifying the specific lawyer you want to lead the local counsel role. Once you have the lawyer identified, you will then take a look at the law firm itself as described more fully later in this article. But remember, it is the lawyer that you are picking that may be the face of the case and also the face of the legal team in a number of different ways.

### **1. Identify Characteristics Needed**

Before you start to search for local counsel candidates, it is critical for lead counsel (or the client's in-house counsel) to identify the characteristics and service requirements of the local counsel needed for the particular matter. This may vary from case to case, so it is not a "cookie-cutter approach." Consider this set of questions first.

Client in-house counsel and/or lead counsel should create a written list of the criteria and factors for the specific local counsel needed ("Requirements List"):

- Geographic location:
  - It is always best to find a lawyer as local to the jurisdiction as possible.
  - Some federal courts have multiple divisions in different cities in the state. Thus, lawyers in one city may not necessarily be the best candidate for your local counsel role in another city;
- Reputation and prestige in the local community:
  - Lawyer's reputation before the specific court in the particular district
  - Lawyer's reputation before the specific judge assigned (i.e., reported decisions, etc.)
  - Lawyer's experience with the specific court and the judge;
- Substantive legal knowledge in the subject area;

- Knowledge level in specific court:
  - Knowledge of the Local Rules
  - Knowledge of the Court's Electronic Filing System.
  - Knowledge of Local Events, Juror Pool, and Significant Community Attributes;
- Experience level required for the local counsel (Partner or not?);
- Competency and integrity of individual lawyer;
- Availability and quality of supporting staff (attorneys and other staff), and resources of the local counsel firm:
  - Local counsel should be available whenever you may need him or her (cell and home phone availability).
  - Adequate local facilities and resources:
    - Prepared to host depositions
    - Local counsel should also have several recommendations and space for war room availability/service
    - Local photocopying services, local jury consultants, local graphics experts, etc.;
- Availability to meet estimated time commitment for estimated duration of engagement:
  - Responsiveness and willingness to give priority to the work;
- Capacity to fulfill the role you need and be responsive to you and your client's needs in the case;
- Prior experience working in the role as local counsel:
  - Obtain and check references as described below;
- Familiarity with, or access to, individuals or institutions that may be important to achieving a successful result including, e.g.:
  - Familiarity with obtaining access to local (or specialized) court or government and/or agency officials

- Access to local (or specialized) experts or investigators (e.g., private investigation);
- Hourly rates, fee structures, and willingness to work within budgeting constraints and a budgeting process;
- Personal compatibility with inside and other outside counsel; and
- Commitment service through communication of information promptly, clearly, candidly, and accurately.

## **2. Timing of the Selection of Local Counsel**

- Inside counsel (or lead counsel) should prepare the Requirements List and then take proactive steps to prepare for a selection process well before it is necessary to retain a lawyer in a particular jurisdiction or practice area.
- If not done early, clients often default to simply repeating history: using the same outside counsel the company has used before (whether good or bad) or calling a colleague and taking the first name.
- Law firms and companies are well served by developing and keeping track of relationships with potential local or specialized attorneys.
- The existence of a local counsel data bank will allow you to respond to emergencies.
- Advance selection is not always practicable because of the limits on inside counsel's time and the impossibility of foreseeing all situations in which local and specialized counsel will be needed.
- The basic point is that the selection of qualified local and specialized counsel is not an isolated, one-time task; it is an ongoing process.

## **3. Locating Candidates to Serve as Local Counsel**

- The key to this process is to look for a specific lawyer not a law firm to fill the role
- While locating a law firm with a good local presence and reputation is important, most important is that, whatever the firm, you find a particular lawyer that is going to be able to meet all the criteria you set.

#### **4. Sources for Local Counsel**

There are multiple potential sources to find the right local counsel. You should use all or most of them. Often, if the same names recur, it validates the best candidates. These sources include:

- Word of mouth and networking through other lawyers you know in the geographical area or nationally;
- Lawyers in your firm or in-house department who may have needed or used local counsel in this particular jurisdiction before;
- In your networking, focus most on recommendations of the individuals who know the individual well and have actually had relevant experience with him or her.
  - However, try to sort out people who are just known to the referring source by name or are pushing a personal relationship they have.
- Search data bases for lawyers that have represented clients on similar matters in the relevant courts.
- If applicable, use law firm networks and organizations you are part of.
  - The vetting process through member organizations should be the same type of “screen” as described earlier in this article.
  - Continue to look for the specific lawyers that fits the situation.
- Former law clerks for the judges in the court you will be in (or better yet the particular judge you will have). This is always a potential good source because the lawyer will know the court and the judge and be known by the court and the judge. You can find these lawyers through the traditional legal directories including Martindale Hubbell.

#### **5. “Due Diligence” After Identifying the Candidates**

- Speak with other lawyers you may know in the jurisdiction to see if they have had any experience, positive or negative, with the specific attorney.
  - Find out whether the attorney has the degree of expertise and “connection to the courts in the jurisdiction” that you are looking for.
  - Get confirmation or validation to identify this lawyer as a candidate.
- Obtain other research about the individual lawyer/firm in advance of contacting the candidate:

- Obtain detailed bio or resume.
  - Do Google search of this lawyer to make sure there are no red flags and to identify other positive attributes on the lawyer's resume.
  - Conduct Westlaw search and review of the firm's website, and the individual's post on the website.
  - All of this will give you insight into how this local counsel will be able to help you navigate the matter in a cooperative and effective strategic way.
- Conduct initial telephone interview with the candidate to identify/probe:
- Prior trials or litigation the attorney has had with that judge and in that court;
  - Prior decisions or reports involving this lawyer;
  - Lawyer's familiarity or experience with the assigned judge, the court, and court rules and procedure;
  - Lawyer's knowledge of the substantive area involved;
  - Lawyer's style;
  - Lawyer's resources in his/her law firm that may be needed;
  - Lawyer's availability given his or her other load requirements;
  - Lawyer's hourly rates and those of supporting staff that may be needed; and
  - Other lawyers within the firm that might be identified to be part of this team (and qualifications and experience).
- RFP's:
- Generally, too cumbersome a process;
  - Less personalized for the relationship you want to establish with local counsel.
- **Draft Engagement Letter:**
- It is best to get a draft form of engagement letter.

- **Present several options to the client**, not just one, unless there is one option that is simply compelling.
  - Compile all this due diligence information into a memo for the client to review and use to make a decision.
- **Final interview process with the local counsel candidates** (if did not get the following information previously):
  - Obtain confirmation of privilege/confidentiality of this discussion;
  - Test attitudes this lawyer has about handling the particular type of problem involved;
  - Test whether the candidate is comfortable or recommends for or against particular strategies or goals you may have in mind in the case;
  - Explore how comfortable the lawyer is with the division of labor you have in mind between lead counsel and local counsel;
  - Get a sense of how this lawyer views opposing counsel and his/her private experience in working with or against the lawyers; and
  - Explore any other specific issues or concerns that the lawyer has about how the matter might proceed based upon the information you can provide regarding the case and the nature of the dispute.

**B. Potential Local Counsel’s Process to Decide Whether to Take On the Local Counsel Role.**

As a potential local counsel, you will want to do a thorough assessment of both the potential client as well as the lawyer and law firm reaching out to seek your potential involvement.

**1. Assess the Potential Client:**

- What type of litigant tare they (i.e., how often and what is their history of both frequency as well as success or failure)?
- Does the company have any particular financial problems which oftentimes will drive both behavior as well as financial commitments to pay for legal services?
- If the matter will involve the top executive team of the company, research those individuals to determine their background, public profiles, and histories.

- This research will illuminate whether this is a solid business with a solid team you can trust.
- This search is typically a predictor of future behavior so be guided carefully by what you learn.

**2. Assess the Lead Lawyer and Law Firm:**

- Do a similar analysis and research.
- Check with others in your network in order to vet both the law firm and the lawyer.

**3. “Interview” the Potential Client/Lead Lawyer:**

- Determine whether or not the client will be able to afford the cost of your services.
- Assess compatibility in working with the lead attorney.
- Insure your judgment will be respected (you do not want to be in a situation where the lead lawyer simply says to you “do what I tell you to do”).
- Early conversations about how that aspect of the relationship will work will be informative and either raise red flags for you or give you a sense of comfort that the relationship will work.

**C. Best Practices in “Managing” the Local Counsel Relationship in Course of the Case**

- **Communication** is a center piece of success.
- **Set specific scope of work** required (see below re local counsel rules in jurisdiction).
- **Set staffing** to meet range of services required within the scope of engagement.
- **Set budgets** for “tasks” on roles as part of overall case strategic plan.
  - Manage by requiring prompt “heads up” communication on budget deviations.
- **Tailor engagement letter** in accordance with any “local counsel” requirements in the jurisdiction.
- **Pro Hac Vice Admission**



- Review the ABA’s pro hac vice admissions chart, and consult the FRCP or the respective state’s rules of civil procedure and local court rules/forms.
  - Obtain key information re jurisdiction.
  - Visit the court’s website and navigate the local rules.
  - Obtain judge’s rules if a judge has been assigned.
  - Consult both your state’s professional rules of conduct, as well as those of the state in which the representation will take place.
- **Review and approve the local counsel invoices** before sending to clients with approval and explanation of costs.
  - **Conduct Organized Orientation**
    - Thorough orientation organized by lead counsel.
    - Discussion and written outline of scope of local counsel role.
    - Discussion of case strategy.
    - Review of communication process for the relationship—designate “point” attorneys in each law firm/in-house.
    - Review of responsibilities of all staff assigned to case.
  - **Designate a contact person at local counsel firm** to stream-line efficiency and communication.
    - Choices among senior and junior person can vary.
    - Agree on process for filing/service of court papers.
    - Agree on process for identifying and approving correct “forms.”
  - **Manage communications** throughout the case to:
    - Insure prompt responses to inquiries
    - “Invite” updates and promote communication need
  - **Identify agreed flow of information communication:**
    - From in-house counsel to local counsel

- Consider extra-net sites and electronic means of including all in communications.
- **Decision-Making:** Be clear on what decisions can/cannot be made by local counsel.

**D. Local Counsel Best Practices in Providing Excellent “Service” to Lead Counsel and Client**

- **Communication:**
  - Manage this consistently by one lawyer responsible for communication.
    - To internal team at local counsel firm
    - To Point Contact at Lead Counsel
  - Clarify what documents/communications are to be made to outside and in-house counsel.
  - Be a source of effective communication with opposing counsel—encourage your use for this function.
- **Proactive management of key milestones/communications:**
  - Deadlines communicated;
  - Reports on status; and
  - Prompt replies.
- **Clarify decision authority:**
  - What authority will local counsel have on certain “decisions” such as extensions, etc.
- **Revisions input and approval** to documents to be filed:
  - Allow sufficient time; and
  - Insist on review—your name is on the paper!