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LOCAL ASSOCIATED COUNSEL IN THE FEDERAL DISTRICT COURTS: A CALL FOR CHANGE

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Most federal district courts permit nonresident counsel to appear *pro hac vice*[1] only if the nonresident counsel associates local counsel to assist in the pending litigation. These courts require association of local, in-district counsel before they will accept pleadings or allow appearances by nonresident attorneys. The courts delineate the precise requirements of local association by local court rule.[2] The supporters of local association apparently justify these rules on two bases: protection of the client and protection of the power and dignity of the court.[3] In practice, however, local rules do not protect the interest of clients; rather, they affirmatively encroach upon the client's right to choose his counsel. The local association rules benefit the courts only by enabling them to control, somewhat autocratically, who can practice before the court.

Whatever the reason for their existence, the primary effect of the local association rules is to protect local attorneys from competition and to provide local attorneys with an association fee when competition is allowed. This Article maintains that the often-parroted justifications for the local association rules are illusory and that the rules do not provide sufficient benefit to courts or clients to justify the present broad scope of the rules.

Although past attempts to alter the association rules have failed,[4] the recent explosion of lawyer malpractice litigation and potential malpractice liability of local associated counsel may soon generate significant changes in the rules. The relatively small fees earned by local counsel do not justify the potential liability of the local counsel for the malpractice of the nonresident counsel. Thus, local counsel will either

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1 "For this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1091 (5th ed. 1979).

2 FED. R. CIV. P. 83 and 28 U.S.C. § 2071 (1976) authorize federal district courts to promulgate local rules of practice. For a discussion of local rulemaking authority of the federal district courts, see 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 3151-3155 (1973).

3 For a description of state interests in state *pro hac vice* cases, see Brown v. Wood, 257 Ark. 252, 516 S.W.2d 98 (1974), *cert. denied*, 421 U.S. 963 (1975).

4 *See generally* Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967).

have to increase fees in proportion to the risk and become more actively involved in the lawsuit or altogether refuse to assume the role of the local counsel.

Until some reform is made, local counsel should be careful to delineate precisely his responsibilities in order to avoid liability for the malpractice of nonresident counsel. Local counsel may not even be allowed this precaution in jurisdictions that require local counsel to have full authority to act for the client. Nor may local counsel contract away those responsibilities made mandatory by local rule.

This Article first examines the association rules, their justifications, and the responsibilities they place on local counsel. Second, the focus turns to lawyer malpractice to alert associated counsel of the potential risks in assuming the associated counsel role. This material indicates that it is now realistic to assume that rejection of the local association rules will be supported by the practicing bar. Finally, this Article proposes that the solution to the problems engendered by the local association rules is to eliminate the local association rules entirely and substitute a uniform federal statute that allows federal courts to require the association of local counsel only in exceptional circumstances. Such change should not wait for the resolution of the general issue of admission to federal practice. In fact, the proposed limitation on association of local counsel would encourage interdistrict legal practices and might serve as a limited experiment to help resolve the current controversy regarding the desirability of national standards for admission to the federal bar.[5]

I

RULEMAKING IN THE FEDERAL DISTRICT COURTS

Under federal statute[6] and the Federal Rules of Civil Procedure,[7] each federal district court is authorized to promulgate local practice rules that are not inconsistent with constitutional protections, statutory requirements, or the Federal Rules of Civil Procedure. Using this grant

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5 This Article will not deal with what constitutes practico of law for state bar activities. For a discussion of what constitutes allowable legal activity within a state by nonresident counsel when not directly preparing for litigation, see Note, *supra* note 4, at 1717-21.

6 28 U.S.C. § 2071 (1976) states: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

7 FED. R. CIV. P. 83 states:

> Each district court by action of a majority of the judges thercof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice not inconsistent with these rules.

of power, district courts have prescribed local rules governing significant matters such as providing for less than a twelve person jury[8] as well as mundane matters such as the hours during which the public will be admitted to the court's library.[9] Although one commentator praises the present rulemaking process for formalizing what otherwise would be informal and often inconsistent procedures,[10] others condemn the current process as inconsistent with the intent of the Federal Rules of Civil Procedure.[11] Few appellate decisions have addressed the proper scope of rulemaking in the federal district courts.[12]

Rule 83's requirement that rules be adopted by "action of a majority of the judges" of a district court is the only limitation upon the method of adopting local rules.[13] Consequently, it is hard to define the precise role local bar associations and local lawyers play in the local rulemaking process. Some courts solicit formal views of the bar and individual lawyers,[14] whereas other courts do not involve the practicing bar in the adoption or amendment of local rules.[15] Irrespective of the lawyers' role in the rulemaking process, however, the ultimate decision as to the content of local rules remains with the individual courts.[16]

A. *Description of the Local Association Rules*

Although the great majority of federal district courts require nonresident counsel to associate local counsel,[17] the content of the local association rules reflects little uniformity among the courts. Some district courts make association of local counsel mandatory;[18] other courts allow

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8 *See* Colgrove v. Battin, 413 U.S. 149 (1973).

9 N.D. CAL. R. 116-1.

10 Flanders, *In Praise of Local Rules*, 62 JUD. 28 (1978).

11 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3152 (draftsmen intended rule 83 to be used sparingly; proliferation of local rules seriously compromise the strong interest in developing uniform federal procedure).

12 *E.g.*, McCargo v. Hedrick, 454 F.2d 393, 402 (4th Cir. 1976); *see* Weinstein, *Reform of Federal Court Rulemaking*, 76 COLUM. L. REV. 905, 947 (1976) (local pre-trial procedure rule void as inconsistent with FED. R. CIV. P. 16; "local rules are not a source of power but are iustead a manifestation of it").

13 FED. R. CIV. P. 83.

14 For a discussion of the experience of the Eastern District of New York, see Weinstein, *supra* note 12, at 953-56.

15 *See id.* at 952-53.

16 For a careful review of the details of an acceptable rulemaking procedure, see J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 117-45 (1977). *See also* E. CLEARY & R. MISNER, PRELIMINARY REPORT: UNIFORM LOCAL RULES FOR UNITED STATES DISTRICT COURTS OF THE NINTH CIRCUIT 35-37 (1979).

17 Most federal district courts have association rules that require participation by local counsel or, at the least, require a local member of the bar to move for admission of counsel *pro hac vice*. The District of Columbia appears to be the only district court without an association or motion rule. D.D.C.R. tit. IV.

18 *See* S.D. ALA. R. 1(E); D. DEL. R. 8.1(D); N.D. FLA. R. 5(D); D. HAWAII R. 1(e); D. IDAHO R. 2(d); C.D. ILL. R. 1(e); D. KAN. R. 4(f); W.D. KY. R. 2(d); M.D. LA. R. 1(E); D.N.H.R. 5(b); N.D.N.Y.R. 3; N.D. OHIO R. 2.03; D. OR. R. 3(c); M.D. PA. R. 205; W.D. PA.

the judge either to dispense with the requirement[19] or to use his discretion in determining whether to order local association in the first instance.[20] Some courts require association if the nonlocal attorney does not reside within the federal district,[21] but most courts require association only if the attorney is not a resident of the state in which the federal court is situated.[22] A few courts, however, do not require association if the nonlocal counsel is from a "contiguous" area[23] or if "out-of-state counsel . . . come[s] from a jurisdiction that does not require the association of local counsel in its courts."[24]

The responsibilities of local counsel vary greatly from district to district. The rules tend to fall into five descriptive categories with varying degrees of responsibility placed upon local counsel.[25] In the first group, for example, local counsel's responsibilities are seemingly menial; often, local counsel is intended to be little more than a mail-drop.[26] In the Northern District of Ohio, for instance, a nonresident attorney must designate an attorney "admitted in this district and with an office in this district to or upon whom all notices, rulings, and communications are to be addressed or served."[27] Even where local counsel is assigued significant responsibility in the case, he often has the added responsibility of forwarding all correspondence to the nonlocal counsel.[28] In the Central District of Illinois, a "resident agent," rather than a local attorney, may accept service of process.[29] In the Western District of North Carolina, nonresident counsel must accept a deputy court clerk as agent for service

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R. 1(e); D.P.R.R. 4(C); D.R.I.R. 5(a)(2); D.S.C. *In the Matter of Admissions and Disbarment of Attorneys* ¶ 4; E.D. TENN. R. 2(a); M.D. TENN. R. 1(h)(1).

19 *See* E.D. ARK. R. 2(d); W.D. ARK. R. 2(d); D. COLO. R. 1(b); M.D. FLA. R. 2.02(a)(1); E.D. LA. R. 21.6; W.D. MO. R. 1(f); D. NEB. R. 5(G); N.D.R. 2(d); N.D. TEX. R. 13.4; S.D. TEX. R. 1(F).

20 *See* N.D. FLA. R. 5(D); N.D. GA. R. 71.41; S.D. GA. R. 19.41; W.D.N.C.R. 1(B); E.D. WIS. R. 2.04.

21 *See* S.D. FLA. R. 16(D)(7); N.D. GA. R. 71.41; N.D. IND. R. 1(a); W.D. LA. R. 4; W.D. PA. R. 1(e); W.D. TENN. R. 1(b); N.D. TEX. R. 13.3; S.D. TEX. R. 1(F); W.D. TEX. R. 4.

22 *See* C.D. CAL. R. 1.3(a); N.D. IOWA R. 5(F); S.D. IOWA R. 5(f); D. KAN. R. 4(f); W.D. KY. R. 4(b); E.D. MICH. R. 12(d); E.D.N.C.R. 2.03(a), 2.05; W.D.N.Y.R. 3(A); E.D. PA. R. 13; E.D. VA. R. 7(D); E.D. WASH. R. 1(c).

23 *See* S.D. ALA. LOCAL R. 1(A)(iii); E.D. ARK. R. 2(d); W.D. ARK. R. 2(d); D.D.C.R. 4-1(a); W.D.N.C.R. 1(A).

24 E.D. OKLA. R. 4(h).

25 As with all categorizations, some elements may defy an exact fit and some groups may tend to overlap, but the groupings are valuable to show in general form how district courts approach local counsel rules.

26 *See* N.D. FLA. R. 5(D); M.D. FLA. R. 2.02(a)(1); N.D. GA. R. 71.41; S.D. GA. R. 19.41; C.D. ILL. R. 1(e); W.D. KY. R. 2(d); W.D. LA. R. 4; W.D. MO. R. 1(f); D.N.H.R. 5(h); D.N.J.R. 4(C); S.D.N.Y.R. 3(a); M.D.N.C.R. 2(d)(1); N.D.R. 2(d)(1); N.D. OHIO R. 2.03; E.D. PA. R. 13(a); W.D. PA. R. 1(e); E.D. TENN. R. 2; M.D. TENN. R. 1(h(1)); W.D. TEX. R. 4.

27 N.D. OHIO R. 2.03.

28 *See, e.g.,* D.N.J.R. 4(C).

29 C.D. ILL. R. 1(e).

of process.[30] Another common type of local rule that appears to give local counsel only menial responsibilities requires only that local counsel sponsor a nonresident attorney before the court or move for the admission of the nonresident attorney.[31]

In the second group of jurisdictions, local counsel plays a more active, responsible role in the pending litigation. The most common requirement is that a nonresident attorney "designate . . . a member of the bar of this Court who maintains an office at the place within the district . . . with whom the Court and opposing counsel may readily communicate regarding the conduct of the case."[32] The "readily communicate" rule is often joined with a requirement that local counsel be designated an agent for service of process.[33]

In the third group of districts, local counsel plays an even more prominent role. For example, the Middle District of Louisiana refers to the nonresident attorney as "co-counsel."[34] In the Southern District of Ohio, the nonresident counsel "may be permitted to appear and participate as co-counsel or associate counsel."[35] Other districts require that nonresident counsel be "in association with a member" of the bar of the court.[36] Closely related to the "co-counsel" rules are those that require local counsel to be "of record."[37] Other rules require local counsel to "appear" in the litigation,[38] while still others require that a client be "represented by" local counsel.[39] Some districts require local counsel to sign all pleadings.[40]

The fourth group of local rules are more exacting with respect to the role played by local counsel. Several courts require local counsel to "meaningfully participate" in the preparation and trial of the case.[41] Other courts require that local counsel have full authority to act for the client.[42] The District of Nebraska requires that local counsel "have full

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30 W.D.N.C.R. 1(B).

31 *See* N.D. MISS. R. G-1(3)(b) & (c).

32 D. ALASKA R. 3(c)(1); *see* ARIZ. R. 6(b); E.D. ARK. R. 2(d); W.D. ARK. R. 2(d); C.D. CAL. R. 1.3(b)(2); E.D. CAL. R. 9(b)(2); N.D. CAL. R. 110.2(a); S.D. CAL. R. 110-3(d); S.D. FLA. R. 16(D)(1); D. IDAHO R. 2(d);D.P.R.R. 4(C).

33 *See* C.D. CAL. R. 1.3(b)(2); E.D. CAL. R. 9(b)(2); N.D. CAL. R. 110(2)(a); S.D. CAL. R. 110-3(d); S.D. FLA. R. 16(D)(1).

34 M.D. LA. R. 1(E)(2).

35 S.D. OHIO R. 3(O)(4).

36 D.R.I.R. 5(b)(2).

37 *See* N.D. IND. R. 1(d); S.D. IND. R. 1(d); D. MD. R. 3; D.N.J.R. 4(C); E.D. PA. R. 13(a); D.S.C. *In the Matter of Admission and Disbarment of Attorneys* ¶ 4; E.D. TENN. R. 2(a); E.D. VA. R. 7(d); W.D. VA. ATTORNEYS (4).

38 *See, e.g.,* W.D. WIS. R. 1(d).

39 *See, e.g.,* M.D.N.C.R. 2(d)(1).

40 *See* D. KAN. R. 4(f); W.D. MO. R. 7(f); D.R.I.R. 5(b)(3); S.D.W. VA. R. 1.05(c).

41 *See* D. HAWAII R. 1(e); D. OR. R. 3(c); E.D. WASH. R. 1(c).

42 *See* D. MONT. R. 1(c); N.D. TEX. R. 13.4; D. UTAH R. 1(c); E.D. VA. R. 7(D); W.D. VA. *Practice of Non-Resident Attorneys* (4).

authority to act for and on behalf of the client in all matters, including pre-trial conferences, as well as trial or any other hearings."[43] The District of Alaska rule states that "[l]ocal counsel shall be primarily responsible to the Court for the conduct of all stages of the proceedings, and their authority shall be superior to that of [nonresident] attorneys."[44] Other court rules grant local counsel full authority to act on behalf of the client if nonresident counsel is unavailable.[45]

The fifth group of rules gives the judge the discretion to determine local counsel's responsibilities.[46] In the District of Nevada, for example, "the court may, in a particular case, at any time, order such nonresident attorney to associate a resident attoruey as co-counsel in the case and the court may specify their respective responsibilities to the case."[47]

The lack of uniformity among the districts as to who may practice in the federal court and as to the role of local counsel is probably even greater in practice than the local rules might indicate. Many local court rules contain waiver provisions.[48] Thus, judges may not apply the association rules in a uniform manner.[49] The problem is compounded by the fact that a decision to waive a rule often does not require written justification and is virtually unreviewed.[50] Even in those districts in which association of local counsel is apparently mandatory, it is likely that individual judges do not uniformly require such association. Judges often choose to ignore certain rules despite rule 83's formal rulemaking requirements.[51] Indeed, most federal courts admit in practice what the Southern District of Alabama has admitted in its rules—that individual judges may well have their own particular rules of procedure.[52]

B. *Justifications for Local Association Rules*

1. *Competency of Counsel*

Local association rules are often justified on the basis that they pro-

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43 D. NEB. R. 5(G).

44 D. ALASKA R. 3(c)(3).

45 *See, e.g.,* E.D. MICH. R. 12(d).

46 *See* E.D. LA. R. 21.5; D. NEV. R. 4(e)(4); D. UTAH R. 1(c).

47 D. NEV. R. 4(e)(4).

48 *See* note 19 *supra*.

49 Justice Stevens, dissenting in Leis v. Flynt, 439 U.S. 438 (1979), recognized that the broad discretion exercised by state trial judges in deciding whether to allow appearances by nonresident lawyers could curtail the reasonable expectations and valid constitutional interests of the parties involved. Justice Stevens would require that the trial judge's discretion be exercised only on the basis of "permissible reasons" and that procedural safegnards be provided to ensure that the affected parties have an opportunity to reason with the judge. *Id.* at 453-56.

50 *See generally* 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3152.

51 *See* Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1264-65 (1967).

52 S.D. ALA. R. 20.

tect unwary clients from attorneys who are ignorant of the "substantive and procedural law and professional traditions peculiar" to the local court.[53] The rules imply that local counsel are knowledgeable in these matters. More broadly, the justification casts the local rules in the role of protecting high, local professional standards.[54] In the federal court context, such justification is dubious.[55]

Historically, the general lack of access to court rules and decisions in other jurisdictions, the lack of quick transportation and communication, and the lack of rigorous standards for admission to the bar justified state *pro hac vice* rules requiring nonresident counsel to associate local counsel in state court proceedings.[56] Today, it is within the prerogative of state bar associations to require association of local counsel given the idiosyncracies of state law practice.[57] Similarly, before the adoption of the Federal Rules of Civil Procedure, one might have been able to justify a narrow *pro hac vice* rule for local association in federal court in view of the federal judiciary's deference to local procedures.[58] Current federal practice, however, with "federalized" substantive law and "federalized" procedural law, substantially undermines the competency justification.[59]

Despite the nonresident lawyer's ready access to local district court rules and to the Federal Rules of Civil Procedure,[60] proponents of local association rules still claim that local counsel is needed to inform nonresident counsel "how it is done around here." This attitude stems from two possible sources: the abuse of rulemaking authority and the need to inform nonresident counsel of the idiosyncracies of a particular district court judge.

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53 M. PIRSIG & K. KIRWIN, PROFESSIONAL RESPONSIBILITY 149 (3d ed. 1976).

54 "Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure." Martin v. Davis, 187 Kan. 473, 485, 357 P.2d 782, 792 (1960), *appeal dismissed sub nom.* Martin v. Walton, 368 U.S. 25, 27-28 (1961) (dismissed per curiam for want of substantial federal question, but cited with approval).

55 For a discussion of the mobility of lawyers in today's practice, see Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170-71 (2d Cir. 1966); 9 CONN. L. REV. 136, 138 (1976).

56 The standards regulating pro hac vice appearances, like most of the policies which first governed qualification for and conduct of the modern legal profession, were framed when the body of the law was finite and was rife with jurisdictional peculiarities rooted in local transition. Lawyers everywhere were generalists. Transportation was largely by horse and buggy. Communication was by slow-delivery letter or personal messenger.

Pro Hac Vice in the Modern World, 106 N.J.L.J. 168 (1980).

57 *See* Martin v. Davis, 187 Kan. 473, 480, 357 P.2d 782, 788 (1960), *appeal dismissed sub nom.* Martin v. Walton, 368 U.S. 25 (1961).

58 For a discussion of the "conformity" doctrine, see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 61 (3d ed. 1976).

59 *But see* Brakel & Loh, *supra* note 4, at 718-19.

60 All federal district and circuit court rules can be found in looseleaf service. *See* FEDERAL LOCAL COURT RULES FOR CIVIL AND ADMIRALTY PROCEEDINGS (Callaghan & Co. 1979).

A court may abuse the rulemaking authority conferred by rule 83 by failing to adopt new rules when old rules are clearly outdated or uninstructive,[61] by making rules or modifying printed rules through "standing orders" not readily available to nonresident counsel,[62] or by allowing important substantive deviations from local rule by individual judges.[63] The abuse of the rulemaking authority suggests a need for stricter adherence to rulemaking responsibilities on the part of federal courts, rather than a need for the association of local counsel as a means of compensating for the defects in the local rules.

Information about the idiosyncracies of a particular district court judge generally is passed on by word of mouth.[64] If the peculiarities of the judge concern only the demeanor of lawyers and "traffic patterns" in the courtroom, the requirement of retaining associated counsel is hardly justified. If the peculiarities concern more substantive matters, however, such as the mechanics of *voir dire*, the method of exercising peremptory challenges,[65] limitations on the number of interrogatories,[66] and the like, the judge can publicize these "rules" through pre-trial conferences or through printed directions supplementing the local rules.[67] If the procedure is so important as to require a separate publication, however, the court should make the procedure part of the district court rules so that it will be uniform throughout the district.[68] District court rules were never intended to be a practice manual, but the rules should contain those procedures that could affect the outcome of litigation in the district.[69]

Often unstated in the discussion of the need for local associated

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61 For example, the Central District of California is currently revising rules originally adopted in 1967, because the old rules do not reflect the way the court now operates.

62 The Central District of California has approximately 181 "standing orders" covering topics as diverse as court security and the speedy disposition of criminal cases. *See* Flanders, *supra* note 5, at 36.

63 Although the 1967 Rules state the page size, type size, and other technical requirements of filed papers, many judges in the Central District of California ignore these rules and make their own technical demands.

64 In 1972-73, a survey of 392 federal court judges was conducted on the topic of admission and discipline of attorneys in the federal district courts. In regard to the need for local counsel to protect high local professional standards, 198 judges stated that local counsel was needed because of "familiarity with local law and custom," yet the great majority of judges admitted that neither in regular admission nor in *pro hac vice* admissions did the court examine the attorney "with respect to knowledge of or familiarity with general or local rules." Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 376 (1975).

65 *See, e.g.*, D. ARIZ. R. 45.

66 Although limitations on interrogatories are not contained in the local rules, Judge James M. Burns of the District of Oregon has, for many years, limited the number of interrogatories allowed to be served on a party to 25.

67 *See* E. CLEARY & R. MISNER, *supra* note 16, at 3-210.

68 *See generally* Flanders, *supra* note 10.

69 *Id.*

counsel is the judicial preference for local attorneys. Judges may feel that local attorneys, who will appear in the local federal court time and time again, will be more "respectful" to the local federal judges.[70] As a result, local counsel will not press a client's claim beyond the "edge of propriety." Taken to an extreme, however, such a submission on the part of counsel to pressure from the court can lead to a failure to prosecute the interests of the client "zealously."[71]

Despite assumptions to the contrary, local counsel is not necessarily more knowledgeable of applicable local law than nonresident counsel. Most districts require that local associated counsel be admitted to the state bar and reside in either the district or state.[72] Admission to the state bar, however, does not reflect any particular expertise in federal practice, nor does mere residence guarantee knowledge.[73] In addition, one state bar is unlikely to require more knowledge of federal practice as a prerequisite to state admission than will the bar of any other state. Thus, local counsel will have no inherent advantage over nonresident counsel in general knowledge of federal practice. No federal court requires local counsel to have any greater degree of federal court practice expertise.[74] In fact, nonresident counsel's expertise in federal practice and federal substantive law is probably the reason the client retained him in the first place.[75]

From a broader perspective, it is unclear that a federal district court has a strong interest in protecting clients from their own choice of counsel. The tradition of the bar dictates that the client have unrestricted choice of counsel.[76] Criminal penalties for barratry[77] and bans on lawyer advertising[78] are expressions of this policy. It is curious

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70 *See* note 64 *supra*.

71 ABA CANONS OF PROFESSIONAL ETHICS No. 7.

72 *See* notes 10-11 *supra*.

73 *See* Brakel & Loh, *supra* note 4, at 718-19.

74 In *Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts*, 85 F.R.D. 155, 213 (1979), the Devitt Committee recommended that

> as a condition precedent to practice in the United States Courts an applicant must pass a written examination on at least the following subjects: Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, Rules of Evidence, Federal Jurisdiction and the Code of Professional Responsibility.

For a discussion of admission requirements for district courts in the Second Circuit, see *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 1091, 1093 (1975).

75 *See* Brakel & Loh, *supra* note 4, at 730 for a description of one small aspect of the use of nonresident counsel—*i.e.*, corporate house counsel.

76 The right to have counsel of one's choice in state courts, however, does not mean that one has a right to be represented by an attorney who is not a member of the state bar. *Cf.* Leis v. Flynt, 439 U.S. 438 (1979) (attorney's fourteenth amendment rights not violated by local association rules).

77 *See* R. PERKINS, PERKINS ON CRIMINAL LAW 523-38 (2d ed. 1969).

78 For a discussion of lawyer advertising before and after Bates v. State Bar, 433 U.S.

that the legal tradition should retreat from its preference for client-chosen counsel in the *pro hac vice* situation.

Most courts do not require or apparently do not make an inquiry into the client's motives for selecting nonresident counsel. These courts honor the client's choice, so long as the client retains additional local counsel. Some local court rules, however, do require a client to have a substantial reason for choosing nonresident counsel as a precondition to permitting the nonresident counsel to practice *pro hac vice*.[79] The substantial reason requirement is somewhat ironic in a legal system that has made free choice of counsel by the client a hallmark.

It could be argued that the importance of the court's interest in protecting clients from unknowledgeable counsel depends upon where the client resides. If the client is an out-of-state client with out-of-state counsel, the burden of protection of the client from the unknowledgeable or unscrupulous attorney would seem to fall upon the out-of-state bar.[80] If the client is an in-state client with an out-of-state counsel, the court must realize that the client's choice is probably a corporate decision or one based on the advice and recommendation of local counsel.[81] Neither situation justifies the court's adoption of rules intended to police the client's choice.

The competency-of-counsel rationale has broader implications as well. The court may feel an obligation to disassociate itself from the possibility of reaching a decision affected by the poor performance of foreign counsel. In this situation, the justification for local association turns from client-centered interests to a court-centered interest—the integrity of the federal judicial system. Although protecting the integrity

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350 (1977), see Meyer & Smith, *Attorney Advertising: Bates and a Beginning*, 20 ARIZ. L. REV. 427 (1978).

79 *See, e.g.*, W.D. WASH. G.R. 2(d). For a similar requirement in a state jurisdiction, see State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225 (1968). Clients may choose nonresident counsel for the following reasons:

> (a) the need for the assistanee of a specialist not available in the local state;
> (b) the inability to obtain counsel in the local state because of local prejudice or bias;
> (c) the need of large organizations engaged in multistate activities to have their own counsel and represent their interests in the several states. Local counsel are unlikely to have the same competence with respect to the special problems of the organization.
> (d) a single legal problem may have multistate ramifications and is best dealt with by a single counsel.

M. PIRSIG & K. KIRWIN, *supra* note 53, at 49 (footnotes omitted).

80 Kalish, *Pro Hac Vice Admission: A Proposal*, 1979 S. ILL. U.L.J. 367 (1979). Professor Kalish, discussing state court *pro hac vice* admissions, sees very little interest for the trial court in protecting nonresident clients from their choice of nonresident counsel. Professor Kalish frames the issue in terms of a balance between the client's view of what is good for him and the trial court's view of what is good for the client. In most cases, he contends, the harm to the client in denying the *pro hac vice* petition outweighs any overall beneficial effects from allowing the trial court to police the client/counsel relationship. *Id.* at 392.

81 *Id.*

of the decisionmaking process is a noble consideration, current local association rules do little to forward the goal of judicial integrity.

Nor do the present rules serve to maintain the high, local professional standards of practice and thereby to protect the unwary client. Clearly, district court rules merely requiring local counsel to be a "mail-drop"[82] do not protect local standards. Local standards can be protected only if local counsel is an active "watchdog" in the litigation and if local counsel standards are truly higher than those of nonlocal counsel. In those districts that lie in multi-district states and which require local counsel to reside within the district,[83] there can be no justifiable claim that protection of standards is at issue. Arguably, the only measure of competency of counsel is through the admissions process of the state bar; there is no reason to believe that counsel residing in-district are more competent than members of the same state bar residing outside the district. Similarly, in districts that admit out-of-state counsel from "contiguous areas"[84] and in districts that admit counsel on a reciprocal basis with other districts,[85] no attempt is made to assess the professional standards in nonresident counsel's home district. If the association rule is intended to protect local standards, one would expect the association rule explicitly to permit waiver of the rule when the court is satisfied as to the competency of nonlocal counsel.[86] The association rule assumes that the level of competency of nonlocal counsel is lower than that of local counsel. When one considers the client's reasons for choosing nonlocal counsel,[87] this is a dubious assumption.

Even if one accepts the proposition that federal district courts can and should use the local association rule to protect high, local professional standards, the active involvement of local counsel is necessary to achieve such a result. It is unclear whether local counsel has actually played that role in the past, and, given their potential malpractice liability, it is doubtful that local counsel will be willing to play such a role in the future.

2. *Ethical Conduct of Counsel*

Courts[88] and commentators[89] often invoke considerations of profes-

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82 *See* note 26 *supra*.

83 *See* note 21 *supra*.

84 *See* note 23 *supra*.

85 *See, e.g.,* N.D. FLA. R. 5(D). For a discussion of reciprocity in state bar admissions, see Kalish, *supra* note 80, at 399-402 (contending that reciprocity rules protect neither litigants nor integrity of the local system, but instead reflect economic concerns of the local bar).

86 In those districts that permit waiver of associated local counsel, *see* note 19 *supra*, the court may consider attorney competency in deciding to waive the association requirement.

87 *See* note 79 *supra*.

88 *See, e.g.,* McKenzie v. Burris, 255 Ark. 330, 344, 500 S.W.2d 357, 366 (1973).

89 *See* Brakel & Loh, *supra* note 4, at 705. Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731 (1967).

sional ethics and discipline to justify rules governing *pro hac vice* admission. Frequently, these justifications are cavalierly carried over as justifications for requiring local counsel. A state court's statement in *McKenzie v. Burris*[90] is typical:

> The state has legitimate interests to be weighed in considering pro hac vice admissions in order to maintain a high level of professional ethics, [and] to assure a high quality of representation in the courts . . . . In order to properly protect these interests and to expedite the administration of justice, the courts are concerned with the qualifications and conduct of counsel, their availability for service of papers and amenability to disciplinary proceedings.[91]

Arguably, a local federal court has a valid concern if the state bar of which nonresident counsel is a member is less active in regulating attorney conduct than is the local bar. In this situation, it is possible that the nonresident's bar has failed to document prior unethical conduct and that the federal court will be unaware of the counsel's prior pattern of behavior.

It is difficult to justify requiring nonresident counsel to associate local counsel on the theory that association will result in more ethical conduct on the part of nonresident counsel. Courts do not promulgate local rules with the explicit intent that local counsel control the unethical conduct of nonresident counsel. If such were the case, control of nonresident counsel's conduct would necessitate a very active role on the part of local counsel in order to monitor nonresident counsel's conduct or to influence nonresident counsel's method of practice. The monitoring role is destructive of both the lawyer-client relationship and the lawyer-lawyer relationship. The leadership by example argument is naive at best.

Closely allied to the concern for ethical behavior is the issue of disciplinary proceedings. Proponents of local association rules argue that local counsel is necessary to control nonresident counsel because the district court may be without disciplinary measures against nonresident counsel. There is no reason, however, why a local federal district court cannot discipline any lawyer who chooses to practice before it.[92] The federal court could readily assume jurisdiction over the nonresident counsel.[93] In addition to normal disciplinary measures, the federal court

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90 255 Ark. 330, 500 S.W.2d 357 (1973).

91 *Id.* at 344, 500 S.W.2d at 366.

92 A few district courts require that nonresident counsel agree to confer disciplinary jurisdiction upon the court as a condition of admission *pro hac vice*. *See, e.g.*, D.D.C.R. 4-3 (VIII). For a discussion of disciplinary jurisdiction in the state *pro hac vice* situation, see People v. Bruinsma, 34 Mich. App. 167, 177-78, 191 N.W.2d 108, 112-13 (1971).

93 *See* Brakel & Loh, *supra* note 4, at 705-06; Comment, *The Local Rules of Civil Procedure in The Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1018; Note, *The Practice of Law by*

could use its contempt power to fine or imprison,[94] its statutory authority to impose costs in certain instances,[95] and its authority under the Federal Rules of Civil Procedure to discipline the attorney.[96] At a minimum, the court could report any incidents of unethical conduct to the federal district court and the state bar association in the nonresident counsel's home state. Even if discipline of nonresident counsel were a serious problem,[97] requiring association of local counsel effects no remedy; the presence of local counsel does nothing to enhance a local federal district court's authority over nonresident counsel.

3. *Availability of Counsel*

The third justification offered by proponents of local association is that local association rules ensure the availability of some counsel for service of process, hearings, and other court activity.[98] In light of modern methods of communication, as well as the added expenses of association, this justification loses force.

Having local counsel available to receive service of process is a matter solely of convenience, but proponents of association mistakenly complicate the issue with problems of jurisdiction. There is no jurisdictional reason why papers cannot be "served" on nonlocal counsel by mail or other delivery systems.[99] Jurisdictional questions do not relate to the locus of counsel but depend upon the locus or contacts of the party.

Out-of-State Attorneys, 20 VAND. L. REV. 1276, 1285 (1967). For a discussion of the problems of disciplining nonresident counsel in state *pro hac vice* situations, see *id.* at 1285.

94 18 U.S.C. § 401 (1976). *See also* 18 U.S.C. § 3162(b) (Supp. III 1979) (fines against attorneys who violate certain provisions of the Speedy Trial Act of 1974).

95 28 U.S.C. § 1927 (1980); *see* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 623 (1977).

96 FED. R. CIV. P. 37.

97 Attorney discipline in the federal district courts is not of great practical significance. *See* Agata, *supra* note 64, at 384-88. Rarely does a federal court need to discipline a lawyer as a result of conduct exhibited during federal proceedings. The majority of disciplinary actions involving federal courts are *pro forma* suspensions of the right to practice in federal court after counsel has been disciplined by the state bar for a state matter. *Id.* at 283. In these *pro forma* situations, most federal courts rely on findings of the state bar associations in their disciplinary proceedings and rarely investigate matters in the first instance. As a practical matter, if nonresident counsel's conduct in federal court requires an investigation, the district court can use its own mechanism to investigate the activity or ask the state bar to serve as its arm of investigation. *Id.* at 283-88.

Although some well-publicized instances of questionable conduct by nonresident counsel may have exaggerated the problem, *see, e.g.*, United States v. Dinitz, 538 F.2d 1214, (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *In re* Belli, 371 F. Supp. 111 (D.D.C. 1974); *In re* Bailey, 57 N.J. 451, 273 A.2d 563 (1971), discipline of nonlocal counsel is not a recurring problem and surely does not justify a local association requirement.

98 *See* Brasier v. Jeary, 256 F.2d 474, 476 (8th Cir. 1958); Martin v. Davis, 187 Kan. 473, 482-83, 357 P.2d 782, 790 (1960), *appeal dismissed sub nom.* Martin v. Walton, 368 U.S. 25 (1961).

99 One of the most interesting tables in the survey of federal judges, *see* Agata, *supra* note 64, at 381, shows that the largest single response to the need for local counsel was for purposes of service of papers.

Although the local counsel may be an agent of the client for service of process, his role as agent is for the court's convenience[100] and is not meant to confer jurisdiction.

The need for the court and counsel to confer on discovery matters and hearing dates is a real one, but it can be served just as easily through alternative methods such as the conference call. Surely, the need to communicate on certain matters does not justify burdening the client with the added expense of associating local counsel. Those courts that require local counsel to "readily communicate"[101] with the court or opposing counsel in the management of the case force local counsel either to actively participate in all aspects of the case or to delay responding to an inquiry until he has consulted with nonlocal counsel. The court or opposing counsel could more efficiently and more effectively deal directly with nonlocal counsel. Thus, the proferred communicative function of local counsel fails to justify the association requirement.

The availability of counsel for scheduled or emergency appearances before the court is the most cogent reason for requiring the association of local counsel.[102] Nonetheless, a blanket rule requiring association in every case is overkill. Few cases progress past the discovery stage; therefore, it seems wasteful to require local counsel in all cases *filed*. Even in those cases that continue to litigation, proper case management should enable nonresident counsel to anticipate necessary appearances with sufficient precision to allow all counsel to plan their schedules accordingly. In the rare, genuine emergency, nonlocal counsel could argue via telephone. There may be rare cases where the need for quick, unscheduled appearances is so great that close-by counsel is necessary, but the client is always free to associate local counsel if the litigation warrants association.

Some courts ensure immediate personal access to counsel by requiring local counsel to have authority to act in all matters for the client when nonlocal counsel is unavailable.[103] This solution necessitates an active local counsel, totally familiar with the current status of the case.

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100 The local association requirement, in fact, may not even merit the "convenience" justification. Sending papers to local counsel, who must then forward them to the nonresident counsel, actually increases the chance that the papers will be lost and proceedings delayed. *Cf.* Baez v. S.S. Kresge Co., 518 F.2d 349, 350 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) (Papers were served on defendant's local registered agent, who mailed them to the defendant's home office. The papers were lost in the mail and the court entered a default judgment. The court of appeals affirmed the district court's refusal to withdraw the default judgment.).

101 *See* note 19 and accompanying text *supra*.

102 *See* Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960), *appeal dismissed sub nom.* Martin v. Walton, 368 U.S. 25 (1961).

103 *See* note 42 *supra*.

Considering that local counsel rarely will be called upon to act in place of nonresident counsel, the result is needless duplication of effort.

Nonlocal counsel may, indeed, be more difficult to contact and confer with than local counsel, but this problem had its genesis in days of limited communication and travel. A more open rule can easily make exceptions for cases in which transportation difficulties are crucial.[104] Only the Southern District of Texas has addressed the problem of unavailability with any creativity:

> An attorney who does not reside or maintain an office in this District but wishes to become the attorney in charge for such a party may request that the Judge designate him as such by submitting a motion . . . agreeing to be available to appear for hearings on 48 hours' notice and to accept collect long distance telephone calls from the Court or opposing counsel for purposes reasonably calculated to advance the case.[105]

The courts could reasonably serve client-centered concerns relating to appearance of counsel. If a client chooses not to associate local counsel, the court should explain to the client that he will incur additional expenses for delivery of papers, long distance calls, and the like. Returning the choice of association to the client could allow courts to require the client to bear responsibility if the action is not timely prosecuted as a result of the unavailability of nonresident counsel. In the past, courts have been unwilling to dismiss with prejudice cases for lack of prosecution by counsel,[106] but courts should be less reluctant to do so if the risk of dismissal is one the client freely assumes in choosing nonresident counsel.

4. *Economic Protection of the Local Bar*

The Supreme Court has recognized that traditional limitations on the practice of law can have serious anticompetitive effects.[107] Local association requirements may have similar anticompetitive effects.[108] In-

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104 For example, in Aronson v. Ambrose, 479 F.2d 75 (3d Cir. 1973), the court recognized that "as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines." Consequently, the Third Circuit upheld the rule of the District Court of the Virgin Islands requiring all members of the Virgin Islands bar to live and practice in the Virgin Islands. *Id.* at 78.

105 S.D. TEX. R. 1(D)(3).

106 *See, e.g.,* Woodham v. American Cystoscope Co., 335 F.2d 551 (1964). *Compare id. with* Rosenberg v. Johns-Manville Sales Corp., 99 Misc. 2d 554, 416 N.Y.S.2d 708 (Sup. Ct. 1979).

107 *See, e.g.,* Bates v. State Bar, 433 U.S. 350, 377 (1976) (removing the ban on advertising by lawyers); Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-84 (1975) (striking down published fee schedules).

108 *See, e.g.,* Comment, *supra* note 93, at 1019; Note, *supra* note 4, at 1711; Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUTGERS L. REV. 1182, 1203-09 (1976).

deed, many observers contend that local association rules exist primarily to benefit the local bar economically at the client's expense.[109]

Commentators who have considered *pro hac vice* admissions in state court recognize the anticompetitive advantages local counsel derive from state restrictions on nonresident counsel. The discussion usually centers on whether protection of local counsel is a legitimate state interest[110] and on the various constitutional theories upon which restrictions on local practice might be challenged.[111] In order to determine the legitimacy of state interests in the area of state *pro hac vice* admission practices, one must balance the policy of federalism[112] and federally protected liberty interests[113] against the privileges and immunity clause,[114] the right to interstate travel,[115] and other constitutional theories.[116] The controversy over and merits of state regulation of local practice is only tangentially applicable to the federal court association rules, because interests of federalism are not present where federal courts are involved.[117]

Some local federal rules are blatantly protectionist. For example, the Eastern District of Louisiana requires associated counsel except where the rule would cause "hardship" to the litigant.[118] The Western District of North Carolina does not require associated counsel "where the amount in controversy . . . does not appear to justify double employment of counsel."[119] The New Jersey District Court limits the number of appearances a lawyer may make *pro hac vice*.[120] Such rules

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109 *See* note 108 *supra*. *But see* Comment, Leis v. Flynt: *Retaining a Nonresident Attorney for Litigation*, 79 COLUM. L. REV. 572, 587 (1979) (footnotes omitted):

> [T]he state has an interest in restraining competition among attorneys. By limiting the number of lawyers it permits to practice, the state preserves "a viable bar committed to the local community," while perhaps reducing financial pressures that may lead to misconduct. Extensive practice by nonresidents may be thought to endanger the livelihood of the local bar and may limit local lawyers' ability to gain expertise in certain types of litigation.

110 *See, e.g.*, Kalish, *supra* note 57, at 394-99.

111 *See* 19 STAN. L. REV. 856 (1967).

112 *See, e.g.*, Brown v. Supreme Court of Va., 359 F. Supp. 549 (E.D. Va. 1973).

113 *See* Leis v. Flynt, 439 U.S. 438 (1979). *See also* Kalish, *supra* note 57, at 377-89.

114 *See* Spanos v. Skourus Theatres Corp., 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966). *See also* 19 STAN. L. REV. 856, 860-63 (1967).

115 More recent cases and commentaries have concluded that the nebulous constitutional right to travel is not overburdened by state licensing. *See* Kalish, *supra* note 57, at 386 n.66.

116 *See* Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 NW. U.L. REV. 737 (1978); Note, *supra* note 69, at 1291.

117 It is clear that the interests of a federal court in admitting a person to practice are different from the state interests. *See* Selling v. Radford, 243 U.S. 47 (1913). In Sperry v. Florida, 373 U.S. 379 (1963), the Court upheld the petitioner's right to practice before the United States Patent Office even though he was not admitted to practice in the state. *See generally* Note, *supra* note 89.

118 E.D. LA. R. 21.6.a.

119 W.D.N.C.R. 1(B).

120 D.N.J.R. 4(c). The rule is described in Note, *Easing Multistate Practice Restrictions*, *supra* note 108, at 1203 n. 71:

> "Rule 4(C) is primarily, however, a disappointing example of local bar eco-

are clearly intended to protect the local bar and cannot be justified by competency, professional conduct, or availablity of local counsel. Rules that require nonlocal counsel to convince the court of their need to appear in the case have a similar effect.[121] The implication of these rules is that if competent local counsel are available, there is no reason not to employ them.[122]

Most simply stated, the purpose of the federal court system is to encourage the fair and efficient settlement of causes of action that have federal implications. In discussing state regulation of *pro hac vice* practice, the Supreme Court stated that a governing body may not, "by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic pub-

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nomic protectionism which supports none of the state or federal systems' legitimate interests."

The Brief for Petitioner on Petition for Writ of Mandamus at 16, Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), discusses Rule 4(C) in the following manner:

> The Clerk of the District of New Jersey informed counsel for petitioners that the Rule was designed to prevent New York and Philadelphia lawyers from monopolizing lucrative commercial cases, especially FELA cases, and was waivable in the kind of case for which there was little competition among New Jersey lawyers.
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> . . . .
>
> In a telephone conversation with Mr. Angelo Locasio, Clerk of the District of New Jersey of Feb. 10, 1976, Mr. Locasio stated that most of the out-of-state attorneys come from Philadelphia and New York City. The areas of law generally involved are patent law, negligence law and FELA actions, with an emphasis on the last two.
>
> The three-time limitation is not defensible in terms of administrative convenience. The Clerk of the District of New Jersey stated that his office no longer keeps strict account of the number of 4(C) appearances, for reasons of administrative convenience. If he or one of his staff recognizes the name of an attorney or a firm as having appeared in court several times, that attorney or firm will be contacted. Telephone conversations wtih Mr. Angelo Locasio, Clerk of District of New Jersey, February 10, 1976 and April 14, 1976.

121 E.D. WASH. R. 1(c); W.D. WASH. G.R. 2(d).

122 Denying the plaintiff's application for the admission of an out-of-state attorney as trial counsel *pro hac vice* in state court, the Supreme Court of Conneeticut stated in Silverman v. St. Joseph's Hosp., 168 Conn. 160, 179, 363 A.2d 22, 31 (1975):

> Based on the conclusive finding of the Superior Court, we cannot find that it misread or misconstrued the requirements of § 15A. The rule clearly states that a showing of "good cause" is a condition precedent to the granting of an application that "[g]ood cause for according such privilege shall be limited to facts or circumstanees affecting the personal or financial welfare of the client and not the attorney." While the rule goes on to state that such facts "may inelude" the showing of a pre-existing attorney-client relationship or the inability of the litigant to secure the services of Connecticut counsel, we do not construe the suggestion of these illustrations of relevant facts which permissibly "may" be shown as being exclusive criteria rather than examples of relevant circumstances affecting the personal or financial welfare of the client which may be proved. Nor do we conclude from the court's finding that it so misread or misconstrued the rule as to find that these were exclusive criteria rather than illustrative examples.

lic interest."[123] Thus, even if economic protection of local attorneys is an acceptable state interest, it is not an interest that should be furthered by federal courts.[124]

C. *Responsibilities of Local Counsel Under the Association Rules*

Under the various local counsel association rules, the duties of local counsel generally can be described in one of five ways: as a "mail drop";[125] as a person with whom the court and opposing counsel can "readily communicate";[126] as "co-counsel";[127] as "co-equal" or "lead" counsel;[128] and as determined by the court on "case-by-case" basis.[129] The limited case law in the area and the conflicting justifications for the rules make it virtually impossible to give specific content to these descriptions. This Article will discuss the possible parameters of these duties with particular attention to the liability of local counsel for malpractice.

Local counsel associated under a "mail-drop" rule ostensibly has no responsibility other than to receive and forward papers to nonresident counsel. In such situations, local counsel can clearly determine what his responsibilities are and whether his fees are commensurate with these responsibilities. Even in these "mail drop" districts, however, the responsibilities of local counsel may be more than menial. Consider, for analogical purposes, those courts that require local counsel to move the admission of nonresident counsel;[130] moving the admission of nonresident counsel represents to the court that nonresident counsel meets the local standards of professional conduct.[131] This "vouching" requirement may have a hidden counterpart in the "mail-drop" rules. Despite the limited wording of the local "mail-drop" rule, a district judge might, as a matter of discretion, require more active participation on the part of local counsel by requiring local counsel to be available and ready to proceed if the nonresident counsel is unavailable.[132] In addition, local

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123 Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 7 (1964). *See also* Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1965).

124 *See* note 116 *supra*.

125 *See* note 26 *supra*.

126 *See* note 32 *supra*.

127 *See* note 35 *supra*.

128 *See* notes 41-45 *supra*.

129 *See* note 47 *supra*.

130 *See, e.g., In re* Greenberg, 15 N.J. 132, 104 A.2d 46 (1954); D. MASS. R. 6(b); W.D. TENN. R. 1(b).

131 "[V]ouching for out-of-state attorneys in order to enable them to appear *pro hac vice* in our courts is not a mere formality, but entails responsibility for the good conduct of such attorneys according to *our* standards of professional conduct." *In re* Greenberg, 15 N.J. 132, 138-39, 104 A.2d 46, 49 (1954) (emphasis in original).

132 Even where admission rules are nebulous or nonexistent, the assumption has always been that courts have a great deal of discretion in controlling practice before them. *See, e.g.,* 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3153.

counsel must assume certain responsibilities in order to justify the "mail-drop" rules as more than an economic windfall for local counsel. In any event, local counsel may be unable to predict what his unstated duties are. More important, at a trial for malpractice, local counsel may find it difficult to convince a jury that he had no duties, only billable hours. Cautious counsel may well determine, even in the "mail drop" districts, that the potential risk of liability for the malpractice of nonresident counsel outweighs the small fee that the status of local counsel might generate.

Association rules that require local counsel to be able to "readily communicate" with the court and opposing counsel must be read to require that local counsel be knowledgeable about the case on his own account, and not simply to provide a telephone middleman between the court and nonresident counsel. At the very least, local counsel should be authorized to communicate the present status of the case without having to "check in" with nonresident counsel, and the court or opposing counsel should be able to rely upon this information. Of course, there is no need to rely on local counsel unless the court or opposing counsel has unsuccessfully attempted to contact nonresident counsel with an immediate need for information. Even under this extremely limited reading of "readily communicate," local counsel has significant responsibilities. In keeping informed about the status of a case, local counsel obliges himself to warn nonresident counsel of impending deadlines. If he is monitoring the discovery process, local counsel should alert nonresident counsel to changes in the law that might affect the discovery process and of which nonresident counsel is unaware.

The justifications offered for local association rules, however, suggest a more active role for local counsel. Under the "convenience" justification, the "readily communicate" rule would require local counsel not only to communicate the status of the case to the court or opposing counsel, but also to have the authority to act for the client when nonresident counsel is unavailable. Under the "competence" justification, the "readily communicate" rule would require an extremely active role for local counsel in order to ensure that the information he communicates to the court and opposing counsel is accurate. A similarly active local counsel is needed if the courts expect local counsel to control the unethical behavior of the nonresident counsel. Although it is unrealistic to believe that local counsel can monitor the ethical conduct of nonresident counsel, the "ethical conduct" justification does require a degree of active participation that will enable local counsel to monitor the conduct of nonresident counsel.

The third group of rules, which describe local counsel as "co-coun-

sel,"[133] "associate counsel,"[134] "of counsel,"[135] or "counsel of record,"[136] seem to require even a greater degree of participation than do the "readily communicate" rules. Neither the terms describing the role of local counsel nor the rules themselves explicitly define local counsel's duties. One must look to federal and state cases and statutes that use the terms, often in only analogous situations, for guidance as to their meaning.

The "co-counsel" rules imply that local counsel should be a participating party with the authority to bind the client. In contexts other than the *pro hac vice* situation, however, at least one court has interpreted the term "co-counsel" as merely a descriptive term that is ultimately given meaning by the lawyers when they determine, by agreement, their respective responsibilities.[137] If local "co-counsel" serves as the co-equal of nonresident counsel, he is better able to serve the competency, ethical, and convenience functions attributed to the local association rules. Some courts imply that the label "co-counsel" indicates parity of responsibility,[138] at least more so than descriptions such as "associate counsel"[139] or "of counsel." At the very least, "co-counsel" implies an active partner in the conduct of the litigation.

The rules describing local counsel as "associate counsel" are similarly unenlightening. The term "associate" counsel seems to indicate a less than equal status but, at the same time, active, responsible participation.[140] In the few cases that use the term "of counsel," courts have implied that the person who is "of counsel" is more of an adviser to the lead counsel, with a low-profile role and little, if any, client contact.[141] The title "of counsel," however, does connote a degree of expertise upon which lead counsel can rely.[142] Consequently, "of counsel" may be accountable for giving erroneous or inadequate advice. The rules use the term "counsel of record" in two different ways. In the first, limited sense, "counsel of record" merely indicates counsel regularly admitted to practice before the court.[143] Even this restricted meaning gives the

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133 S.D. ALA. R. 1(E)(ii). *See also* note 33 *supra*.

134 S.D. OHIO R. 3(O)(4). *See also* note 34 *supra*.

135 *See* N.D. IND. R. 1(d).

136 E.D. PA. R. 13(a). *See* note 35 *supra*.

137 In Oberman v. Reilly, 66 A.D.2d 686, 411 N.Y.S.2d 23 (1978), the court allowed a division of attorneys' fees based upon the division of authority between "co-counsel."

138 *See, e.g.,* State v. Lerner, 112 R.I. 62, 90, 308 A.2d 324, 341 (1973).

139 Brown v. Wood, 257 Ark. 252, 256, 516 S.W.2d 98, 100 (1974).

140 In Cruis Along Boats, Inc. v. Langley, 255 Md. 139, 142-43, 257 A.2d 184, 186 (1969), the court rejected the theory that associated counsel is not "real counsel." *See also In re* Doran's Estate, 138 Cal. App. 2d 541, 292 P.2d 655 (1956).

141 *See* De Parcq v. United States Dist. Court, 235 F.2d 692, 694 (8th Cir. 1956); Nightingale v. Oregon Cent. Ry., 18 F. Cas. 239 (C.C.D. Or. 1873) (No. 10,264); Keogh v. Pearson, 35 F.R.D. 20, 24 (D.D.C. 1964); People v. Bruinsma, 34 Mich. App. 167, 173-75, 191 N.W.2d 108, 111 (1971); Roskind v. Brown, 29 A.D.2d 549, 550, 285 N.Y.S.2d 410, 411-12 (1967).

142 Kiser v. Bailey, 92 Misc. 2d 435, 440, 400 N.Y.S.2d 312, 315 (N.Y.C. Civ. Ct. 1977).

143 *See In re* Miltones, Inc., 286 F. 806, 809 (2d Cir. 1922).

"counsel of record" a certain degree of responsibility; under federal law, for example, a motion to disqualify a federal trial judge must be made by "counsel of record."[144] In the second, broader sense, the "counsel of record" is the legal counsel, the one who assumes the ultimate responsibility for the conduct of the case.[145] This second meaning clearly requires a more responsible role for local counsel.

Local counsel often assumes various other duties as well. In a few jurisdictions, local counsel must sign the initial pleadings or sign documents,[146] thereby ratifying the contents of the documents.[147] Thus, by a simple act required by court rule, local counsel exposes himself to potential liability for errors that may not be his own. Other rules require local counsel to "participate"[148] or "appear"[149] in the case.[150] These terms,

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144 28 U.S.C. § 144 (1976); *see* United States v. Gilboy, 162 F. Supp. 384, 391 (M.D. Pa. 1958).

145 "It is our considered judgment that an attorney of record can best be described as the person (or persons) in charge of a client's business in any action, suit or proceeding." Home Ins. Co. v. Sormanti Realty Corp., 102 R.I. 187, 192, 229 A.2d 296, 299 (1967). *See also* United States v. McCoy, 573 F.2d 14, 16 (10th Cir.), *cert. denied*, 436 U.S. 958 (1978); Nickel Rim Mines Ltd. v. Universal-Cyclops Steel Corp., 202 F. Supp. 170, 174-75 (D.N.J. 1962); Brown v. Wood, 257 Ark. 252, 256, 516 S.W.2d 98, 100 (1974); Burlington County Internal Medicine Assocs. v. American Medicorp, Inc., 168 N.J. Super. 382, 384, 403 A.2d 43, 44 (Ch. 1979); Roskind v. Brown, 29 A.D.2d 549, 550, 285 N.Y.S.2d 410, 411-12 (1967).

146 *See* note 40 *supra*.

147 FED. R. CIV. P. 11 states:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

For a discussion of the history and interpretation of rule 11, see 5 C. WRIGHT & A. MILLER, *supra* note 2, § 1333. *See also* Chandler Supply Co. v. GAF Corp., 30 Fed. R. Serv. 2d 258 (9th Cir. 1980); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) (civil rights case in which court waived loeal rule requiring that the petition be signed by local counsel because no local counsel could be found to sign petition and therefore endorse its contents); United States v. American Surety Co., 25 F. Supp. 225 (E.D.N.Y. 1938). In Slayman v. Steinhoff, 195 Kan. 88, 89, 340 P.2d 98, 99 (1959), the court stated that the purpose of the Kansas statute requiring local counsel to sign the complaint was "to insure that the court will have ready jurisdiction over counsel . . . at all times." This implies responsibility of local counsel for the contents of the complaint. *But see* De Parcq v. United States Dist. Court, 235 F.2d 692 (8th Cir. 1956).

148 *See* D. HAWAII R. 1(e); D. OR. R. 3(c); D. UTAH R. 1(c).

149 *See* D. IDAHO R. 2(d); N.D. IOWA R. 5(F); S.D. IOWA R. 5(F); E.D.N.C.R. 1.E.

just as the others, are susceptible of different meanings. Clearly, all the rules contemplate active involvement by local counsel—just how active is unpredictable.

In the fourth descriptive group, local association rules make local counsel at least co-equal to nonresident counsel by specifically requiring that local counsel be able to act in all matters for the client.[151] The District of Alaska goes even further, requiring local counsel to be the "lead" counsel.[152] In essence, these rules place complete responsibility for the client's case on local counsel unless the attorneys can agree among themselves to limit contractually the responsibility of local counsel. Because district court rules have the force of law,[153] it is unlikely that counsel can contract away that which the local rules require.[154] In any case, as is true with all the descriptive groups, the rules are not sufficiently precise to outline the exact responsibilities of local counsel and thus leave local counsel unsure of his sphere of accountability.

Under the fifth descriptive group of rules, the court must assign respective responsibilities to local and nonresident counsel.[155] Even if one does not question the court's right to direct the attorney-client relationship, the guidelines set out by the court may not be any more specific than the ambiguous descriptions of local counsel's role found in local rules.[156] Consequently, even within this group of rules, local coun-

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150 Kansas does not permit the court to "*entertain* . . . [*i.e.*]to receive and take into consideration," any action in which local counsel is not associated. Bradley v. Sudler, 172 Kan. 367, 371, 239 P.2d 921, 923 (1952).

151 *See* D. ALASKA R. 3(C)(3); C.D. CAL. R. 1(b)(3); D. NEB. R. 5.G.

152 D. ALASKA R. 3(C)(3): "Local counsel shall be primarily responsible to the Court for the conduct of all stages of the proceedings . . . ."

153 *See* FED. R. CIV. P. 83. *See also* MacNeil v. Hearst Corp., 160 F. Supp. 157, 160 (D. Del. 1958).

154 6A A. CORBIN, CONTRACTS § 1374 (1962).

155 *See* note 46 *supra*.

156 In Burlington County Internal Medicine Assocs. v. American Medicorp, Inc., 168 N.J. Super. 382, 384-85, 403 A.2d 43, 44-45 (Ch. 1979), the court required out-of-state counsel to file certain information before the judge, in the exercise of his discretion, would admit the attorney *pro hac vice*. The information consisted of proof

> (1) that foreign counsel is of good standing in his state and is associated with [local] counsel of good standing here. A certificate from the official of the [foreign state] authorized to attest to the good standing of attorneys must be submitted . . . . Good standing of [local] counsel is acknowledged;
> (2) by affidavit of foreign counsel, that he has maintained his competence as an attorney, particularly in any specialization which he claims, through experience, schools, lecturcs and readings;
> (3) by letter of defendant, that it desires to be reprcsented by [out-of-state] counsel in New Jersey, stating reasons;
> (4) good cause, presented in affidavit form, which may consist of: (a) a showing that the cause involvcs a complex field of law in which counsel is a specialist, (b) a long held attorney-client relationship, (c) lack of local counsel with expertise in the field involved, (d) the existence of lcgal questions involving the law of the foreign jurisdiction, (e) the need for extensive discovery proceedings in the foreign jurisdiction. In the event the defense requcst is granted, counsel's admission will be subject to appropriate conditions . . . .

sel may have difficulty determining his precise responsibilities. The foregoing attempt to discern the duties of local associated counsel indicates that local counsel has no way of predicting just what is expected and required of him. The lack of any clear justification for the association rules, the vague and ambiguous wording of the rules, the dearth of judicial interpretation of the rules, and the discretion and independence of the federal district court judge all point to a possible result extremely detrimental to the associated attorney: the duties of local counsel may become "known" only retrospectively when the jury deliberates the malpractice liability of local counsel for the actions or inactions of nonresident counsel.

II

MALPRACTICE LIABILITY OF LOCAL COUNSEL

Because of the ambiguity of local rules, local counsel cannot determine what responsibilities—thus, what potential liabilities—he has accepted. If local counsel knew precisely what duties he must bear, he could act accordingly and set a fee commensurate with both the time necessary to carry out his prescribed duties and the risk of a malpractice judgment.[157] Because he is frequently unable to determine the precise scope of his responsibilities, however, local counsel runs the risk of serving, for a relatively small fee, as an insurer of the competency of nonresident counsel. If one concedes that the local association rules are intended primarily to ensure competent and ethical practice before the local federal court, the broad role of local counsel with its broad liability seems most appropriate. This broad liability, however, requires larger fees reflecting the increased duties and risks assumed by local counsel. But with the larger fees comes the need for stronger justifications for the association rule—and such justifications do not exist.

> [He must] (B) advise the court immediately if he ceases to be an attorney in good standing of the foreign jurisdiction; (C) continue to be associated with [local] counsel throughout the trial of the cause and to obey the strictures of [the local rules]; (D) consent to the service of process upon associated [local] ceunsel in any suit brought against him and his firm arising from his participation in the within cause, with the understanding that such service subjects him to the jurisdiction of this court; (E) recognize and follow [local] customs of practice in addition to its Rules of Court; (F) conduct all discovery proceedings in [the local state], through [local] counsel, unless opposing counsel agrees to a different arrangement; (G) not apply for any continuances respecting motions and trials on the ground that he is committed to appear before a court of a foreign jurisdiction, other than a federal court; (H) file a certificate issued by a responsible insurance company showing that he is covered by adequate malpractice insurance.

157 The attorney must factor in the risk of malpractice suits when establishing his fee. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 454 (1977).

Neither the present Code of Professional Responsibility[158] nor the recent attempts to re-codify the law of professional responsibility[159] adequately particularize the obligations of local counsel. Although the present Code of Professional Responsibility admonishes counsel to render competent[160] and zealous[161] representation while avoiding even the appearance of impropriety, it does not address specific duties of local counsel.[162] The Kutak Commission's Model Rules, a recent attempt to improve "the ethical premises and problems of the profession of law,"[163] offer only similar generalities.[164] The Model Rules' only arguable contribution to determining the role of local counsel relates to the discussion of the responsibilities of a supervisory lawyer.[165] The Model Rules require that a supervisory lawyer make reasonable efforts to ensure that the lawyers under his control conform to the rules of professional conduct.[166] Local counsel can therefore conclude that if he has supervisory

158 ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1979) [hereinafter cited as ABA CODE].

159 *See* ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, May 1981) [hereinafter cited as KUTAK MODEL RULES]; THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, *The American Lawyer's Code of Conduct* 401 (Public Discussion Draft, June 1980); NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT AND RECOMMENDATION ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (Jan. 30, 1980).

160 ABA CODE, *supra* note 158, Canon 6.

161 *Id.* Canon 7.

162 *Id.* Canon 9.

163 KUTAK MODEL RULES, *supra* note 159, Chairman's Introduction.

164 "A lawyer shall provide competent representation to a client. Competence consists of the legal knowledge, skill and thoroughness, preparation and efficiency reasonably necessary for the representation." KUTAK MODEL RULES, *supra* note 159, at 7.

165 *Id.* at 170-72.

166 RULE 5.1 *RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER*

(a) A PARTNER IN A LAW FIRM SHALL MAKE REASONABLE EFFORT TO ENSURE THAT ALL LAWYERS IN THE FIRM, INCLUDING OTHER PARTNERS, CONFORM TO THE RULES OF PROFESSIONAL CONDUCT.

(b) A LAWYER HAVING SUPERVISORY AUTHORITY OVER ANOTHER LAWYER SHALL MAKE REASONABLE EFFORT TO ENSURE THAT THE OTHER LAWYER CONFORMS TO THE RULES OF PROFESSIONAL CONDUCT.

(c) A LAWYER SHALL BE RESPONSIBLE FOR ANOTHER LAWYER'S VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF:

(1) THE LAWYER ORDERS OR RATIFIES THE CONDUCT INVOLVED; OR

(2) THE LAWYER IS A PARTNER IN THE LAW FIRM IN WHICH THE OTHER LAWYER IS A PARTNER OR ASSOCIATE, OR HAS SUPERVISORY AUTHORITY OVER THE OTHER LAWYER, AND KNOWS OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

Id. at 170.

authority[167] over the nonresident counsel, he must supervise! The vague provisions of The American Lawyer's Code of Conduct Public Discussion Draft[168] and the Report of the National Organization of Bar Counsel[169] are likewise of little assistance. Thus, the uncertainties contained in the present Code of Professional Conduct and its proposed successors merely reinforce the uneasiness that ensues when one undertakes the responsibilities of local associated counsel.

Virtually no courts have addressed the issue of local counsel's liability for acts of nonresident counsel. Nonresident counsel has an obligation to tell the client that he is associating local counsel[170] and to get the client's permission to do so.[171] The nonresident counsel may also be liable for associating a local attorney whom he knew, or should have known, would not adequately represent the client's interests.[172] Although courts have indicated that co-counsel may be liable for each other's acts,[173] the reported decisions have not yet gone past this point.

Babich v. Clower[174] presents a situation in which local counsel's own negligent actions might give rise to malpractice liability. In *Babich*, plaintiff's counsel failed to file notice of appeal after the district court in the Eastern District of Virginia had dismissed plaintiff's complaint.

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167 The comments to rule 5.1 indicate that the existence of supervisory authority is a question of fact. *Id.* at 170-71.

168 See, *e.g.*, rule 4.1: "At a minimum, a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, *supra* note 159, at 401. Rule 4.5 might be interpreted, however, as requiring that any limitation on the normal attorney-client relationship be limited by the client: "A lawyer shall keep a client currently apprised of all significant developments in the matter entrusted to the lawyer by the client, unless the client has instructed the lawyer to do otherwise." *Id.*

169 *See, e.g.*, NATIONAL ORGANIZATION OF BAR COUNSEL, *supra* note 159. The N.O.B.C. draft does require, however, that a division of legal fees must be made known to the client. *Id.*, Proposed Rule DR 2-197, at 27. The draft also contains similar provisions as does the Kutak Commission Report on the duties of supervisory lawyers. *Id.* at 9.

170 *See* Kravis v. Smith Marine, Inc., 15 Ill. App. 3d 494, 501, 304 N.E.2d 720, 726 (1973), *rev'd on other grounds*, 60 Ill. 2d 141, 324 N.E.2d 417 (1975).

171 Mackler v. Richard Hyde Estate, Inc., 199 Misc. 837, 838, 105 N.Y.S.2d 276, 277-78 (App. T. 1951).

172 *See* Tormo v. Yormark, 398 F. Supp. 1159, 1170-71 (D.N.J. 1975).

173 *See, e.g.*, Floro v. Lawton, 187 Cal. App. 2d 657, 671, 10 Cal. Rptr. 98, 106 (1960). *See also* Livingston v. Cox, 6 Pa. 360, 366 (1847). Nonetheless, the respousibilities and therefore the liabilities of co-counscl may be limited contractually as the "mere association of other counsel does not create a partnership between the associated attorneys." R. MALLEN & V. LEVIT, *supra* note 157, § 36 and cases cited therein. The uncertainty of the liability of associated counsel can be seen in the following summary of the law in Gates & Zilly, *Legal Malpractice*, in ABA DIVISION OF EDUCATION, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 311, 315 (1978):

> When an attorney associates another attorney for a particular matter, with the client's knowledge and consent, the first attorney is ordinarily not vicariously liable for the negligence of the second attorney, provided the latter's negligence was an independent act; in such situations, it is advisable to specify the respective duties of the attorueys.

174 528 F.2d 293 (4th Cir. 1975).

Counsel, whose office was in Washington, D. C., claimed that he had never received the court's order dismissing the complaint and consequently never knew to file an appeal.[175] The local rules of the Eastern District of Virginia provide that timely service upon local counsel is equivalent to service on the nonresident counsel for whom he appears.[176] Local counsel was not familiar with the local rules and assumed that nonresident counsel would also receive a copy of the court's order. On motion for an extension of time to file an appeal, the Fourth Circuit reinstated the appeal, concluding that the trial court's order reasonably could have been interpreted to indicate that the order dismissing the complaint had been mailed to counsel in Washington.[177] Local counsel thus was spared liability for an error that could have resulted in dismissal of the plaintiff's case.

In time, more sophisticated malpractice cases may impose liability upon local counsel for the acts of nonresident counsel. Such liability can be based on the duty of local counsel either as explicitly imposed by local rule or as implied from the local rule in light of the justification it purportedly serves—ensuring competent and ethical counsel. Local counsel, given the responsibility by the local association rule "meaningfully [to] participate in the preparation and trial of the case,"[178] or designated as the person "with whom the Court and opposing counsel may readily communicate regarding the conduct of the case,"[179] or designated "co-counsel,"[180] or required to "appear" in the litigation,[181] can hardly disclaim responsibility for damages resulting from the failure adequately to prosecute or defend the suit. When local counsel signs the pleadings as required by local rule,[182] he can hardly disclaim liability by arguing that his signature is a mere formality. Even in those districts in which local counsel's only apparent duty is to receive service of papers, he may be accountable for obvious acts of malpractice, such as failure to meet the statute of limitations or failure to file a notice of appeal.[183]

Local counsel might seek to limit his potential malpractice liability by contracting with nonresident counsel to delineate precisely his duties.[184] In a subsequent malpractice action, the court might give some

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175 *Id.* at 294.

176 E.D. VA. R. 7(D).

177 528 F.2d at 296.

178 D. HAWAII R. 1(c); *see* note 41 *supra*.

179 *See* note 32 *supra*.

180 *See* note 34 *supra*.

181 *See* note 38 *supra*.

182 *See* notes 40 & 147 *supra*.

183 *See* note 132 *supra*.

184 *See* text accompanying note 154 *supra*. In Keenan, Pro Hoc Vice: *Revitalizing a Wounded Specialty*, 4 AM. J. TRIAL ADVOCACY 23, 37 (1980), it is suggested that the motion to appear *pro hoc vice* provide "[a]n outline of the responsibilities of local counsel, to inelude:

(a) making all non-trial appearances,

weight to such a contract if the local rules are sufficiently ambiguous. But a court could not give effect to a contractual division of authority and liability that contravenes the division of authority implicitly or explicitly required by the local rule.[185]

III

PROPOSAL

Commentators desiring to liberalize bar admission requirements rely heavily on constitutional theories, including the flow of interstate commerce,[186] to create a right in lawyers to conduct multistate practices. In addition, the interests of the client often enter the debate; again, the discussion drifts immediately into the constitutional realm, and attempts are made to include a right to have counsel of one's choice free of boundary restrictions[187] within the sixth amendment.[188] This Article focuses on legislative choices rather than constitutional mandates and proposes statutory restrictions on the ability of federal district courts to require nonresident counsel to associate local counsel. The arguments are addressed to Congress instead of the individual federal district courts because of the need for uniformity and because the local association rules have attained such importance as a symbol of the autonomy of federal district courts that the courts may be unwilling to effect any substantial change.

A. *Costs and Benefits of Local Association Rules*

This Article has already discussed the benefits that the client purportedly derives from local association rules.[189] In short, the rules are designed to protect the client from his own choices.[190] The rules force

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(b) receiving, duplicating, and dispatching to opposing counsel all pleadings and notices,
(c) scheduling and notifying opposing counsel as to discovery dates."

185 Local rules have the force of law; duties imposed on one party by these rules cannot be shifted contractually to another party. *See* note 154 *supra*.

186 *See, e.g.*, Comment, *supra* note 116.

187 *See* Note, *supra* note 89.

188 *See, e.g.*, United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946).

189 *See* text accompanying note 53 *supra*.

190 *See* Silverman v. Browning, 414 F. Supp. 80, 87-88 (D. Conn.), *aff'd*, 429 U.S. 876 (1976). In Burlington County Internal Medicine Assocs. v. American Medicorp, Inc., 168 N.J. Super. 382, 384, 403 A.2d 43, 44 (1979), the court required the client to justify a need for foreign counsel and limited the grounds for such justification to five:

(a) a showing that the cause involves a complex field of law in which counsel is a specialist,
(b) a long held attorney-client relationship,
(c) lack of local counsel with expertise in the field involved,
(d) the existence of legal questions involving the law of the foreign jurisdiction,
(e) the need for extensive discovery proceedings in the foreign jurisdiction.

the client to accept local counsel's "insights" into local practice and judicial idiosyncracies whether he wants them or not. Even assuming that courts should try to protect clients from incompetent or unethical behavior, they fail to achieve this result under the present rules.[191] If the client desires the assistance of local counsel, he should be able to select, with the advice of his nonresident counsel, the terms of association that fit his particular needs.

The costs to the client of associating local counsel are difficult to quantify.[192] The client pays a premium whether or not local counsel actually guards against incompetent and unethical nonresident counsel. The additional expense is wasted unless nonresident counsel actually needs such guidance. Because of the lack of data concerning the relative competency of individual attorneys,[193] there is no way to assess how often the client needs this guarantee of competency. Furthermore, it is not unlikely that the client has retained the nonresident counsel precisely because of his reputation for competent legal service.[194] But even if local association rules are an effective guarantee of attorney competency, the client is not necessarily unprotected without them. A dissatisfied client can resort to a malpractice suit against nonresident counsel or, at least, can terminate his relationship with the incompetent attorney.

It is argued that nonresident counsel benefits from the association rules by having the assistance of local counsel when he is incapable of adequate representation and is unwilling to admit his lack of competence to the client. Use of local counsel for this purpose, however, contravenes the Code of Professional Responsiblity, which requires a lawyer to practice only in matters in which he is competent.[195] Moreover, al-

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191 *See* text accompanying note 82 *supra*.

192 From a monetary standpoint, it is very difficult to determine the additional cost of the requirement of local counsel. It is assumed by the courts, *see* Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir.) (on reconsideration en banc), *cert. denied*, 385 U.S. 987 (1966), and by the commentators, *see* Comment, *supra* note 116, at 754, that the requirement is costly. It has also been noted that "[l]ocal counsel, anticipating no continuing relationship with the client, may tend to exaggerate his billings to the client." Kalish, *supra* note 68, at 394. In Martin v. Davis, 187 Kan. 473, 476, 357 P.2d 782, 786 (1960), *appeal dismissed sub nom.* Martin v. Walton, 368 U.S. 25 (1961), at a time when minimum fee schedules were allowed, it was alleged that the Wyandotte County Bar Associations required "that local counsel be compensated approximately one-third to one-half of the fee of the particular litigation." In Comment, *supra* note 93, at 1017 n.31, 34.7% of all responding practitioners believed that the local counsel rules had a detrimental effect in increasing the cost of litigation. In Atkins v. State Bd. of Educ., 418 F.2d 874, 876 (4th Cir. 1969), the delay in filing was attributed to the costs of retaining local counsel.

193 *See generally* Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

194 *See* text accompanying note 81 *supra*.

195 ABA CODE, *supra* note 158, Canon 6: "A Lawyer Should Represent a Client Competently." *See also id.* EC-1: a lawyer "should accept employment only in matters which he is or intended to become competent to handle"; Degen v. Steinbrink, 202 A.D. 477, 481, 195 N.Y.S. 810, 814 (1922); KUTAK MODEL RULES, *supra* note 159, § 1.1 (Jan. 30, 1980).

though local counsel may provide valuable assistance in some cases, the need for that assistance depends both on the case and the expertise of the nonresident counsel. A uniform rule requiring association in every case often will require association of local counsel when it is neither necessary nor desirable. The client and his nonresident counsel should decide whether to associate local counsel and, if so, should be free to determine the scope of local counsel's responsibilities.

Although the claimed benefits of requiring local association are dubious, the costs are clear. The local association rules disrupt the normal lawyer-client relationship—a relationship of confidentiality and confidence—by interposing a third party, often with undetermined responsibilities, into the relationship. If local counsel has the authority to bind the client to his decisions[196] the interference is compounded, because this dilutes the authority of nonresident counsel and client to control the litigation.

Local counsel intrudes further in his role as "watchdog" for the court. An active "watchdog" role requires that local counsel be kept informed of all developments and reasoning behind each decision. If this role includes reports to the court concerning the nonresident counsel's behavior and conduct, the intrusion increases. Forced association and ambiguously defined duties also lead to confusion and friction between local and nonresident counsel. In *Baez v. S. S. Kresge Co.*,[197] for example, a lack of coordination between local and nonresident counsel resulted in lost pleadings and a dismissal of the suit. In *Smith v. Widman Trucking and Excavating, Inc.*,[198] local trial counsel stipulated to a judgment against the client. This stipulation was apparently beyond the scope of authority of local counsel and resulted from a misunderstanding between local counsel and the party's "regular" counsel.[199]

The benefits to local counsel from the local association rules are primarily proprietary.[200] This Article propounds, however, that the potential malpractice costs to local counsel have risen to such an extent that local counsel either will have to increase his participation in the litigation, with a concomitant increase in fees, or forego becoming local counsel in order to avoid the risk of malpraetice liability. This increase in fees for local counsel would be duplicative and wasteful.

Although local association rules are supposed to ensure the integrity of nonresident counsel,[201] the primary benefits of local association rules to the courts are convenience and control.[202] Requiring local counsel

196 D. ALASKA R. 3(c)(3); C.D. CAL. R. 1(b)(3); D. NEB. R. 5.G.
197 518 F.2d 749 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).
198 627 F.2d 792 (7th Cir. 1980).
199 *Id.* at 796-97.
200 *See* note 109 *supra*.
201 *See* notes 192-94 and accompanying text *supra*.
202 *See* note 98 *supra*.

ensures the court of the physical presence of counsel on short notice.[203] Local counsel may also display greater deference to the court than nonresident counsel.[204] The local rules may also facilitate communication,[205] discipline,[206] and service of process.[207] The federal courts could achieve these benefits, when necessary, in a less obtrusive manner with a uniform, limited right to require association of local counsel, perhaps as an exercise of discretion on a case by case basis. A blanket rule requiring association in every case is unnecessary.

B. *Mechanics for Change*

Federal Rule of Civil Procedure 83[208] and 28 U.S.C. § 2071[209] authorize federal district courts to adopt local rules of practice. Although many individual rules are truly administrative in character, every district court has adopted rules that affect legal rights.[210] Because of the scope of local rulemaking authority by the federal district courts and accompanying abuses,[211] the practice of law in the local federal district courts throughout the nation is anything but uniform.[212] Courts adopt local rules with a simple majority vote of the local federal district court judges,[213] and there is virtually no national level of review over the rules adopted by local courts.[214] The independence evidenced by the individual federal district courts forces two conclusions. First, individual courts are unlikely to relinquish control over admission rules through a liberalized association rule. Second, there can be uniformity among association rules only if association standards are adopted at the national level.

An effort to change the present association policy could concentrate on either of the two sources of rulemaking authority: the Federal Rules

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203 For an example of unavailability of nonresident counsel, see People v. Bruinsma, 34 Mich. App. 167, 191 N.W.2d 108 (1971). In the survey of federal judges, the necessity of local counsel to guarantee appearances was recognized as a major reason for requiring local counsel. Agata, *supra* note 64, at 381.

204 *See* note 70 and accompanying text *supra*.

205 *See* note 32 and accompanying text *supra*.

206 *See* note 92 and accompanying text *supra*.

207 *See* note 99 and accompanying text *supra*.

208 *See* note 2 *supra*.

209 *Id.*

210 *See* J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976); Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 292 (1979); Flanders, *supra* note 10, at 35.

211 *See* 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3151. *But see* Flanders, *supra* note 10, at 35.

212 The lack of uniformity even within the Ninth Circuit has caused the district judges of the Circuit to seek uniform local rule for all district courts in the Ninth Circuit. *See* E. CLEARY & R. MISNER, *supra* note 16.

213 FED. R. CIV. P. 83. The district courts must submit their rules and amendments to the Supreme Court. *See* note 7 *supra*.

214 The Speedy Trial Act of 1974, however, requires local rules implementing the Act to be sent to the circuit court for approval. 18 U.S.C. § 3165(c) (1976).

of Civil Procedure or the United States Code. The federal rules now have no provision specifically treating admission to practice in the federal courts. An amendment to rule 83 could withdraw from local district courts the power to limit *pro hac vice* admissions, but it is undesirable to correct every flaw in rulemaking authority in this manner. As a matter of drafting, it makes no sense to list exceptions to the broad grant of authority contained in rule 83. A more rational method of change would be a congressional amendment to 28 U.S.C. § 1654[215] that would allow clients to be represented by counsel of their choice before any district court. It should be noted that neither the United States Supreme Court[216] nor the courts of appeals[217] have any geographic or local association requirements.

C. *Proposal for Change*

A statutory amendment designed to provide the benefits of the association rules without imposing the costs should contain two elements: a statement limiting the district court's ability to require local associated counsel and a statement granting to the district court the discretionary authority to discipline any lawyer who involves himself in an action pending in the court.

This Article does not address the broader question of national standards for admission to practice.[218] An attempt to establish national standards for admission to practice either in the federal or state courts will encompass a decade of debate.[219] This Article proposes a limited cure to an immediate problem. This rather limited proposal should give some insight, however, into the effect of reducing barriers to lawyers so that a client can receive representation by a lawyer of his choice despite the locus of the litigation.

The amendment should first contain a statement limiting local district courts' ability to require local associated counsel. The primary function the association rules serve is to ensure availability of counsel. Normally, communication betweeen the court, counsel, and opposing counsel can be achieved by telephone. There may be cases, however, in

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215 28 U.S.C. § 1654 (1976).

216 SUP. CT. R. 5.1.

217 FED. R. APP. P. 46(a).

218 For a discussion of the general issue of national standards for admission to practice, see REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, 85 F.R.D. 155, 208 (1979).

219 For example, at the August 1980 Annual Meeting of the American Bar Association House of Delegates, a resolution seeking to standardize *pro hoc vice* admissions in state courts was defeated after a debate which covered topics such as states' rights, the multistate examination and economic interests of local attorneys. *Reports and Proposals*, 27 CRIM. L. REP. 2470-71 (Aug. 17, 1980).

which counsel's presence becomes necessary[220] or nonresident counsel purposefully hinders communication. Consequently, the amendment should allow a district court to require local associated counsel after there has been at least one substantial instance of unavailability of counsel. If local counsel is then required, the court should specify in detail the minimum duties of local counsel and make this specification a part of the record.[221] In every case, the minimum duties of local counsel should be responsive to the reason for unavailability and should go no further than is necessary to remedy that reason.

A rule similar to that proposed by this Article is already found in admission requirements for the Judicial Panel on Multidistrict Litigation.[222] Rule 3 of The Rules of Procedure of the Judicial Panel on Multidistrict Litigation states:

> Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record in any action transferred under Section 1407 may continue to represent his client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred.[223]

The Multidistrict Litigation statute and rules promulgated under the statute have as their purpose the "just and efficient conduct"[224] of civil actions which have multidistrict ramifications. For the client's choice of counsel, the proposed amendment characterizes virtually any litigation in which a nonresident or resident client chooses a nonresident counsel as "multidistrict." One must expect that participants in a federal system of courts may come from various geographic segments of the federalized whole.[225]

The second necessary component of the proposed amendment is a statement that a lawyer who appears *pro hac vice* is subject to the jurisdiction of the court for purposes of discipline. Arguably, courts already have the inherent authority to discipline those attorneys who appear

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220 There are some cases such as where temporary restraining orders are used in which a lawyer's continued presence is necessary.

221 The detail must be greater than that found in the court's order in Burlington County Internal Medicine Assocs. v. American Medicorp, Inc., 168 N.J. Super. 382, 403 A.2d 43 (Ch. 1979). *See also* Keenan, *supra* note 184.

222 28 U.S.C. § 1407 (1976).

223 Rules of Procedure of the Judicial Panel on Multidistrict Litigation 3, 28 U.S.C. app. § 1407 (1976).

224 *See* H.R. REP. NO. 1130, 90th Cong., Committee of the Judiciary 2d Sess. 1-2 (1968).

225 In 1975, the New York courts approved guidelines to implement a New York statute which allows foreign attorneys, who are residents of New York, to advise clients on issues of foreign law. *See* Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199 (1975).

before them,[226] but a clear grant of such authority by Congress would assuage judicial opposition to this proposal.

It is worth repeating that until some reform is effected in the local rules, local and nonresident counsel should carefully identify their respective responsibilities. In those districts where the local rules are ambiguous as to the precise obligations of local counsel, counsel should seek a determination from the court that the duties assigned local counsel, by contract or otherwise, meet the minimum obligations imposed by the local rule.

Nonresident counsel naturally should keep the client informed concerning any association of counsel outside the firm and any agreement between counsel as to individual duties. This is in keeping with the general proposition that a client should choose who is to represent him.[227]

During this interim period, local members of the bar should attempt to convince the local federal court to alter its local association rules. Lawyers should also work through their local, state, and national bar associations to lobby Congress for legislative change. These interim solutions, however, affect only one case or one district court at a time, and thus can be only stop-gap measures.

CONCLUSION

The local rules requiring associated counsel in *pro hac vice* admissions in federal court must be changed. The association rules unfairly restrict the relationship between the client and the nonresident counsel. The local association rules fail to give notice to local counsel of his precise duties and, consequently, subject local counsel to an undeterminable risk of malpractice liability. This latter circumstance should, and will, give impetus for change. For the sake of uniformity and speed, changes in the association rules should come from Congress in the form of an amendment to 28 U.S.C. § 1654, limiting the district courts' ability to require association and granting to district courts the authority to discipline lawyers who appear before them.

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226 *See, e.g.,* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 378 (S.D. Tex. 1969).

227 EC 2-22 provides: "Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable."

This basic proposition is fundamental to our legal system. It is evidenced throughout the Code of Professional Responsibility in many ways, such as EC 2-7 (discussing the selection of a lawyer) and DR 2-110 (withdrawal from employment).