TWO LAWYERS, ONE CLIENT: ETHICAL CONSIDERATIONS IN CO-COUNSEL RELATIONSHIPS

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The days of one firm—let alone one lawyer—handling all of a client's complex cases or transactions are fading fast. A complex federal civil trial today can often involve lead national counsel, local counsel, specialty counsel interfacing with experts, settlement counsel, and appellate counsel. As in many other fields of endeavor, blending the special talents of different firms can produce a cohesive team able to address the increasingly intricate facets of a trial or transaction. At the same time, co-counsel relationships can present their own ethical and risk management challenges for the lawyers and firms involved.

In this article, we'll look at three of these challenges: (i) conflicts; (ii) defining the scope of individual firm responsibilities; and (iii) billing and fee-sharing.[1] Before we do, three caveats are in order:

1. First, although the three areas addressed frequently present issues for co-counsel, they are neither an exclusive list, nor do they inevitably arise in every co-counsel relationship.[2]
2. Second, co-counsel issues can be magnified if the law firms involved are also representing multiple clients in the same matter. Although our focus in this article is on co-counsel relationships, lawyers in those arrangements should be equally attentive to conflict and confidentiality issues that can arise when representing more than one client in the same matter.[3]
3. Finally, lawyers within law firms have many different contractual affiliations today, ranging from equity partners to contract lawyers. ABA Model Rule 1.0(c) defines the term "firm" broadly to sweep a wide variety of individual relationships under the umbrella of the employing law firm. These varying relationships within a single firm can create their own ethical and risk management issues.[4] This article, however, will focus on multiple firms (regardless of how they are staffed) that are representing a client as co-counsel.

CONFLICTS

In the law firm context, ABA Model Rule 1.10(a) and its state counterparts generally impute one lawyer's conflicts to the firm as a whole. By contrast, a conflict on the part of one firm in a co-counsel relationship is not automatically imputed to the other firms simply by virtue of being co-counsel. Instead, the question of imputation turns on whether the conflicted firm has actually shared confidential information from the current or former client generating the conflict with the other firms in the co-counsel relationship. If so, then the other law firms in the co-counsel team may be construed as sharing the conflict. If not, the conflict—and any resulting disqualification risk—will generally remain solely with the conflicted firm.

First Small Business Investment Company of California v. Intercapital Corporation of Oregon offers an illustration. [5] Two corporate officers from Intercapital Corporation of Oregon (ICO) met with an attorney for two hours about the possibility of representing ICO in consolidated litigation against Intercapital Corporation of Washington (ICW). The attorney declined the work and ICO hired another firm. Shortly before trial, ICW's law firm associated the attorney who had met earlier with ICO as co-counsel for ICW. ICO moved to disqualify both the new co-counsel and ICW's original law firm.

At the hearing on the disqualification motion, the attorney who met with the two ICO officers told the court that he could not recall what was discussed at the meeting and, in any event, he had not shared any aspect of the meeting with ICW's original law firm when he became co-counsel. The attorney later withdrew voluntarily and the trial court declined to disqualify ICW's original law firm—noting that it had not received any of ICO's confidential information. ICO appealed and the Washington Court of Appeals reversed, essentially imputing the conflict. Following further skirmishing on the disqualification issues on remand, the Washington Supreme Court granted discretionary review, reversed the Court of Appeals, and reinstated the original trial court order denying disqualification.

In doing so, the Washington Supreme Court found that, unlike lawyers in a single law firm, there is no automatic imputation of conflicts between co-counsel. Rather, there must be a showing that the confidential information that created the conflict for one firm was shared with the other in order to warrant disqualification.

Although the result in *First Small Business* is sound, it also illustrates another practical aspect of conflicts in the co-counsel setting. The Washington Supreme Court decision came nearly four years after the trial court hearing on the disqualification motion. Given the expense and uncertainty of litigating disqualification motions, risk management considerations suggest ensuring that potential co-counsel have thoroughly vetted and resolved any potential conflicts before moving forward. Moreover, some courts may not require evidence of an actual transfer of confidential information from one firm to another as a precondition to disqualification. For example, if a transfer of confirmation was likely to have been shared, a court may be tempted under the circumstances to apply an irrebuttable presumption of shared confidences.[6]

SCOPE

Lawyers have long defined the scope of their representations in engagement agreements as a matter of prudent risk management practice. ABA Model Rule 1.2(c) and its state counterparts also generally permit lawyers to limit the scope of their representation. Given the complexity of the matters that often call for co-counsel, defining the role that a particular firm will play is important both for practical coordination and to potentially insulate the firm from liability in the event another firm on the team makes a mistake. A local counsel, for example, may not have been responsible for an error that was solely within national trial counsel's purview. Similarly, trial counsel may not have been responsible for a calendaring error that led to appellate counsel filing an appeal one day late. Nonetheless, unless the respective responsibilities of the various team members are defined in writing, they may all find themselves as defendants in a later malpractice claim.[7]

New York City Bar Formal Opinion 2015-4 surveys these issues in the context of local counsel. The opinion notes that local counsel are hired primarily for their knowledge of local rules, judges, and jury pools and often have limited contact with the client, primarily interfacing with lead counsel. It suggests that state equivalents of ABA Model Rule 1.2(c) offer local counsel a means to define the relatively narrow confines of their role, providing a practical—albeit not always foolproof—measure of "insulation" from liability in the event something "bad" happens in an area of the case outside their responsibility. The opinion observes that while Rule 1.2(c) does not require a client's consent to the limitation to be in writing, prudent risk management counsels obtaining written documentation.

One practical wrinkle in attempting to define the limited role of local counsel is that some rules governing pro hac vice sponsorship—typically part of the duties of local counsel—require local counsel to certify that they will be involved in all aspects of the case. Lawyers approached to be local counsel should carefully examine the wording of the specific rule involved as there is much variation nationally. The Oregon Court of Appeals in *Tahvili v. Washington Mutual Savings Bank*, for example, affirmed the denial of a motion to continue a trial after lead counsel was disqualified because the Oregon rule required local counsel to "participate meaningfully," which the Oregon court interpreted as being ready on short notice to try the case.[8] The Court of Appeals in neighboring Washington, by contrast, took a more realistic view of local counsel under its comparable rule in *Hahn v. Boeing Co.*, noting that the core duty of local counsel is to provide "reasonable assurance that local rules of practice and procedure will be followed."[9]

Even in jurisdictions using a "meaningful participation" standard or the equivalent, a written engagement agreement specifically defining the limited role of local counsel will still be of evidentiary benefit in the event of a later claim involving potential malpractice on the part of lead counsel.

BILLING AND FEE-SHARING

Handling hourly fees in the co-counsel context is usually straightforward. In many instances, the separate firms involved simply bill the client directly for their individual work. In others, a lead firm may pass through associated counsel's bills to the client as a cost item.[10]

Sharing contingent or similar lump-sum fees, by contrast, can be considerably more complicated. ABA Model Rule 1.5(e) outlines the requirements for multiple law firms to split a single fee generated by their collective involvement:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> - The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
> - The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> - The total fee is reasonable.

Following the contours of the rule, Model Rule 1.5(e)(1) generally permits the firms involved to share fees using either a dollar or percentage basis. Similarly, payment of referral fees is permitted as long as the recipient is "responsible" in a liability sense for the matter.[11]

The requirements for client consent in Model Rule 1.5(e)(2) serve as both a reminder that the client has a "say" in the division and that the arrangement must be confirmed in writing. A recent Washington Court of Appeals decision, for example, voided a fee-split that two lawyers had agreed to but had not confirmed with the client in writing.[12] The rule is silent on its face on when the client consent must be obtained. Prudent practice, however, suggests doing so at the time of association even if the allocation is amended later (meeting the same standards) as the case develops.

Model Rule 1.5(e)(3) is a simple but pointed reminder that fee-sharing is an act of division rather than

multiplication and remains subject to Model Rule 1.5(a)'s overarching standard of reasonableness.

Taken together, the requirements in Model Rule 1.5(e) highlight the importance of carefully documenting a fee-split to ensure that it will be enforceable later.

SUMMING UP

In an increasingly complex legal environment, co-counseling a matter can provide important benefits to both the lawyers and the clients involved. At the same time, relatively simple practical steps can reduce the accompanying risks when more than one firm is involved in a matter.

Notes

1 We will focus our discussion on the ABA Model Rules of Professional Conduct. Although the ABA Model Rules now form the basic template for professional regulation in all 50 states and the District of Columbia, they are "model" rules—not "uniform"—and lawyers should be appropriately sensitive to variations in both the rules and other authority in their particular jurisdictions.

2 For example, Comment 6 to ABA Model Rule 1.1 notes that client consent should "ordinarily" be obtained before associating other counsel on the matter concerned. Similarly, although co-counsel can generally share information confidentially without a joint prosecution/defense agreement because they are all representing the same client, simply having sensitive information pass through more hands can lead to practical challenges in protecting confidentiality.

3 See, e.g., ABA Formal Op. 06-438 (2006) (discussing aggregate settlements).

4 See generally ABA Formal Ops. 88-356 (1988) (addressing contract lawyers); 08-451 (2008) (discussing outsourced legal and support services).

5 738 P.2d 263 (Wash. 1987).

6 See, e.g., Advanced Messaging Technologies, Inc. v. Easy-Link Services Intern. Corp., 913 F.Supp.2d 900 (C.D.Ca. 2012).

7 Courts have generally looked with disfavor on malpractice claims brought by one co-counsel against another. See, e.g., Beck v. Wecht, 48 P.3d 417 (Cal. 2002); Mazon v. Krafchick, 144 P.3d 1168 (Wash. 2006). By contrast, under the "communication rule"—ABA Model Rule 1.4 and its state counterparts—one co-counsel who becomes aware that another has committed a potential material error in an ongoing matter generally has a duty to inform the client if the other lawyer or firm has not already done so. See generally ABA Formal Op. 481 (2018) (discussing the duty to inform current clients of material errors).

8 197 P.3d 541, 553-54 (Or. App. 2008).

9 621 P.2d 1263, 1266 (Wash. App. 1980).

10 This same approach is often used for contract lawyers working with firms. See generally ABA Formal Op. 00-420 (2000).

11 Some states, such as Oregon's version at RPC 1.5(d), omit the "joint responsibility" requirement for referral fees. Lawyers should carefully review the specific wording of their state's version of ABA Model Rule 1.5(e).

12 Kayshel v. Chae, Inc., 486 P.3d 936 (Wash. App. May 17, 2021) (remanding the case to the trial court to determine whether the lawyer seeking a share was entitled to quantum meruit recovery; see also Chambers v. Kay, 56 P.3d 645 (Cal. 2002); Huskinson & Brown v. Wolf, 84 P.3d 379 (Cal. 2004) (collectively discussing the interplay between splitting fees under California's version of the rule and potential quantum meruit recovery if those requirements are not met).