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Team Sport:
Co-Counsel Relationships

"Gettin' good players is easy. Gettin' 'em to play together is the hard part."
~Casey Stengel, baseball manager

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Lawyers often work in teams with co-counsel from other firms. By "co-counsel," I mean lawyers from different law firms who are collaborating on the representation of a single client or set of clients in the same matter.[1] Quick examples are local and national counsel handling a trial or real estate and land use law firms working on a development project. As legal issues have become more complex, blending the skills of lawyers from different firms has also become more common. At the same time, co-counsel relationships can present their own risk management nuances for the firms involved. In this column, we'll survey three: conflicts; defining the scope of individual firm responsibilities; and fee-division.

Before we do, two qualifiers are in order.

First, although the three areas discussed arise with regularity for co-counsel, they are not intended to be an exclusive list nor do they touch every co-counsel relationship.[2]

Second, lawyers within law firms have many different contractual affiliations today ranging from equity partners to independent contractors.

Washington RPC 1.0(A)(c) defines "firm" broadly to generally sweep a wide variety of individual relationships under the umbrella of the employing law firm. These varying relationships within a firm have their own contractual, ethical and risk management considerations.[3] This column, however, will focus on multiple law firms—regardless of their respective internal organization—representing a client as co-counsel in the same matter.

Conflicts

Within a single law firm, RPC 1.10(a) generally imputes a lawyer's conflicts to the firm as a whole. By contrast, a conflict on the part of one law firm in a co-counsel relationship is not automatically imputed to the others simply by virtue of being co-counsel. Instead, imputation turns on whether the conflicted firm actually shared confidential information from the current or former client creating the conflict with the other firms in the co-counsel relationship. If so, the other firms in the co-counsel team may be construed as sharing the conflict. If not, then the conflict—and the resulting risk of disqualification—will generally remain solely with the conflicted firm.

First Small Business Investment Company of California v. Intercapital Corporation of Oregon, 108 Wn.2d 324, 738 P.2d 263 (1987), is the leading Washington decision on this point. Two corporate officers from Intercapital

Corporation of Oregon met with a lawyer for two hours about the possibility of representing ICO in consolidated litigation against Intercapital Corporation of Washington. Shortly before trial, ICW's law firm associated the lawyer as co-counsel who met earlier with ICO. ICO moved to disqualify both the new co-counsel and ICW's law firm.

At the hearing on the disqualification motion, the lawyer 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 law firm when he became co-counsel. The lawyer later withdrew voluntarily, and the trial court declined to disqualify ICW's law firm—noting that it had not received any of ICO's confidential information during its relatively brief co-counsel relationship with the lawyer. ICO appealed and the Court of Appeals reversed, essentially imputing the conflict. Following further litigation over disqualification on remand, the Supreme Court granted discretionary review, reversed the Court of Appeals and reinstated the original trial court ruling denying disqualification.

In doing so, the Supreme Court found that, unlike lawyers in a single law firm, there is no automatic imputation of conflicts between co-counsel. Rather, the Supreme Court held that there must be a showing that confidential

information that created a conflict for one firm was shared with the other to warrant disqualification. This suggests having a conversation with potential co-counsel about possible conflicts—without sharing confidential information—before the arrangement is finalized.

Scope

Prudent practice has long counseled defining the scope of a representation in an engagement agreement.[4] RPC 1.2(c) also generally permits a law firm to limit the scope of its representation.[5] Given the complexity of matters that often call for co-counsel, defining the role that a particular firm will play with both the client and the other firms involved—preferably in writing—is important both for practical coordination and, in the event another firm on the team makes a mistake, potentially insulating the others from liability. An environmental lawyer offering discrete advice about a particular site involved in a corporate acquisition, for example, may not have been responsible for an error that a securities lawyer made in managing the overall transaction. Similarly, trial counsel may not have been responsible for a calendaring error that led to appellate counsel filing an appeal a day late.

Defining the respective roles of the firms involved may not provide a completely clear path to exoneration in the event of an error. The rule governing

local counsel in the federal Western District of Washington, for example, requires local counsel to certify that they are ready and able to handle all aspects of the case involved.[6] Unless the respective responsibilities of the various co-counsel firms are defined in writing (and they act consistent with those roles), however, they may all find themselves as defendants in a later malpractice claim if an alleged error occurs.[7]

On a related point, all of the lawyers in a co-counsel relationship share the duty keep their mutual client informed about material events affecting the matter involved.[8] This includes an error that may give rise to a malpractice claim.[9] Therefore, one co-counsel who discovers 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.

Fee-Division

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

Sharing a contingent or similar lump-sum fee,[10] by contrast, is generally governed by RPC 1.5(e)(1):

> A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;
> (ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (iii) the total fee is reasonable[.][11]

Assuming the other requisites of the rule are met, RPC 1.5(e)(1) permits the firms involved to share fees on either a dollar or percentage basis.[12] Similarly, the division can either be based on the actual proportion of overall work or by virtue of each lawyer or law firm sharing in "joint responsibility" for the matter—with the latter defined as "financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."[13]

Client consent to the division must generally be obtained before or within a reasonable period after the employment of multiple counsel begins.[14] When the RPCs were comprehensively updated in 2006, the amendments added the requirement that client consent to a fee division be confirmed in writing.[15] Failure to timely obtain the client's written consent is not solely a regulatory risk.[16] The Washington Court of Appeals in *Kayshel v. Chae, Inc.*, 17 Wn. App.2d 563, 486 P.3d 936 (2021), voided a fee-division where two lawyers had agreed between themselves but had not confirmed the client's consent in writing. In that

circumstance, the lawyers involved may be left with a *quantum meruit* division imposed by a court.[17] To avoid that uncertainty, co-counsel should reach agreement with the client at the outset of the relationship and memorialize the client's consent in writing.

ABOUT THE AUTHOR

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[1] This definition is commonly used in both regulatory and civil contexts. *See generally* Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering* § 15.08 (rev. 4th ed. 2020) (regulatory); Ronald E. Mallen, *Legal Malpractice* § 5.48 (rev. ed. 2020) (civil). This is contrasted with situations where multiple law firms are separately representing clients in the same matter and may cooperate in some areas, such as several defense firms representing different clients sharing in the retention of an expert witness in the same case. This column addresses the former rather than the latter situation.

[2] For example, co-counsel relationships can raise issues of due diligence in the selection of a lawyer to serve as co-counsel. *See generally* RPC 1.1, cmt. 6 ("Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of the client."). By contrast, privilege does not ordinarily create issues in co-counsel relationships because the participating lawyers and law firms are representing the same client in the same matter. *See generally* Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in Washington*, § 9.05 (rev. 5th ed. 2021) (discussing parameters of attorney-client privilege).

[3] *See generally* ABA Formal Ops. 88-356 (1988) (contract lawyers), 90-357 (1990) ("of counsel" lawyers), 00-420 (2000) (billing for contract lawyers), and 08-451 (2008) (outsourced legal and support services). *See also* WSBA Advisory Ops. 1901 (2000) (compensation of "of counsel" lawyers), 2127 (2006) (payments to contract lawyers), and 2159 (2007) (same).

[4] *See generally* Restatement (Third) of the Law Governing Lawyers § 19, cmt. c (2000) (Restatement) ("Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed.").

[5] RPC 1.2(c) reads: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Washington RPC 1.2(c) is patterned on its ABA Model Rule counterpart.

[6] Western District LCR 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the *pro hac* vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter, including the trial thereof, in the event the applicant is unable to be present on any date scheduled by the court."). *See also* Eastern District LCivR 83.2(c)(1) (requiring that local counsel "meaningfully participate in the case."). Washington state courts have taken a more nuanced view of the role of local counsel under APR 8(b), with the Supreme Court noting in *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980), that local counsel is essentially vouching for the out-of-state lawyer and ensuring that local rules of practice and procedure will be followed.

[7] *See, e.g., Murphy v. Sadler*, 2014 WL 12539671 (W.D. Wash. Jan. 6, 2014) (unpublished) (granting motion for partial summary judgment holding co-counsel jointly liable for legal malpractice claim). By contrast, the Washington Supreme Court in *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006), held as a matter of law that one co-counsel cannot sue another for an error that caused the loss of prospective fees. *See also Evans v. Steinberg*, 40 Wn. App. 585, 699 P.2d 797 (1985) (rejecting argument that one co-counsel was the intended beneficiary of the other's work).

[8] RPC 1.4(a)(3) expresses this in regulatory terms: "A lawyer shall . . . keep the client reasonably informed about the status of the matter[.]" The regulatory duty reflects the associated fiduciary duty and the standard of care. *See generally* Thomas R. Andrews and Robert H. Aronson, *The Law of Lawyering in Washington* at 5-2 (2012) ("To a considerable extent, the requirements of competence, diligence, and communication contained in the RPC parallel similar standards that have been developed for imposing civil liability on lawyers for malpractice, breach of fiduciary duty, and breach of contract."); *see also* Restatement, *supra*, § 20 (duty of communication).

[9] *See* ABA Formal Op. 481 (2018) (discussing disclosure of potential malpractice claims); *see also Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (claims for malpractice and breach of fiduciary duty premised on failure to communicate material developments to client).

[10] Comment 7 to RPC 1.5 defines a "division of a fee" as "a single billing to a client covering the fee of two or more lawyers who are not of the same firm."

[11] RPC 1.5(e)(2) addresses dividing fees with bar-related referral services.

[12] ABA Formal Opinion 464 (2013) addresses (and generally approves) the additional nuance of dividing fees with lawyers in states permitting those lawyers to, in turn, share fees with nonlawyers. Comment 8 to RPC 1.5 addresses (and generally approves) another nuanced situation—sharing fees "to be received in the future for work done when lawyers were previously associated in a law firm."

[13] RPC 1.5, cmt. 7. *See also* WSBA Advisory Op. 1522 (1993) ("The Committee was of the unanimous opinion that 'joint responsibility' as used in RPC 1.5(e) . . . refers to legal liability to see that the client's work is competently performed.").

[14] *See In re Perkins*, Washington Disciplinary Board No. 19#00013, Stipulation and Order at 6 (Apr. 14, 2020) (unpublished) (framing the requirement as "before or within a reasonable time after commencing the representation").

[15] *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 145 (2004) ("The Committee concluded that requiring client agreement to a division-of-fee arrangement, with confirmation in writing, is more in keeping with the general approach to client consent in the Rules than the current language, which requires only that the client be 'advised' of such an agreement and 'not object.'") (on file with author); *see also* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 840 (1986) (discussing the prior formulation of the rule).

[16] *See In re Perkins*, *supra*, Washington Disciplinary Board No. 19#00013, Stipulation and Order at 6.

[17] *See, e.g., Knutsen v. Lopez & Fantel, Inc., P.S.*, 2008 WL 2791986 (Wn. App. July 21, 2008) (unpublished) (*quantum meruit* division in absence of written agreement); *see also McNeary v. American Cyanamid Co.*, 105 Wn.2d 136, 143, 712 P.2d 845 (1986) (cited approvingly in *Knutsen* and examining general factors under former DR 2-106 for assessing reasonable fee as guide for determining proportionate fee-division).