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Navigating the world of co-counsel relationships

SIMPLE PRACTICES TO HELP YOU FORM A SUCCESSFUL CO-COUNSEL RELATIONSHIP AND AVOID POTENTIAL ETHICAL VIOLATIONS

In today's complex legal landscape, co-counsel relationships between attorneys at different law firms are increasingly common. While co-counsel arrangements are usually contrived to achieve the best outcome for the client, sometimes, they can become a disaster for both the attorneys and the client involved.

There are plenty of horror stories about incompetent co-counsel and its disastrous consequences. However, an effective, carefully considered co-counseling relationship can both serve the client's best interests and benefit the attorneys included. When done correctly, co-lawyering allows attorneys to combine their expertise and share the workload in a productive manner. There are a number of considerations to keep in mind when navigating the world of co-counsel relationships.

Know your co-counsel

Before agreeing to a co-counsel situation, you should make sure the relationship is a good match. Attorneys have different work styles and varying personalities, and not all of them work well together. It is important to learn about the attorney you are considering as your co-counsel. If you know little about the associating attorney, you should investigate them diligently before committing to working with them.

Consider conducting a background check, asking for references, and reading their reviews. Make sure the lawyer is in good standing with the State Bar. In addition, you can reach out to judges or attorneys in the same practice area to inquire about the lawyer's work ethic and dependability. Even if the co-counsel arrangement is a short-term commitment, the work you do together can positively or negatively affect your practice and reputation. As with any relationship, lawyers should only enter co-counsel agreements with those they trust and with whom they are compatible.

Know the case

Usually, the soliciting lawyer in a co-counsel arrangement will present their case in a positive light. However, a potential co-counsel may see a case with merit where there is none. Do not assume the other attorney's level of competency when it comes to analyzing a case. Many cases may seem reputable to clients, but they can have significant flaws or holes that are nearly impossible for even the most experienced lawyers to navigate. Before agreeing to work together, have a discussion with your co-counsel regarding the case merit, strategy, and the approaches you will each take.

Making a formal, written co-counsel agreement

As matters that demand co-counsel can be complex, setting clear responsibilities for each attorney involved is particularly important. Because of this, perhaps the most crucial element to a productive co-counsel relationship is creating a formal agreement which lays out the duties and expectations of each attorney. This document should delegate responsibilities to each lawyer, such as completing tasks, holding client funds, billing the client, paying litigation costs, and communicating with the client.

The agreement should also clearly address how payments will be divided, how the monies will be split in different circumstances, and how disputes are to be ironed out. The division of fees, in addition to considering time spent on the case, should reflect your respective skills, such as trial competency.

Rather than making assumptions of "who does what," a formal agreement ensures that each attorney is accountable for their responsibilities. A written engagement agreement that specifically states the roles of each lawyer is always beneficial, especially if there is a malpractice claim against one attorney down the line. Furthermore, when you are deciding whether to co-counsel, ask the originating lawyer for a copy of the fee agreement with the client. Make certain that it complies with Business and Professions Code section 6147 and that you agree with the fee structure.

Co-lawyering cases require a written agreement between the lawyers to divide the fee, and a disclosure to the client which explains the situation. According to California Rules of Professional Conduct (CRPC), under Rule 1.5.1, the client needs to be aware of and consent to the division of fees, the identity of the lawyers or firms that are parties to the division, and the terms of the division. (CRPC 1.5.1(a)(2).)

There is also a requirement that the total fee charged by the attorneys involved cannot be inflated due to the fee-splitting agreement. (CRPC 1.5.1(3).) If the agreement is not in compliance with this rule, the total due can be found as an "unconscionable" fee based on CRPC 1.5(a). The client's disclosure and consent should be obtained at the same time, or as soon as possible thereafter, as the written fee agreement between the lawyers. Certainly, do not wait until a recovery is realized to inform the client and gain their written consent to the fee split.

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Knowing your responsibilities to the client

It is essential to remember that, as co-counsel, you are jointly responsible for the matter being handled, and you each take on the same ethical duties to the client. Attorneys are expected to act in accordance with the California Rules of Professional Conduct. For example, under Rule 1.1, an attorney is required to competently perform the legal services agreed to by the parties involved. Additionally, to adhere to Rule 1.3, you need to act with reasonable diligence in your work on the matter.

Furthermore, according to Rule 2.1, when you come onto the case, you are obligated to give the client your honest opinion and professional judgment. This amplifies your duty to scrutinize the case diligently before agreeing to co-counsel, as the advice you give the client will not always be pleasant.

Each attorney that represents the client owes them fiduciary duties, including paying their funds promptly, as stated in CRPC 1.5(d)(7). While, hopefully, your written agreement with co-counsel has dictated who will hold the client's funds, never assume that your partnering attorney will properly handle the monies. If, for example, your co-counsel began using client funds for personal expenses, you could be liable because of your fiduciary duties for the client. Because of risks inherent in handling money, it is crucial to monitor and properly account for the client's funds regardless of your designated role as co-counsel.

If it is impossible to put the client's interest above all else, it may be wise for the associating attorney to withdraw from representation. A disagreeable co-counsel relationship can be like a troubled marriage, and sometimes, similar to getting a divorce, a withdrawal is the best outcome. Rule of Professional Conduct 1.16(b)(7) says that a ground for permissive withdrawal is when "the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal." In your agreement with the client, you should address what happens when one attorney withdraws, and the right of the other attorney to withdraw. This prevents you from being stuck on a case if your co-counsel changes their mind.

Communication is key

Often, lawyers in a co-counsel relationship overlook the basic responsibility of maintaining communications with their client. When multiple attorneys are involved in a matter, a seamless flow of communication with the client becomes even more critical to avoid confusion. As such, when you draft a fee agreement with co-counsel, ensure that it lays out who will be responsible for giving the client valuable information and updates. Both attorneys must act in accordance with CRPC 1.4(a), which outlines attorneys' responsibilities in terms of reasonably consulting with and informing the client of the status of a matter.

Between attorneys, lack of effective communication is likely the greatest risk to an efficient co-counsel arrangement. It is imperative that you and your co-counsel have regular conversations and meetings to check on task completion, billing, and progress.

Navigating new models

With new technological resources in the legal profession that have surfaced since the pandemic, it's a possibility to engage clients or co-counsel whom you have never met in person. However, keep in mind that technology has its quirks, and ensuring that you, your client, and co-counsel are on the same page may prove harder than it seems. After Zoom meetings, for example, it is helpful to send a follow-up email to address the points of the call.

Today, co-counseled matters include sharing documents, data, and client information, often in digital format. According to the California State Bar's Standing Committee on Professional Responsibility and Conduct's Formal Opinion Interim No.16-0002, lawyers using electronic devices which contain confidential client information need to take reasonable steps to reduce the risk of a data breach. When you are sending client information and sharing documents with co-counsel, the risk of accidental disclosure rises. To be cautious, consider tech security issues at the onset of your co-counsel relationship, and certify that all attorneys involved are using secure systems to protect client confidentiality.

Make sure co-counsel is insured

In California, under Rule 1.4.2, lawyers are required to disclose in a written fee agreement if they do not carry professional liability insurance. Without this information, the fee-sharing agreement becomes unenforceable. (*Hance v. Super Stores Industries* 2020 Cal. App. LEXIS 60 (Cal.App.Ct. Jan. 23, 2020).) Make sure that your potential co-counsel is properly insured and obtain written proof of that insurance.

Conclusion

Co-counsel relationships are common in the legal practice, and there are plenty of situations in which the arrangement can be beneficial to both the attorneys and the client involved. In a complicated legal landscape, co-counseling allows attorneys to collaborate with one another and contribute their differing expertise to achieving the best outcome for a client.

However, these co-counsel relationships raise significant ethical and risk-management issues. Before you agree to co-lawyering, investigate the associating attorney, evaluate the strength of the case, and know the duties to the client that you will assume. Discuss your strategy with co-counsel and make a formal, written agreement in which you allocate responsibilities to each attorney and describe how monies will be split. Plan on regular meetings with co-counsel and make certain to communicate developments in the case to the client. Finally, confirm that your prospective co-lawyer is properly insured. Keeping these simple practices in mind will help you form a successful co-counsel relationship and help to avoid potential ethical violations.

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