ALPS
Practice Management Pointers

Co-Counsel Relationship Hazards

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Co-counsel relationships are sometimes formed "on the fly" meaning that no thorough discussion as to who will be responsible for whatever occurs. This can be disastrous if both attorneys assume the other will meet a critical deadline and then neither actually files suit. Oops! It can get even messier if one of those two attorneys happens to be uninsured. Heaven forbid if the one who is uninsured is an out-of-state attorney who got you involved solely to act as local counsel. And here you thought you were just along for the ride with your assumed duties limited to serving as the mail drop. This is just one example of the hazards that can arise in co-counsel relationships.

Here's another. Local counsel had worked with an out-of-state firm on a number of matters over the years and the work done by this out-of-state firm was consistently of high quality. As a result, local counsel became less and less vigilant in staying on top of active matters being handled by the out of-state firm, eventually getting to the point where he just signed documents or made an appearance with out-of-state counsel when necessary. Eventually one of these matters ended up going to trial. When the judge entered the courtroom he unexpectedly informed the out-of-state attorney that certain documents were not in order and as a result the out-of-state attorney was not going to be able to try the case. The judge then turned to local counsel and said "you're up." Due to his total dependence on the efforts of the out-of-state firm, local counsel was completely unprepared; but with no other options he had to step up and try the case. It was apparent to everyone in the courtroom, including the client, just what had happened. While the local attorney reported that this experience was the most horrific experience of his career, he was able to acknowledge that his own assumptions helped create that nightmare.

Perhaps there was a time when, out of professional courtesy, we could assume that everything would be fine and that our professional colleagues were all competent. Sadly, those days are long gone. Consider that in an ABA report released in 2012, 45% of all malpractice claims during the period of 2008-2011 were the result of a substantive legal error.* Running with assumptions about the competency or reliability of any attorney you are about to co-counsel with can lead to serious malpractice and ethical trouble should something go terribly wrong. Understand that if you and your co-counsel share joint responsibility and/or are splitting the fee on the matter at hand, then you both owe undivided loyalty to your mutual client. This means that your client will look to hold

you both accountable for all that happens should anything go wrong. With all this in mind, here are a few practice pointers that can significantly reduce your exposure to these kinds of problems if taken to heart.

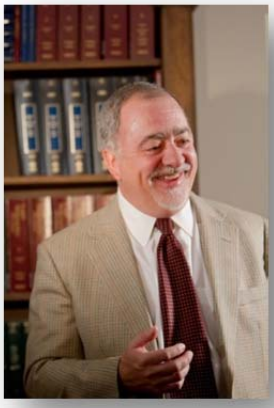
- When considering entering into a co-counsel relationship with an attorney about whom little is known, investigate the attorney before committing to the relationship. At a minimum, confirm the lawyer is admitted to practice in the jurisdiction and conduct an Internet search of the attorney's name. You might also ask for recommendations or references, conduct a background check, interview the attorney, and/or contact area judges or attorneys who practice in the same field in order to ask about prospective co-counsel's qualifications and reliability.

- Have a formal written co-counsel agreement that documents the roles and responsibilities of each attorney. This agreement should address issues such as who will do what, how disagreements will be resolved, who gets paid what and when, who will hold client funds, who will bill the client, how will expenses be paid, who discusses expense decisions with the client, how will monies be split if the client only partially pays, etc. How the negotiation over the co-counsel agreement proceeds may help you decide whether the two of you can work well together. Consider also documenting your roles and responsibilities with the client if for no other reason than to avoid having assumptions in play there as well. Written documentation of roles should always be given to the client if one of you is going to have a very limited role in the matter.

- Commit to tracking all critical deadline dates on all co-counsel matters regardless of your level of involvement and follow up with your co-counsel to either confirm you will meet your specific deadline or to make certain that your co-counsel will meet hers. This is particularly important on those matters where your involvement is going to be limited to nothing more than your serving as a local contact who will eventually receive some type of referral fee. Again, remember that as co-counsel you are jointly responsible and liable for the client's matter. There really isn't any halfway with this. If lead co-counsel misses a deadline, you've got a problem. This is why attorneys who decide to exit a co-counsel relationship exit completely to include forfeiting any referral fee. Responsibility and liability does come with the money.

- Finally, make certain that your prospective co-counsel is adequately insured and do not accept a verbal assurance. I have had attorneys tell me that they will say they are insured to get work when in fact they are practicing without any coverage. Financial pressures in competitive markets can result in certain attorneys being forced to take financial risks. This means you do need to get written proof that the co-counsel is adequately covered. A simple swap of a copy of everyone's declaration page to their malpractice policy would suffice. If you find it hard to have this conversation, place the responsibility on your malpractice carrier. A request framed as "my malpractice carrier has advised that I obtain written verification of your coverage" can help.

*Profile of Legal Malpractice Claims 2008-2011, ABA Standing Committee on Lawyer's Professional Liability 2012



Risk Management Questions?

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