

HOW TO WORK WITH LAWYERS
CO-COUNSELING, CONTRACTING, OF COUNSEL & OTHER
METHODS OF COLLABORATING FOR MUTUAL BENEFIT

PRESENTERS

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PMAS SMALL FIRM LUNCH AND LEARN SERIES



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HOW TO WORK WITH CO-COUNSEL

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CO-COUNSEL RELATIONSHIPS

- Introduction & Welcome
- Why Consider Working with Co-Counsel?
- The Client
- Logistics
- Conclusions
- Contact Information

INTRODUCTION & WELCOME

- Tom Martin, solo practitioner June 29, 2009 to March 3, 2013
- My solo firm's purpose was *very narrow*... to be the best unemployment insurance (UI) firm for Employers in Washington, D.C.
- Experience: Office of Administrative Hearings (OAH)
 - D.C. Official Code Section 51
 - Employee handbooks
 - Separations from employment

WHY CONSIDER WORKING WITH CO-COUNSEL?

- Attorneys in solo or small firm practice may find themselves in need of additional capacity, specialized knowledge, or co-counsel and want to engage another attorney outside their firm to fill that need.
- This program will survey the various opportunities and arrangements under which attorneys can work with each other.
- In my case, an opportunity arose that was best suited to a co-counsel arrangement.

THE CLIENT

- My firm was working with UI client that received a wage-hour complaint (D.C. Superior)
- Situation:
 - My firm had the client relationship,
 - A general understanding of the Fair Labor Standards Act (FLSA) and D.C. Official Code Section 32
 - Administrative law experience, BUT at that time,
 - No D.C. Superior Court experience

LOGISTICS

- With Client
 - Two retainer agreements addressing confidentiality, fees and consolidated invoicing
 - Communications from both firms
- With Court & Opposing Counsel
 - Entering one Notice of Appearance
 - Confidentiality
- Settlement negotiations
 - Reporting out
 - Closing out

CONCLUSIONS

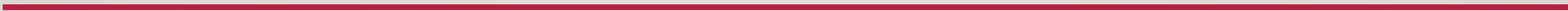
- These arrangements can work when there is trust and openness between attorneys and clients.
- These are opportunities for solos to learn a new forum or practice area.
- Clients can benefit from consolidated advice and billing.
- Everybody can win.

CONTACT INFORMATION

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THE LAW FIRM OF
JANE LEMLEY RASMUSSEN



TO BE OR NOT TO BE:

OF COUNSEL

OR

CONTRACT ATTORNEY?

OF COUNSEL

- A law firm has approached you or your solo firm about joining it as “of counsel”;
- You are thinking about asking a lawyer or his/her firm to join as “of counsel”?

OF COUNSEL


What does it mean?

A outside lawyer who has a “close, regular, and personal relationship” with the firm to which it serves as Of Counsel.

ABA Formal Opinion 90-357 (1990)

OF COUNSEL

Traditional examples recognized by the ABA:

- a part-time lawyer within the firm;
 - a retired partner of the firm available for consultation;
 - a new lateral attorney on a probationary period before being made partner; and
 - a senior attorney with the firm who is not on the partnership track.
- 

OF COUNSEL

Other options:

- Bringing on an outside attorney with a particular expertise for an ongoing relationship— not a “one off”;
- Two lawyers who wish to maintain solo practices but also wish to work together regularly;

OF COUNSEL

WHY DO IT?

- In some instances, the reason is obvious;
- Add an experienced attorney to your to your client offerings;
- Train and mentor other attorneys; and
- Work together regularly without becoming partners.

OF COUNSEL

Put it in writing:


- Scope of the relationship (duties);
- Payment terms – fee splitting?;
- Employee (w-2) or independent contractor (1099)?
- Malpractice insurance;
- “Monogamous”?;
- Disclosures to the client and to the public.

OF COUNSEL

CONFLICTS CHECK:

An of-counsel designation deems the lawyers to be “associated” in a firm under Rule 1.10, such that all the conflicts of the counsel lawyer and of the law firm are imputed to each other.

DC Legal Ethics Opinions 247 (1994), 255 (1995), and 338 (2007)



OF COUNSEL

The of-counsel designation gives the public the impression of a sufficiently close relationship among lawyers that they should be treated as if they were the same firm for imputed disqualification analysis under D.C rule 1.10.

DC Legal Ethics Opinion 338 (2007)

OF COUNSEL

An of-counsel lawyer in Firm A who was a partner in Firm B would be deemed to be associated with Firm A and any disqualification of a lawyer in either firm would be imputed to all lawyers of both firms.

DC Legal Ethics Opinion 338 (2007)

CONTRACT ATTORNEYS

For the lawyer who only occasionally works for clients of another firm for specific types of issues: joint representation.

Contractual representation must be clearly explained to the client and the inception of the representation and the lawyers must comply with the fee sharing requirement of D.C. Rule 1.5(d).

CONTRACT ATTORNEYS

Get it in writing!

- scope of representation;
- payment of fees (when collected; writing off fees);
- costs;
- malpractice insurance; and
- taxation (1099).

EMPLOYEE (W-2) OR INDEPENDENT CONTRACTOR (1099)

The IRS – and not you – decides.

- Behavioral Control;
- Financial Control; and
- Relationship

DIVISION OF FEES: LAWYERS NOT IN THE SAME FIRM

Rules of Professional Conduct: Rule 1.5--Fees

e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.

(2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;

(3) The client gives informed consent to the arrangement; and

(4) The total fee is reasonable.

DIVISION OF FEES

COMMENT TO RULE 1.5(E)

[9] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

[10] Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, represents a change from the basis for fee divisions allowed under the prior Code of Professional Responsibility. The change is intended to encourage lawyers to affiliate other counsel, who are better equipped by reason of experience or specialized background to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

DIVISION OF FEES

COMMENT TO RULE 1.5(E)

[11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.

[12] The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered. The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. The referring lawyer does not, however, escape the implications of joint responsibility, see Comment [11], by avoiding direct participation.

DIVISION OF FEES

COMMENT TO RULE 1.5(E)

[13] When fee divisions are based on assumed joint responsibility, the requirement of paragraph (a) that the fee be reasonable applies to the total fee charged for the representation by all participating lawyers.

[14] Paragraph (e) requires that the client be advised, in writing, of the fee division and states that the client must affirmatively give informed consent to the proposed fee arrangement. For the definition of “informed consent,” see Rule 1.0(e). The Rule does not require disclosure to the client of the share that each lawyer is to receive but does require that the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm on the fee charged.

RESOURCES

- [DC Rule of Professional Conduct 1.5\(e\)](#)
- [IRS Fact Sheet re: classifying employees versus independent contractors](#)
- [CPA Journal January 2019 Issue re: classifying employees versus independent contractors](#)

QUESTIONS?



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