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Practice Management Track – Session 3

The Ups and Downs of Co-Counsel

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About the Presenters...

Robert J. Kasieta is the managing member of the Madison firm of Kasieta Legal Group, LLC. He concentrates his practice in civil litigation, including personal injury, professional liability, civil rights, and corporate litigation. Bob has been practicing law since 1983. Following a judicial clerkship, for fourteen years Bob was an insurance defense lawyer. In 1997, he formed Kasieta Legal Group, LLC, which has a plaintiffs' practice. For the last twenty-seven years, Bob has taught pre-trial advocacy and trial advocacy at Wisconsin Law School. Bob is a certified civil pre-trial and trial advocate by the National Board of Trial Advocacy. He has also been elected to the American Board of Trial Advocates (ABOTA). Since 2019, Bob has twice had among the top 100 verdicts and settlements in the United States. He has been listed several times by Milwaukee Magazine as one of the top 50 lawyers in Wisconsin and top 25 lawyers in Madison. He has had AV and SuperLawyer status for decades.

Elizabeth Rich is a Wisconsin attorney who has practiced in the areas of environmental, land use and regulatory law for 30 years. Elizabeth has managed and run Rich law for over 14 years. She works for clients who challenge the government. Prior to that she worked for two years at the Farm-to-Consumer Legal Defense Fund. At the beginning of her legal career, she worked at Petrie & Stocking, becoming the principal shareholder of the Sheboygan office. She is the board chairperson of the non-profit, the Food Freedom Foundation, which works to promote an inclusive food system that is fair to farmers and consumers. She also founded Andrew's V.O.I.C.E, a non-profit organization that raises awareness of, and works to combat unjust commitments.

Ups and Downs of Co-counsel

The concept of co-counsel arrangements suggests combined efforts that are often rewarding for clients. Lawyers with different skills join in a spirit of cooperation to provide a client the significant advantage of expertise of multiple lawyers. What could go wrong? Before we get to that, let's talk about what goes right.

Benefits of Co-Counsel Relationships

There are three primary benefits to co-counsel relationships from the client's perspective.

First, the client enjoys the expertise of two lawyers. The adage of two heads being better than one certainly applies here. The ability of lawyers to challenge ideas, brainstorm, reassess, and generally work the problems of the cases, can provide great value to the client. Creativity can multiple geometrically when lawyers combine forces.

Second, co-counsel relationships can soften the blow of expensive cases. The client needn't worry as much about the lawyer's ability to fund an expensive case where two lawyers share the financial burden. This is particularly true in professional negligence cases, where lawyers work on contingency and the financial demands of the cases are high.

Third, results can be better with two lawyers. The rigors of litigation are less onerous where duties are shared. This permits each lawyer to focus on her/his part of the case, instead of being responsible for the entire matter. Division of labor can afford time to produce a better legal product than would otherwise have been possible.

Challenges of Co-Counsel Relationships

For all the benefits, co-counsel relationships bring challenges, too. It is sometimes difficult for two driven, individualistic attorneys to function as a team. There is a lone wolf quality about many lawyers, especially trial lawyers. Lawyers often pride themselves on individuality, spontaneity, and creativity. Harnessing those qualities to create a collegial relationship with another attorney can present a challenge to some lawyers. And there is no guarantee that combining forces with another lawyer will improve the result over what it would have been with one lawyer working the case. There have surely been cases where division of the file between lawyers meant that no one knew the entire case, and the client was ill-served because of it.

One common concern that sometimes arises in co-counsel relationships is the equitable distribution of duties. Where either lawyer perceives that he/she is bearing too much of the load, there will be acrimony. Yet, it is not possible in many engagements to split duties precisely. Mutual respect and trust between counsel is vital to ensure a constructive co-counsel relationship. Where the division of labor is not clearly established at the outset, or where the course of the case is not readily predictable, there is greater risk of one or both lawyers feeling put upon.

A significant challenge of the co-counsel arrangement is the uncertainty of what lies ahead. Two principled, well-intentioned attorneys can join forces in good faith to try to help a client. Often, neither can anticipate eventualities the case might present. Perhaps facts develop badly in discovery. One lawyer is convinced that it is in the best interest of the client to accept a modest settlement offer. The other is equally convinced that the bad evidence can be overcome and that the case should proceed to trial. The lawyers must submit a cogent recommendation to the client. But who's vision controls? It is often impossible to anticipate situations like these. Sometimes, lawyers solve for this by agreeing that one of them has tie-breaking authority. This is perilous, too, because the other always has the right to walk away from the case and assert lien rights, with crippling effect on the case.

Keys to Good Co-Counsel Arrangements

Good co-counsel arrangements have some common traits. At the heart of all of these is effective communication. Lawyers are often great communicators. It is the coin for the realm for effective advocacy. Yet, lawyers sometimes suffer bad co-counsel relationships because of poor communication.

Be Certain that the Case Calls for Co-Counsel

Not every case requires, or justifies, two lawyers. Some cases would clearly be "over-lawyered" by two competent counsel digging into them. This consideration turns on value of the case, complexity of the issues, and jury optics. In the extreme example, no lawyers would team up to take on a small claim case. Often, co-counsel relationships communicate to the jury that the case is important. If it is truly important, this is a positive impression. Where, however, the case is modest, the jury will not be impressed with two lawyers working the issues.

The value of the case implies not just gross damage value, but also the economics of retaining counsel. There is often no justification for retaining two lawyers to work a case on an hourly basis. In all circumstances, of course, the client must be fully apprised of the financial implications of the co-counsel relationship. Put another way, the presence of two lawyers should add meaningful value to the case, even if that value is not precisely quantifiable.

Complex issues do not always require co-counsel relationships. Often, complexity can be resolved before trial, and it is unnecessary for two lawyers to work the issue (at least, not two lawyers present at trial). Sometimes, the intricacy of issues benefits from two lawyers minding all the disparate complexities at trial. In such cases, trial presentation is enhanced by the efforts of two counsel. This is obviously a judgment call for the lawyers in consultation with the client.

Jury optics is a science unto itself. A case that can justify two lawyers might also justify a focus group. Part of what can be focus grouped is the impression of two lawyers working the case at trial. Ultimately, counsel must use her/his best judgment about the appearance of having two lawyers. Optics also involve identification of counsel with the issues. Evidence wins cases, no doubt. But jurors identify cases with lawyers. Where case presentation is diluted by the presence of two lawyers, there is a risk that the jury loses identification with either lawyer. The efficacy of counsel can also be assessed in focus groups (although, this is sometimes a difficult message for counsel to receive).

Manage Expectations

To be good co-counsel, lawyers must share complementary expectations of what the relationship will be. It is a good idea for counsel to sign a written co-counsel agreement. It should be specifics in all respects where specificity is possible. "Other tasks as necessary" should be minimized. This might seem like an unnecessary exercise at the start. But it is often difficult to resolve disputes about duties amid the rigors of litigation.

A precise description of the duties of counsel has the added benefit of creating clarity for the client. Sometimes, clients are thoroughly confused by two lawyers working on the case, neither of whom can clearly articulate the roles of the lawyers. This will sometimes provoke anxiety in the client. In the nightmare scenario where everything goes badly, it is also helpful to have defined the roles of counsel, to reduce finger pointing.

Don't Fight About Money

Just like a good marriage requires agreement on finances, so, too, does a good co-counsel relationship. There will never be any squabbling about money where the terms of the co-counsel relationship is spelled out before the work begins. Avoid the temptation to "work it out at the end." This is certainly possible, but it is rife with potential problems. And it can spoil the prospect of future co-counsel relationships with that lawyer.

Remember to Be A Team

Kids learn early that teamwork requires forgiveness and empathy when a member of the team makes a mistake because everyone makes mistakes. They also explicitly or implicitly come to realize that no one is perfect, and that if one expects forgiveness for one's own mistakes, she must show the same compassion when others on the team demonstrate their human frailty, too.

Key to teamwork is remembering always that the problem is never a teammate. The problem is always the challenges that the case presents. Blame is easy, and sometimes it is satisfying. Sometimes, it is even justified. But it never strengthens the team. Good teammates ask, "How do we move forward?" and not, "What did you do, Co-Counsel, to get us in this mess?" There may be occasion for postmortem analysis when the engagement ends. It is rarely helpful while the battle is raging.

Where the conduct (or lack thereof) of co-counsel requires attention mid-case, consider approaching the issue by suggesting alternative arrangements rather than pinning blame. This will be perceived by co-counsel as a gracious gesture, and it will often pay dividends of better work and greater commitment to the cause. If co-counsel is self-aware, he/she will understand that the team is not being well-served and might be receptive to change.

Stay in Touch

Although each counsel might have her/his own part of the case to work up, it is vital to the effort for the lawyers to remain connected. Otherwise, the end product might seem like two unrelated cases. Consider regular meetings to touch base on what progress each lawyer is making. This also enhances accountability.

I had the experience several years ago of trying a corporate dispute case on behalf of a plaintiff in which the defense had co-counsel. I watched the defense attorneys each proficiently perform his appointed duties. What was missing was coordination of effort. There was a key piece of evidence that would have badly damaged my case. The defense never introduced that crucial evidence. It was clear that the lawyer who had obtained the damning evidence didn't appreciate its value because it related to a part of the case that that lawyer was not tending. The lawyer who could have used the evidence to great advantage in his part of the case was clearly not even aware of it. Plaintiff won the case, largely because co-counsel for the defense had not compared notes on what they had discovered.

Split the Work in a Way that Makes Sense

Some cases lend themselves to easy division. In a personal injury case, for example, co-counsel might divide the labor based on liability and damages. Other cases do not present such convenient division of labor. Here are some considerations to aid in division of labor in those cases.

Play to the strengths of the team. Great sports teams are often great because they maximize the talents of the team. A football team that insists on passing on every play, even though it has a world class running back and strong offensive line, often will not win because it doesn't maximize the potential of the team. Recognize the skills of the lawyers involved, and where possible, use those skills. For example, some lawyers have accounting backgrounds. They are ideally suited to address issues in cases involving financial or statistical analysis.

Make adjustments, when necessary. Rigid adherence to a plan, even when it is demonstrably failing, is folly. Good co-counsel relationships benefit from sufficient flexibility to adjust to changing circumstances. This is not to endorse constant realignment of the co-counsel relationship. But when something is not working and does not have the prospect of getting better, change it.

Don't assume that all's well. Just as all relationships require nourishing, so, too, do co-counsel relationships. This is not a daily, or even monthly, exercise. But take time during the engagement to simply ask the question: "Is this working for you?" The answer might surprise you, and it might lead to changes that make the joint effort more enjoyable and more successful.

Split Fees in a Way that Makes Sense

Sometimes, the tension of co-counsel relationships centers on the way in which fees will be divided. It is important at the start of the relationship to plan an equitable distribution of any fee. This is generally not an issue on hourly cases. With contingency matters, however, the fee division must approximate equity, or the co-counsel relationship will be unhappy.

There is a desire among some lawyers to work out fees at the end of the case. The sentiment is spurred by the notion that fairness will be easier to determine when everyone knows what work has been done and what fee has been won. This is a bad idea most often. Once there is money to be divided, the conversation becomes more difficult. "I should get a bigger percentage," takes on a different feel with money in the trust account. The reality is that unless both counsel account for every hour invested in the case, and unless the work has approximately

equal value, there is no perfect way to split the contingency fee in a co-counsel arrangement. And even rigorous timekeeping is not perfect because it imposes on both counsel the onerous task of accounting for all time spent. Unless the case has a statutory fee-shift (like Title VII cases, or those arising per 42 USC 1983), many lawyers are not good at precisely tracking their time.