



THE IOWA STATE BAR ASSOCIATION

Committee on Ethics and Practice Guidelines

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August 19, 2013

Mr. Dwight Dinkla
Executing Director
Iowa State Bar Association
625 East Court
Des Moines, IA 50309

RE: IA Ethics Opinion 13-05 Co-Counsel Relationships

Dear Mr. Dinkla,

The Committee has been asked to provide guidance regarding the nature and scope of the co-counsel relationship. A co-counsel relationship exists when two or more lawyers, not in the same firm, represent the client on the same matter. The relationship finds its inception in several ways. A client may request a lawyer to bring in additional counsel, a lawyer may advise the client that co-counsel is needed or a third party, such as insurance company, may provide counsel even though the client has personal counsel. Regardless of the inception, when two or more lawyers work together for a single client a co-counsel relationship is formed. In this opinion we will address the duties of the lawyers to each other and to the client.

Independent Overriding Obligation to the Client

It is important to keep in mind that in all co-counsel relationships each lawyer owes an independent overriding duty of care to the client. Iowa Rule of Prof'l Conduct

32: 2.1 states that “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” Rule 32.1.7 prohibits a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. These rules make it clear that while a fiduciary relationship exists between each lawyer and the client there is no fiduciary duty of loyalty as between the lawyers. Were it otherwise, a division of loyalty could occur between the lawyers and the client. Consequently, a lawyer engaged in a co-counsel relationship must always maintain the ability to communicate openly and freely with each other and with the client.

Duty of Mutual Cooperation

Because co-counsel owe the same fiduciary duty of loyalty to the client, they have an obligation to cooperate with each other to accomplish the client's goals. When disagreements cannot be resolved, Iowa Rule Prof'l Conduct 32: 1.4(b) require the lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Limitation of Authority

Unless specifically defined, co-counsel relationships are viewed as joint ventures. Iowa Rule of Prof'l Conduct 32: 1.2(c) provides that

“a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Consequently co-counsel are able to delineate the scope of their respective work provided, of course, that the client gives informed consent. Rule 32:1.0 specifies that:

“ Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable alternative to the proposed course of conduct.”

Lawyers contemplating a co-counsel relationship would be well advised to define the scope, nature and limitations of their duties in writing with the client.

Division of Fees

Iowa Rule of Prof'l Conduct 32: 1.5(e) provides that:

” 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 agrees to the agreement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.”

Comment 7 makes clear that “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.” This would be the case in the typical contingent fee. Fees strictly for referring a matter to another lawyer are not allowed. The rule provides two measures for dividing a fee: The proportion of the services performed or the assumption of joint responsibility. Consequently a lawyer may be justified in receiving a fee without actually performing the legal services provided that the lawyer is willing to accept joint responsibility – liability- for the case. In doing so, the lawyer should be mindful that courts generally do not allow suits as between co-counsel for damages resulting from malpractice or breach of fiduciary duty, whereas they do allow claims of indemnity or contribution in relation to a malpractice claim brought against them by the client. See, Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?, 98 Ky. L.J.461, 464 (2010)

However co-counsel are not limited to being compensated by dividing a single fee. In many situations co-counsel may charge a fee calculated upon their individual service, such as an hourly or unit rate or a flat fee, IA Sup.Ct. R. 45.10. In those situations the fee that is charged must comply with the reasonableness standard described in Iowa Rule of Prof'l Conduct 32:1.5.

Imputed Conflicts of Interest

Co-counsel are independent counsel and are not considered “associated in a firm” for the purpose of imputed disqualification under Iowa Rule Prof'l Conduct 32: 1.10. Comment [1] provides that: “For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”

Conclusion

When contemplating a co-counsel relationship, Iowa lawyers are advised to reduce the terms of the relationship to writing and obtain the client’s informed consent. In those situations where a division of fee is contemplated, the fee division must be based either upon services performed or assumption of responsibility and the client

must consent in writing to the agreement, including the share each lawyer will receive.

For the Committee,

A handwritten signature in black ink that reads "Nick Critelli". The signature is written in a cursive, slightly slanted style.

NICK CRITELLI, Chair
Iowa State Bar Association
Ethics and Practice Guidelines Committee