

## USING OUTSIDE COUNSEL

by  
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Lawyers may, and often do, associate with counsel outside of the lawyer's own firm in the representation of a client. This allows the lawyer to improve the representation of the client by utilizing persons with additional knowledge, experience and/or expertise. There are a few requirements, however, a lawyer must follow when the lawyer seeks to associate with co-counsel outside the firm. Principal among these are rules of professional conduct which require the lawyer to have an appropriate fee-sharing arrangement, preserve client confidences, and ensure there are no conflicts of interest. An admonition recently issued by the director of the Office of Lawyers Professional Responsibility (OLPR) illustrates the point.

The client retained the lawyer to represent the client in an appeal of a criminal matter. The lawyer received a \$5,000 fee. The lawyer then contracted with an attorney outside of the lawyer's firm to assist in the representation. The lawyer paid co-counsel one-half of the fee.

Unfortunately, the lawyer did not advise the client of the involvement of or fee paid to co-counsel, did not give the client the ability to object to the participation of co-counsel in the representation, and had not secured client consent to disclosure of client confidences and secrets to prospective co-counsel.

Rule 1.5(e) of the Minnesota Rules of Professional Conduct (MRPC) provides the client with specific rights when the client's attorney wants to pay a lawyer outside the firm to help with representation. A division of fee between lawyers who are not in the same firm may be made only if:

- the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
- the total fee is reasonable.

In this matter, the division of fee was not in proportion to the services performed, but was simply allocated half to each lawyer. This is permissible, but only if there was a written agreement with the client

in which each lawyer assumes joint responsibility for the representation. There was no such agreement. Additionally, the client was not advised of the share of the fee that each lawyer was to receive and did not have the ability to object to the participation of the lawyers involved.

Rule 1.6 of the MRPC protects client confidences and secrets. The lawyer discussed the client's case with co-counsel without the client's knowledge or consent, thereby violating the rule. Additionally, under rules 1.7 and 1.9, lawyers must ensure that neither lawyer has a conflict of interest.

The client did not know that the lawyer had associated with co-counsel until after briefing was completed. It did not appear that the lawyer's conduct harmed the client, who was understandably surprised and upset when he found out what had happened. This led to a complaint, and an admonition, which were easily avoidable.

Clients can derive many benefits when lawyers associate with co-counsel outside the firm. Co-counsel can provide valuable knowledge and expertise. Particularly for sole practitioners, the "extra set of eyes and ears" that another lawyer can bring may be added to the file by associating with co-counsel. The MRPC allow lawyers to associate in this way, but the rules also have established protections to fully vindicate the client's rights to conflict-free representation and to determine who represents the client and receives the client's confidences and secrets.