Professional Responsibilities of Co-Counsel:
Joint Venturers or Scorpions in a Bottle?

Douglas R. Richmond

INTRODUCTION

Maine lawyer Terrance Duddy surely thought that he had found gold in the Rockies. His client, Albert Wooster, had been injured in a head-on collision on a Wyoming highway in which the other party’s driver was plainly at fault for crossing the center line. The other party was clearly capable of satisfying any judgment that Wooster might receive. Duddy accordingly arranged for Wyoming lawyer Robert Horn to prosecute Wooster’s personal injury claim in Wyoming state court and, as part of the deal, contracted with Horn to share in Horn’s contingent fee to be paid out of Wooster’s expected recovery. Unfortunately, Horn missed a required statutory filing and Wooster therefore lost at summary judgment. When Duddy sued Horn for legal malpractice to recover for his lost fee, he fared no better. Fearing the prospect of “unseemly squabbling between attorneys that could erode the public’s confidence in the legal system” and the compromise of clients’ interests because of the “self interests of feuding attorneys,” the Wyoming Supreme Court declined to recognize a cause of action for legal malpractice between co-counsel.

Consider further the unfortunate conduct of a relatively inexperienced New Mexico lawyer, Michele Estrada. In a nutshell, Estrada committed serious discovery misconduct and introduced a forged prescription into evidence in a pharmacy malpractice case. She did so principally because of forceful instruction by her client’s national counsel. Estrada allowed herself to be guided by the client’s national counsel even though he was not her supervisor, did not share her ethical duties because he was not admitted to practice in New Mexico, and did not enter his appearance in the

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1 Senior Vice President, Global Professions Practice, Aon Risk Services, Chicago, Illinois. J.D., University of Kansas; M.Ed., University of Nebraska; B.S., Fort Hays State University. Opinions expressed herein are the author’s alone.
2 Horn v. Wooster, 165 P.3d 69, 70-71 (Wyo. 2007).
3 Id. at 71.
4 Id.
5 Id. at 79.
6 In re Estrada, 143 P.3d 731, 735-36 (N.M. 2006).
7 See id. at 737-39.
8 See id. at 741.
case. In an unsparingly critical opinion, the New Mexico Supreme Court suspended Estrada from practice for one year but deferred her suspension for a probationary period in recognition of mitigating circumstances.

The idea that co-counsel may find themselves actually or potentially adverse to one another is unremarkable, as is the notion that co-counsel relationships may have significant professional responsibility components. Co-counsel relationships between attorneys in different law firms are quite common. Corporations often engage national or coordinating counsel to work with local or regional counsel in various types of litigation. Lawyers asked by clients to handle cases in foreign jurisdictions affiliate with local counsel and those relationships often become reciprocal. Two law firms may “partner” to land business from a corporate client that neither firm could attract alone. Lawyers who lack experience or expertise in some aspect of the law may align with specialized co-counsel or veteran practitioners to achieve competence while preserving client relationships. Lawyers may refer clients to attorneys with specialized practices while maintaining a broader concurrent relationship with those clients and ostensibly overseeing the work of the lawyers to whom the referrals are made. Transactional lawyers may work with counterparts at other firms on different aspects of a joint client’s acquisition, merger, multi-state secured loan, or real estate transaction. Indeed, co-counsel and referral relationships between lawyers in different firms are so common and widespread that controversies are inevitable, whether linked to tactical disagreements, errors or misjudgments by one of the participants, client-centered disputes, or fights over fees.

At the same time, professional liability and responsibility aspects of co-counsel and referral relationships have largely escaped scholarly attention. Related articles are rare. The leading legal malpractice treatise devotes approximately five pages to rights among counsel and even less space to referrals and local counsel relationships and a recent legal malpractice casebook excerpts only one case on lawyers’ duties to co-counsel while citing to three others. This Article recognizes that courts and lawyers presented with co-counsel questions and controversies require more substantive guidance than has so far been available.

Looking ahead, Part I of the Article addresses co-counsel’s potential

9 See id.
10 Id. at 744.
12 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 59, at 685-94 (2009 ed.).
liability to one another for breach of fiduciary duty or legal malpractice. It then examines lawyers’ ability to obtain contribution, indemnity or setoffs from co-counsel when accused of professional negligence by a common client. As we will see, courts staunchly resist recognizing lawyer-to-lawyer liability for breach of fiduciary duty or malpractice and are only somewhat more receptive to third-party practice where potential liability to a client is involved.

Part II examines three areas or scenarios in which co-counsel may face liability to clients. It first analyzes lawyers’ liability arising out of the referral of matters to lawyers outside their firms who then breach duties to clients. Second, it discusses lawyers’ joint or vicarious liability for co-counsel’s errors. Third, it looks at issues commonly encountered in co-counsel relationships characterized by one lawyer’s service as “local counsel.”

Finally, Part III surveys three professional responsibility subjects relevant to co-counsel: (a) the duty to inform a client of another lawyer’s malpractice or fiduciary breach; (b) lawyers’ supervisory duties under Model Rule of Professional Conduct 5.1; and (c) the appropriate division of legal fees between lawyers in different firms, generally referred to as “fee-splitting.”

I. LAWYER LIABILITY TO CO-COUNSEL AND THIRD-PARTY PRACTICE

To analyze lawyers’ potential liability to co-counsel, it is necessary to understand lawyer liability arising out of clients’ representations more broadly. Most lawyer liability cases are premised on two theories: legal malpractice or professional negligence, and breach of fiduciary duty. Although variously phrased by courts, a plaintiff alleging legal malpractice or professional negligence, and breach of fiduciary duty, must prove that (1) her lawyer owed her a duty, (2) the lawyer breached that duty, and (3) the lawyer’s breach of duty proximately caused (4) actual damages. The lawyer’s duty of care flows from the attorney-client relationship. It is accordingly the general rule that, in the absence of fraud

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14 In addition, lawyers are often sued by third parties for aiding and abetting clients’ misconduct. Aiding and abetting liability, while a serious threat to lawyers, is beyond the scope of this Article. For recent discussions of the subject, see Katerina P. Lewinbuk, Let’s Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client’s Breach of Fiduciary Duty, 40 Ariz. St. L.J. 135 (2008); Douglas R. Richmond, Lawyer Liability for Aiding and Abetting Clients’ Misconduct Under State Law, 75 Def. Couns. J. 130 (2008); Eugene J. Schiltz, Civil Liability for Aiding and Abetting: Should Lawyers Be “Privileged” to Assist Their Clients’ Wrongdoing?, 29 Pace L. Rev. 75 (2008).


16 See Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 635 S.E.2d 274, 276 (Ga. Ct.
or other improper motives, lawyers are liable for professional negligence exclusively to those with whom they have an attorney-client relationship.\textsuperscript{17} This is sometimes referred to as the “strict privity rule.”\textsuperscript{18} Lawyers’ liability for breach of fiduciary duty arising from their representation similarly requires proof of (1) an attorney-client relationship giving rise to a fiduciary duty, (2) breach of that duty, and (3) actual damages proximately caused by the breach.\textsuperscript{19} Because the lawyer’s fiduciary duty flows from the attorney-client relationship, lawyers are generally liable on this theory only to clients.\textsuperscript{20}

Courts are reluctant to expand lawyers’ potential liability for malpractice or breach of fiduciary duty to non-clients because doing so “could result in potential ethical conflicts for the attorney and compromise the attorney-client relationship, with its attendant duties of confidentiality, loyalty, and care.”\textsuperscript{21} Nonetheless, lawyers may owe duties to non-clients in limited circumstances, such as when a client hires a lawyer specifically to benefit a third party,\textsuperscript{22} or when the non-client is otherwise the direct and intended beneficiary of the lawyer’s services.\textsuperscript{23} Incidental beneficiary status, on the other hand, will not support liability.\textsuperscript{24} Determining whether a non-client is a direct and intended beneficiary of a lawyer’s services is necessarily a fact-dependent inquiry.\textsuperscript{25} Generally speaking, courts are most willing to recognize duties to non-clients in trusts and estates matters.\textsuperscript{26}


\textsuperscript{21} McIntosh County Bank, 745 N.W.2d at 545.

\textsuperscript{22} DeLuna v. Burciaga, 857 N.E.2d 229, 247 (Ill. 2006).


\textsuperscript{26} See, e.g., Young v. Williams, 645 S.E.2d 624, 625-26 (Ga. Ct. App. 2007) (allowing testator’s widow to sue testator’s lawyer for malpractice); Friske v. Hogan, 698 N.W.2d 526, 531 (S.D. 2005) (concluding that non-client beneficiaries could sue the lawyer who drafted testamentary instrument for malpractice); Calvert v. Scharf, 619 S.E.2d 197, 207 (W. Va. 2005).
A. Co-Counsel’s Direct Liability to One Another

Given courts’ reluctance to permit non-clients to sue lawyers, it should be no surprise that they generally prohibit suits between co-counsel alleging legal malpractice or breach of fiduciary duty. After all, while co-counsel represent a common client, they do not share an attorney-client relationship with each other. Other courts, when asked to decide whether to permit contribution or indemnity actions between co-counsel, have rejected them and thus could be expected to reject direct claims between co-counsel as well.

There are at least two common policy reasons for courts’ refusal to recognize legal malpractice and breach of fiduciary duty actions between co-counsel. First, allowing co-counsel to sue each other would imperil client confidences. A lawyer sued for malpractice or breach of fiduciary duty would be permitted to reveal the client’s confidences in defending against co-counsel’s allegations. While it is true that a lawyer’s duty of confidentiality and the attorney-client privilege are impliedly waived in a legal malpractice or breach of fiduciary duty case brought by the client, in a suit between co-counsel there is no implied waiver and the client’s confidences may be exposed against its will. The thought of lawyers asking clients to waive confidentiality or the attorney-client privilege so that they may pursue claims against co-counsel is equally unappealing to

(recognizing that will beneficiaries have standing to sue the drafting lawyer).


29 Model Rules of Prof’l Conduct R. 1.6(b)(5) (2009) (permitting a lawyer to reveal information relating to a client’s representation to the extent necessary “to respond to allegations in any proceeding concerning the lawyer’s representation of the client”).

30 Stone, 41 P.3d at 710-11.
Second, allowing co-counsel to sue one another would spawn numerous conflicts of interest. Recognizing duties running between co-counsel would dilute the lawyers’ duty of undivided loyalty to their common client. Rather than considering only the client’s best interests, co-counsel would have to consider their obligations to one another when making decisions related to the client’s representation. Co-counsel would thus be forced to serve multiple masters in any given case.

*Mazon v. Krafchick* is an illustrative case. In *Mazon*, Tahar Layouni was seriously injured in an electrocution accident when a drilling company struck a buried electric line. Layouni retained Michael Mazon to represent him in an action to recover for his injuries. With Layouni’s consent, Mazon involved Steven Krafchick, a lawyer with expertise in this type of case. Mazon and Krafchick entered into “a ‘joint venture agreement,’” whereby “Mazon would draft the complaint and find the addresses and agents of the defendants to serve, and Krafchick would file and serve the complaint.” They agreed to split fees and costs equally. Unfortunately, Krafchick’s legal assistant did not serve the complaint until three days after the statute of limitations had run. Krafchick told Mazon of the error approximately one month later and acknowledged his responsibility for serving the complaint.

Layouni sued both Krafchick and Mazon for legal malpractice. Both lawyers had the same professional liability carrier, which settled Layouni’s malpractice suit for $1.3 million, allocating $1.25 million of the settlement to Krafchick and $50,000 to Mazon. Mazon then sued Krafchick for breach of contract, breach of fiduciary duty, professional negligence, and indemnification. He sought damages for the loss of the $325,000 fee

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31 See *Gauthier*, 780 A.2d at 1023.
33 Schefller v. Adams & Reese, LLP, 950 So. 2d 641, 652 (L.a. 2007).
34 See *Horn v. Wooster*, 165 P.3d 69, 78-79 (Wyo. 2007) (recognizing that lawyers’ self-interests could compromise clients’ best interests).
37 *Id.* at 1170.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 See *id.*
43 See *id.*
44 *Id.*
45 *Id.*
he had expected to earn from Layouni’s case, $465 in costs he advanced, his $2500 insurance deductible, and his insurer’s $50,000 settlement payment. Mazon’s lost contingent fee obviously was the centerpiece of his suit against Krafchick.

The trial court granted Krafchick summary judgment on Mazon’s malpractice and breach of fiduciary duty claims, reasoning that “allowing claims for reduced or lost fees would be potentially inconsistent with [co-counsel’s] overriding duties to their client.” The trial court did, however, award Mazon his “out of pocket expenses” and insurance deductible. Both parties then appealed. The Washington Court of Appeals affirmed the trial court’s denial of Mazon’s recovery for his expected contingent fee and adopted a bright-line rule “prohibiting [co-counsel] from suing each other for lost or reduced prospective attorney fees.” In doing so, the court of appeals reasoned that while Mazon’s claim did not impair his or Krafchick’s duties of undivided loyalty to Layouni, public policy dictated a blanket prohibition of suits between co-counsel to recover lost prospective fees because of the potential conflicts of interest such suits would generate.

The court of appeals determined that a bright-line rule was preferable to a case-specific approach “because it prevents conflicts from arising at any point during the representation, assures the client’s interest is paramount regardless of the issue, and is easy to administer.” The court of appeals also allowed Mazon to recover his insurer’s $50,000 settlement payment. Both parties then sought review by the Washington Supreme Court.

The supreme court in Mazon agreed with the lower appellate court’s reasoning and adopted “a bright-line rule that no duties exist between [co-counsel] that would allow recovery for lost or reduced prospective fees.” As the court explained:

As [co-counsel], both attorneys owe an undivided duty of loyalty to the client. The decisions about how to pursue a case must be based on the client’s best interests, not the attorneys’. The undivided duty of loyalty means that each attorney owes a duty to pursue the case in the client’s best interests, even if that means not completing the case and forgoing a potential contingency fee.

46 Id.
47 Id. at 1171.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 1171-72.
53 Id. at 1171.
54 Id.
55 Id. at 1172.
If we were to recognize an attorney’s right to recover from [co-counsel] . . . , potential conflicts of interest that harm the client’s interests may arise. [Co-counsel] may develop an impermissible self-interest in preserving the claim for the prospective fee, even when the client’s interests demand otherwise. Additionally, the question of whether an attorney’s claim conflicts with the client’s best interests may be difficult to answer. Discretionary, tactical decisions, such as whether to advise clients to settle or risk proceeding to trial and determining the amount and structure of settlements, could be characterized by [co-counsel] as a breach of the contractual duties or general duties of care owed to one another and provide a basis for claims seeking recovery of prospective fees. 56

Mazon countered that prohibiting suits between co-counsel would undermine public confidence in the legal system because under that regime co-counsel could not be held accountable to one another. 57 According to Mazon, the court’s bright-line rule would encourage co-counsel to collude to conceal malpractice from clients because innocent lawyers exposed to substantial liability to clients could never be made whole through suits against negligent co-counsel. 58 Faced with the loss of prospective fees and potential liability to clients, lawyers with no means of recovering from co-counsel would be more likely to elevate their interests above their clients’. 59 The supreme court was not persuaded.

We find this argument unpersuasive because it presumes that allowing [co-counsel] to recover prospective fees will eliminate attorneys’ incentive to collude and protect themselves from liability. Instead, we believe that allowing [co-counsel] to recover prospective fees would create the opposite incentives to overemphasize the informal divisions of responsibilities between [co-counsel], overlook any failings of [co-counsel], and later claim that [co-counsel’s] failures were not their responsibility. Prohibiting [co-counsel] from suing each other for prospective fees arising from an attorney’s malpractice in representing their mutual client provides a clear message to attorneys: each [co-counsel] is entirely responsible for diligently representing the client. 60

The supreme court reasoned that prohibiting suits between co-counsel encourages lawyers in such relationships “to back each other up” and cooperate to reduce the chance of errors or misjudgments in pursuing the

56 Id. at 1172-73.
57 Id. at 1173.
58 Id.
59 Id.
60 Id.
best result for the client.\textsuperscript{61} “[Co-counsel] are in the best position to ensure that they are not injured by each other’s mistakes,” and encouraging them to do so is consistent with their duty of “undivided loyalty to the client.”\textsuperscript{62} This approach also serves the public interest.\textsuperscript{63} Accordingly, the court in \textit{Mazon} affirmed the court of appeals’ holding and adopted a bright-line rule against recognizing a duty that would permit co-counsel to recover prospective fees from one another.\textsuperscript{64}

\textit{Schef\textsuperscript{f}er v. Adams and Reese, LLP}, is another exemplary case.\textsuperscript{65} The plaintiff, Louisiana lawyer William Schef\textsuperscript{f}er, was retained by Boomtown Casino to defend it in personal injury litigation.\textsuperscript{66} Before formally engaging him, Boomtown told Schef\textsuperscript{f}er that his retention had to be approved by James Perdigao, the casino’s regular corporate counsel and a partner with Adams and Reese, LLP.\textsuperscript{67} Schef\textsuperscript{f}er met with Perdigao and Boomtown executives, and was formally retained shortly thereafter.\textsuperscript{68} Schef\textsuperscript{f}er received a fixed monthly fee from Boomtown and was reimbursed for all of his litigation-related costs.\textsuperscript{69} Boomtown instructed him “to work with and report to Perdigao.”\textsuperscript{70} Things went smoothly for approximately two years, but then, on the heels of a vague report by Boomtown officials that Perdigao was having “ethical problems,” a New Orleans newspaper published a story revealing Perdigao’s long-running scheme to defraud Adams and Reese by collecting fees intended for the firm.\textsuperscript{71} Although Schef\textsuperscript{f}er worked closely with Perdigao in representing Boomtown, he knew nothing of Perdigao’s fraud.\textsuperscript{72} Even so, Boomtown terminated Schef\textsuperscript{f}er’s representation in light of Perdigao’s public fall from grace.\textsuperscript{73}

Schef\textsuperscript{f}er sued Perdigao and Adams and Reese in connection with Boomtown’s termination of his representation. The defendants moved to dismiss the action, and the case swiftly reached the Louisiana Supreme Court on the narrow issue of whether Schef\textsuperscript{f}er could maintain a cause of action for breach of fiduciary duty against the defendants.\textsuperscript{74}

The court began its analysis by scrutinizing the pleadings for evidence

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item See id.
\item Id.
\item Schef\textsuperscript{f}er v. Adams & Reese, LLP, 950 So. 2d 641 (La. 2007).
\item Id. at 645.
\item Id.
\item See id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 645-46.
\end{enumerate}
\end{footnotesize}
of a fiduciary relationship between Scheffler and the defendants. Scheffler had pleaded no facts that would support the existence of such a relationship. Scheffler and Perdigao were separately retained by Boomtown to represent the casino in its legal affairs. Scheffler had no contract with Perdigao or Adams and Reese, there was no claim of an agency relationship between Scheffler and Perdigao or his firm, and Scheffler and Perdigao were not partners or joint venturers in representing Boomtown. Rather, Scheffler and Perdigao were simply co-agents of Boomtown. Long story short, there was no relationship between Scheffler and Perdigao that would support a fiduciary duty running to the former.

Scheffler argued that if he were allowed to conduct discovery, he could “uncover additional facts, not previously pleaded, establishing the existence of a fiduciary relationship between Perdigao or Adams and Reese and himself.” But here Scheffler ran up against public policy, which, the court reasoned, “dictate[d] against recognizing a fiduciary duty among co-counsel to protect one another’s interest in a prospective fee” between co-counsel.

In discussing the public policy implications of Scheffler’s claims, the court observed that a lawyer’s paramount duty is to his client; indeed, “in no other agency relationship is a greater duty of trust imposed than in that involving an attorney’s duty to his client.” It thus followed that a lawyer’s fiduciary duty to a client “should not be diluted by a fiduciary duty owed to some other person, such as co-counsel.” Although a client’s and lawyer’s interests are normally aligned in the pursuit of a favorable result, “[i]t would be inconsistent with an attorney’s duty to exercise independent professional judgment on behalf of a client to impose upon him a fiduciary obligation to take into account the interests of co-counsel in recovering any prospective fee.”

The court acknowledged that there was no evidence of a conflict of interest between Scheffler and Perdigao, but reasoned that a bright-line rule was “appropriate to avoid even the potential specter of divided loyalty.” In addition to avoiding conflicts of interest, a bright-line rule against

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75 Id. at 647.
76 Id.
77 Id. at 648.
78 Id.
79 Id. at 648-49.
80 Id. at 649.
81 Id.
82 Id.
83 Id. at 651.
84 Id. at 652.
85 Id. at 652-53.
86 Id. at 653.
fiduciary duty claims between co-counsel “protects the confidentiality of attorney-client communications.”87 The court therefore held as a matter of public policy that “no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another’s prospective interests in a fee.”88

It is easy to understand why courts reject fiduciary duty claims between co-counsel; many such relationships are not structured in ways in which one lawyer might be a fiduciary to another. In many instances, co-counsel are simply fellow agents of a mutual client, as was the case in Sheffler.89 It is also obvious that legal malpractice claims between co-counsel ought to fail in jurisdictions that adhere to the strict privity rule, because co-counsel do not share an attorney-client relationship with each other. Even in states that have relaxed the strict privity rule and permit legal malpractice actions by non-clients who are direct and intended beneficiaries of lawyers’ services, co-counsel are not such beneficiaries of their counterparts’ services. At most, they are incidental beneficiaries, and that status will not support liability.90

Even if a co-counsel relationship were structured on a fiduciary basis or if co-counsel could be somehow defined as direct and intended beneficiaries of each other’s services, most claims between them would still be futile for the mundane reason that any alleged damages are too speculative to be recoverable. Cases accepted on a contingent fee basis are often lost or are resolved for a fraction of the amount originally anticipated, such that the lawyers receive nothing for their services or pocket a far smaller fee than expected. By way of further example, Boomtown could have terminated Sheffler’s representation at any time, thus bringing his monthly fixed fees to a halt.

On the other hand, there are arguments for recognizing duties between co-counsel. For example, the Sheffler court noted that co-counsel might structure their relationship as a joint venture.91 At its core, a joint venture is “an undertaking by two or more persons to carry out a single business enterprise jointly for profit.”92 Joint ventures share certain elements, but there is no formula for identifying a joint venture relationship in all instances, as each case turns on its own facts.93 Courts understandably

87 Id.
88 Id.
89 Id. at 648-49.
91 Sheffler; 950 So. 2d at 648 n.2.
93 Sandvick v. LaCrosse, 747 N.W.2d 519, 522 (N.D. 2008).
characterize some co-counsel relationships as joint ventures.\textsuperscript{94} Likewise, co-counsel often consider themselves joint venturers.\textsuperscript{95} Regardless, joint ventures are fiduciary relationships akin to partnerships,\textsuperscript{96} and lawyers who are joint venturers owe one another fiduciary duties that are actionable in breach.\textsuperscript{97} Furthermore, under the approach articulated in the Restatement (Third) of the Law Governing Lawyers, lawyers may owe duties to non-clients where: “(a) the lawyer . . . invites the [non-client] to rely on the lawyer’s opinion or provision of other legal services, and the [non-client] so relies; and (b) the [non-client] is not, under applicable tort law, too remote from the lawyer to be entitled to protection.”\textsuperscript{98} The Restatement test describes many co-counsel relationships.\textsuperscript{99} As for the notion that damages in cases between co-counsel will generally be too speculative to support a recovery, that will not always be true. Thus, lawyers might argue that courts should recognize causes of action between co-counsel when the requisite elements are properly pleaded. If a plaintiff’s case fails for the inability to prove all the elements, so be it.

Finally, exempting lawyers from malpractice liability to co-counsel makes little sense. As a dissenting justice asserted in \textit{Mazon}:

\begin{quote}
The majority fears attorneys might “develop an impermissible self-interest in preserving the claim for the prospective fee, even when the client’s interests demand otherwise.” This is fiction. Krafchick’s negligence would never be in the client’s interest. . . . When an attorney commits malpractice and that same misconduct damages [co-counsel], there is no reason both the client and [co-counsel] should not be allowed to recover. This result does not jeopardize an attorney’s duty of loyalty, it promotes it.\textsuperscript{100}
\end{quote}

Of course, the fact that there was no conflict in \textit{Mazon} does not mean that other co-counsel controversies will be conflict-free. Similarly, there were no confidentiality issues in \textit{Mazon}, but there may be in different cases. The bottom line is that bright-line rules are simple but imperfect. That imperfection may well cause future courts to eschew the bright-line rule of \textit{Mazon} and \textit{Scheffler} in favor of a case-by-case approach. Many states have yet to address causes of action between co-counsel. It is difficult, however,

\textsuperscript{94} See, e.g., Duggins v. Guardianship of Washington, 632 So. 2d 420, 426-28 (Miss. 1993) (finding a joint venture between plaintiffs’ lawyers based on shared responsibility for representation and division of contingent fee); Fitzgibbon v. Henry A. Carey, P.C., 688 P.2d 1367, 1371 (Or. Ct. App. 1984) (affirming trial court finding that class counsel were joint venturers).
\textsuperscript{95} See, e.g., Mazon v. Krafchick, 144 P.3d 1168, 1170 (Wash. 2006).
\textsuperscript{96} \textit{Pellegrini}, 81 Cal. Rptr. 3d at 397; \textit{Scheffler}, 950 So. 2d at 648 n.2.
\textsuperscript{98} Restatement (Third) of the Law Governing Lawyers § 51(2) (2000).
\textsuperscript{99} See \textit{Mazon}, 144 P.3d at 1175-76 (Sanders, J., dissenting).
\textsuperscript{100} \textit{Id.} at 1176 (Sanders, J., dissenting) (citation omitted).
to see how recognizing legal malpractice actions between co-counsel will erode public confidence in the legal profession, a reason regularly offered for refusing co-counsel the right to recover prospective fees when joint representations are ruined by error.\textsuperscript{101} Attorney fee disputes are a regular feature of the litigation landscape and are the subject of numerous reported opinions. The same is true for conflicts of interest. To the extent courts wish to prohibit actions between co-counsel, they should do so for reasons other than the speculative preservation of public confidence in the legal profession or system.

Lawyers’ general inability to sue co-counsel for malpractice or breaches of fiduciary duties does not mean that they are precluded from suing them for all possible wrongs.\textsuperscript{102} For example, lawyers may be able to sue co-counsel for breach of contract, as where a lawyer allegedly reneges on an agreement to divide fees.\textsuperscript{103} It is also conceivable that in some circumstances a lawyer might be able to sue co-counsel for negligent or fraudulent misrepresentation, given that courts have permitted third-parties to sue lawyers on these theories.\textsuperscript{104} As a California court observed in holding that a law firm could be held liable for fraud to a transactional counterparty, “[A] fraud claim against a lawyer is no different from a fraud claim against anyone else.”\textsuperscript{105} Other courts have reached similar conclusions.\textsuperscript{106} At least one court has permitted a law firm to sue opposing counsel for indemnity based on the opposing lawyer’s fraudulent misrepresentations in


\textsuperscript{102} A lawyer might be able to sue co-counsel for breach of fiduciary duty if that duty was not premised on an attorney-client relationship or did not essentially duplicate a legal malpractice claim. See, e.g., Thomas B. Olson & Assoc. v. Leffert, Jay & Polglaze, P.A., 736 N.W.2d 907, 914-17 (Minn. Ct. App. 2008) (permitting breach of fiduciary duty action by predecessor counsel versus successor counsel based on an alleged conversion of funds held in trust in successor counsel’s trust account).


a commercial transaction. If courts will permit third parties—including opposing parties and adverse counsel—to sue lawyers for fraud and misrepresentation, it is reasonable to assume that they would permit such actions by co-counsel on the right facts. Still, such actions are rarely likely to succeed.

In *Blondell v. Littlepage*, for example, William Blondell was engaged by Lois and Hugh Corbin to represent them in a medical malpractice action. He referred the matter to another lawyer, Diane Littlepage, and Blondell and Littlepage became co-counsel and established a fee-sharing agreement. According to this agreement, Littlepage assumed primary responsibility for the case with Blondell agreeing to provide services at Littlepage’s request. At least partially in response to Littlepage’s advice that Blondell’s delay in filing the action afforded the defendants an arguably valid statute of limitations defense, the Corbins eventually settled their case for a sum far less than Blondell anticipated. Blondell sued Littlepage for “fraud/deceit, breach of contract, breach of fiduciary duty, negligence, and intentional interference with contractual relations.” The trial court granted Littlepage summary judgment and Blondell appealed. Blondell framed the sole issue on appeal as follows:

> Was the [trial] court legally correct in granting . . . summary judgment . . . after [Littlepage], without informing or consulting [Blondell], advised the clients to settle the matter by falsely stating to them that [Blondell] had not timely filed their claim and had committed malpractice, necessitating an immediate settlement?

The *Blondell* court agreed with the trial court and therefore affirmed summary judgment for Littlepage.

The court began its analysis by stating that Blondell’s fraud and negligence claims depended on the existence of a duty owed to him by Littlepage. Blondell advanced three duty arguments. First, he reasoned, his co-counsel relationship and fee-sharing agreement with Littlepage

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109 Id.
110 Id.
111 Id.
112 Id.
113 Id. at 681.
114 Id.
115 Id.
116 Id. at 685.
gave rise to a special relationship supporting a duty.\textsuperscript{117} Second, he cited the statement in section 56 of the Restatement (Third) of the Law Governing Lawyers that “lawyers are subject to liability to a client or [non-client] when a [non-lawyer] would be in similar circumstances.”\textsuperscript{118} Third, he invoked section 51 of the Restatement, which addresses lawyers’ liability to third parties.\textsuperscript{119} The court rejected all three arguments.

The court rebuffed Blondell’s special relationship argument because it ran contrary to Maryland’s strict privity rule in legal malpractice cases.\textsuperscript{120} By elevating co-counsel status to a special relationship, Blondell effectively advocated expanding lawyers’ liability to non-clients, with a corresponding detrimental effect on lawyers’ duty of loyalty to clients.\textsuperscript{121} The court found that this impairment of loyalty is “precisely the problem the strict privity rule seeks to avoid.”\textsuperscript{122} As for Blondell’s theory based on section 56 of the Restatement, the court dismissively explained that section 56 did nothing more than state the obvious point that lawyers’ status as counsel “does not provide blanket protection from liability when liability would otherwise exist.”\textsuperscript{123} Accordingly, “refusing to recognize the novel tort duty between co-counsel” was entirely consistent with the section 56 provision that “lawyer[s] should share the same tort liability as [non-lawyers] would under similar circumstances.”\textsuperscript{124} Finally, with respect to section 51 of the Restatement, the court simply did not believe that it applied to the facts presented.\textsuperscript{125}

Retreating, Blondell argued for a duty based on ethics rules and on his fee-sharing agreement with Littlepage; neither approach succeeded.\textsuperscript{126} As the court explained with respect to the first:

\begin{quote}
The mere existence of a contract, in this context a fee sharing agreement, is also not enough to create a tort duty. In fact, the fee sharing agreement here directly contradicts Blondell’s position that Littlepage owed him a duty of consultation and communication, stating that Blondell would provide services “as requested” by Littlepage. Though Blondell technically remained co-counsel, and had some minimal involvement in the case, these circumstances are not enough to elevate his relationship with Littlepage to
\end{quote}

\textsuperscript{117} See id. at 688.
\textsuperscript{118} Id. (quoting Restatement (Third) of the Law Governing Lawyers § 56 (2000)).
\textsuperscript{119} Id. at 688-89 (quoting Restatement (Third) of the Law Governing Lawyers § 51 (2000)).
\textsuperscript{120} Id. at 688.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 688-89.
\textsuperscript{126} Id. at 689.
special status.127

With respect to the second, the court noted that ethics violations do not give rise to private rights of action.128 If Blondell thought Littlepage was dishonest, his proper course of action was to report her to disciplinary authorities.129

Regarding his breach of contract claim, which was premised on the fee-sharing agreement, Blondell theorized that Littlepage had breached the duty of good faith and fair dealing implied in all contracts.130 This argument was also unsuccessful. While Maryland law implies a duty of good faith and fair dealing in all contracts, Littlepage paid Blondell his share of their contingent fee from the Corbins’ settlement, and thus fulfilled the terms of their agreement.131 Blondell contended that the duty of good faith and fair dealing obligated Littlepage to communicate and consult with him concerning the Corbins’ representation, but that argument failed because of a lack of supporting authority.132 Moreover, the fee agreement authorized Littlepage to prosecute the Corbins’ case without consulting Blondell, as evidenced by the language making her primarily responsible for the representation and obligating Blondell to perform services only as she requested.133

Blondell’s breach of fiduciary duty claim was doomed first by the fact that Littlepage performed her obligation under the fee-sharing agreement by paying Blondell the amount he was due when the case settled.134 Nothing in the fee-sharing agreement required Littlepage to consult with Blondell concerning the Corbins’ representation.135 The argument was also undermined by the fact that, because he and Littlepage did not share equal responsibility for representing the Corbins, their relationship could not be characterized as a joint venture.136 Finally, even if Blondell could establish the existence of a joint venture, “[lawyers’] fiduciary duties arising from a fee sharing agreement are ordinarily limited to accounting for fees and expenses and are unrelated to providing legal advice to the joint client.”137

127 Id. (citing Jacques v. First Nat’l Bank of Md., 515 A.2d 756, 759 (Md. 1986) (“[A] duty assumed or implied in contract by fact alone [does not] become a tort duty.”)).
128 Id.
129 Id.
130 Id. at 692.
131 Id.
132 Id. at 693.
133 Id.
134 Id. at 694.
135 Id.
136 Id. at 694-95.
137 Id. at 695.
There was no “generic cause of action for breach of fiduciary duty.”

Blondell’s final claim against Littlepage alleged her tortious interference with his contractual relations. This theory failed for the obvious reason that Littlepage was a party to the fee-sharing agreement on which it was premised, and it is commonly accepted that a party cannot tortiously interfere with her own contract. Blondell unsuccessfully tried to escape this principle by arguing that he had an independent obligation to represent the Corbins as one of their co-counsel and, as to that relationship, Littlepage was a stranger. Branding this argument a “non-sequitur,” the court correctly noted that while Blondell and Littlepage each owed the Corbins a duty of undivided loyalty, Littlepage was nonetheless a party to the fee-sharing agreement. Thus, the rule that a party cannot interfere with its own contract still defeated Blondell’s claim.

B. Contribution, Indemnity, and Setoff Claims

Co-counsel’s general inability to sue one another for breach of fiduciary duty or legal malpractice does not mean that co-counsel will categorically escape responsibility to their counterparts when clients sue for malpractice. A lawyer sued for malpractice or breach of fiduciary duty by a client may be able to mitigate her damages through a contribution or indemnity claim against co-counsel, or by seeking a setoff for co-counsel’s alleged liability. Even courts that have prohibited co-counsel from suing each other for breach of fiduciary duty or legal malpractice have permitted them to assert contribution or indemnity claims, provided the requisite conditions or factors are satisfied. Indeed, while courts have uniformly resisted direct actions between co-counsel, many have allowed co-counsel to maintain

138 Id.
139 Id. at 696.
140 See id. (referring to Littlepage as a “third party”).
141 Id. at 696-97.
142 Id. at 697.
145 But see, e.g., Erickson v. Erickson, 849 F. Supp. 453, 458-59 (S.D. W. Va. 1994) (rejecting contribution and indemnity claims where lawyer asserting them was accused of fraud and bore fault, and lawyers did not have common obligations); Rivas v. Raymond Schwartzberg & Assocs., 861 N.Y.S.2d 313, 314 (N.Y. App. Div. 2008) (rejecting contribution and indemnity claims because second lawyer was not joint tortfeasor); Gen. Accident Ins. Co. of America v. Schoendorf & Sorgi, 549 N.W.2d 429, 433 (Wis. 1996) (rejecting contribution where law firms were successive rather than joint tortfeasors).
contribution or indemnity actions against each other.\textsuperscript{146} \textit{Parler & Wobber v. Miles & Stockbridge, P.C.}, leads this line of authority.\textsuperscript{147}

In \textit{Parler & Wobber}, Royal Insurance hired Miles & Stockbridge (“Miles”) to defend Salomon, Inc., its insured, in an asbestos case referred to as the “Jerome litigation.”\textsuperscript{148} Unfortunately, Miles apparently misunderstood the effect of removing the Jerome litigation to federal court during its time to answer and, therefore, the court filed a default judgment against Salomon.\textsuperscript{149} Miles also allegedly failed to timely identify possible third-party defendants.\textsuperscript{150} Royal fired Miles and replaced it with another firm, Parler & Wobber (“Parler”).\textsuperscript{151} Parler failed to file any third-party complaints before the deadline for doing so and also conceded the effectiveness of the default judgment when it allegedly should not have done so.\textsuperscript{152} Eventually, Royal settled the Jerome litigation for $1.6 million supposedly on Parler’s advice.\textsuperscript{153} Royal sued Miles in a Maryland federal court for malpractice for allowing the default and failing to timely identify third-party defendants, which it claimed compelled the $1.6 million settlement.\textsuperscript{154} Miles in turn filed a third-party complaint against Parler for contribution and indemnity, contending that Parler blundered in failing to vacate the default judgment, was negligent in not filing third-party complaints, and erred in advising Royal to settle the Jerome litigation for more than it was worth.\textsuperscript{155}

The district court hearing the malpractice case certified the following question to the Maryland Court of Appeals: “[W]hen a client sues former counsel for professional malpractice, may that former counsel implead the client’s successor counsel for contribution and indemnification where it alleges that successor counsel’s professional negligence in the same matter contributed to the injury suffered by the client?”\textsuperscript{156} The court in \textit{Parler &

\begin{itemize}
\item \textsuperscript{148} Id. at 529.
\item \textsuperscript{149} Id. at 529-30.
\item \textsuperscript{150} Id. at 530.
\item \textsuperscript{151} Id. at 529-30.
\item \textsuperscript{152} Id. at 530.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 530-31.
\item \textsuperscript{156} Id. at 531.
Wobber answered the certified question in the affirmative. 157

Dissecting the parties’ positions, Miles asserted that Parler’s impleader was clearly proper under the Maryland Uniform Contribution Among Tortfeasors Act (UCATA). 158 Parler argued that despite UCATA’s apparent applicability, public policy considerations precluded its liability given that the client sued only Miles. 159 Allowing former counsel to implead successor counsel, Parler argued, “would breach the attorney-client relationship by invading the successor attorney’s duty of confidentiality owed to the client and the attorney-client privilege.” 160 According to Parler, recognizing a contribution or indemnity claim here would “create a potential conflict between the interests of the client and the inherent self-protection instinct of the successor attorney.” 161 Parler warned that if the court permitted Miles to implead it under UCATA, the decision would “open Pandora’s box by providing a third party with the right to interfere in the sacred attorney-client relationship.” 162

The court recognized that confidentiality is a core value of the attorney-client relationship, but it is not absolute. 163 Furthermore, Parler failed to acknowledge the critical distinction between a lawyers’ ethical duty of confidentiality and the evidentiary basis of the attorney-client privilege. 164 This duty of confidentiality encompasses all situations except those where the law compels the lawyer to provide evidence. 165 In that situation, only the attorney-client privilege prevents the lawyer from revealing confidential information. 166 Thus, relevant evidence must be produced unless it is protected against discovery by the attorney-client privilege, and lawyers’ ethical duty of confidentiality is subordinate to “the search for truth.” 167

With respect to the attorney-client privilege, the court noted that it is not absolute either, as clients may expressly or impliedly waive it. 168 Under Maryland law, the privilege is impliedly waived in any proceeding in which a client challenges its lawyers’ advice or activities. 169 The question for the court was “whether [it] should extend the implied waiver rule

157 Id.
158 Id. at 531-32.
159 Id. at 532.
160 Id.
161 Id.
162 Id.
163 Id. at 535-36.
164 Id. at 536.
165 Id. (quoting In re Criminal Investigation No. 1/2/42Q, 602 A.2d 1220, 1222 (Md. 1992)).
166 Id. (quoting In re Criminal Investigation No. 1/2/42Q, 602 A.2d at 1222).
167 Id.
168 Id. at 537.
169 Id.
... to attorney-client privileged communications between the client and successor counsel when the client, by claiming malpractice or negligence against former counsel, has injected an issue that also implicates successor counsel’s negligence in the same matter.”170

The court in Parler & Wobber rejected Miles’ argument that a client’s suit against its former counsel automatically waives its attorney-client privilege with successor counsel.171 Instead, the court adopted the Hearn test for waiver,172 which is derived from the case of Hearn v. Rhay.173 Under this test, a court should find an implied waiver of the attorney-client privilege where:

(1) Assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.174

On remand to the district court, Miles would bear the burden of showing an implied waiver using the Hearn test.175 If Miles could not do so, it would obviously face significant evidentiary problems in defending itself. The existence of that potential hurdle was not, however, a sufficient basis for rejecting the firm’s right to contribution or indemnity.

The court also considered cases from around the country in concluding that courts permitting contribution and indemnity actions were more closely aligned with Maryland law than those that did not.176 Although the Parler & Wobber court shared its sister courts’ desire to uphold the attorney-client privilege and protect the attorney-client relationship, it was reluctant to exempt joint tortfeasors from responsibility for their negligence.177 The wiser public policy course was “for the parties to lay their cards on the table for the fact-finder to determine the facts and allocate the loss to the proper parties, rather than granting successor counsel a shield of immunity for its alleged wrongful acts.”178

Many courts prohibit third-party actions between co-counsel for the same reasons they reject direct actions.179 In Stone v. Satriana, for example,

170 Id. at 538.
171 Id. at 545.
172 Id. at 545-46.
174 Parler & Wobber, 756 A.2d at 541-42 (quoting Hearn, 68 F.R.D. at 581).
175 Id. at 546.
176 Id. at 542.
177 Id.
178 Id. at 544.
the Supreme Court of Colorado refused to permit a law firm to designate a former client’s successor counsel as a nonparty-at-fault. In so holding, the court was persuaded by the reasoning of courts in other states that had disallowed contribution or indemnity actions because they (a) might be misused as a litigation tactic to disqualify successor counsel, (b) could create conflicts of interest, and (c) might jeopardize client confidences. Additionally, successor counsel have no duty to mitigate harm done by a legal malpractice plaintiff’s predecessor counsel. Without such a duty, the Stone court reasoned, it would be improper to designate successor counsel as a nonparty-at-fault.

At least one court has charted a middle course based on a comment to section 53 of the Restatement (Third) of the Law Governing Lawyers, which states:

When the damage caused by the negligence or fiduciary breach of a lawyer is increased by the negligence or fiduciary breach of successor counsel retained by the client, the first lawyer . . . may not seek contribution or indemnity from the successor lawyer in the same action in which the successor lawyer represents the client, for that would allow the first lawyer to create or exacerbate a conflict of interest for the second lawyer and force withdrawal of the second lawyer from the action. The first lawyer may, however, dispute liability in the negligence or fiduciary breach action for the portion of the damages caused by the second lawyer . . . . The client may then choose whether to accept the possibility of such a reduction in damages or to assert a second claim against successor counsel, with the resultant necessity of retaining a third lawyer to proceed against the first two.

In Mirch v. Frank, a Nevada federal court reasoned that the Restatement approach balanced the competing interests for and against recognizing

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180 Stone, 41 P.3d at 708–12 (explaining the nonparty–at–fault designation under Colorado law).

181 Id. at 709–11.

182 Id. at 711; see also Daniel B. Meyer & Edward C. Eberspacher IV, Legal Malpractice and the Liability of Successor Counsel, FOR THE DEF., May 2009, at 16–17 (discussing the successor counsel doctrine in legal malpractice litigation).

183 Stone, 41 P.3d at 712.


contribution and indemnity actions between successive lawyers.\textsuperscript{186} The court in \textit{Mirch} observed that the Restatement approach “[p]laces the course of the litigation and the ultimate waiver of attorney-client privilege in the hands of the aggrieved client” where these issues belong.\textsuperscript{187} At the same time, it affords the former lawyers the affirmative defense they require without placing successor lawyers in a conflict of interest.\textsuperscript{188}

The Restatement approach to contribution or indemnity claims between lawyers raises three points worth mentioning. First, it contemplates lawyers’ successive representations of a client, rather than co-counsel’s concurrent representation.\textsuperscript{189} In a case of two co-counsel committing legal malpractice during a concurrent representation, allowing a contribution or indemnity action by one against the other does not pose the conflict of interest concerns or the potential for abusive litigation tactics that apparently influenced the Restatement view. Second, this approach ignores the possibility that a lawyer sued for malpractice or fiduciary breach might not make a contribution or indemnity claim against successor counsel in the same action in which the client sues her, but might instead file a separate action after the initial action is resolved. Again, this tactic avoids the problems identified in the comment to section 53.\textsuperscript{190} Finally, to the extent the conflict of interest concern in the Restatement is premised on the advocate-witness rule—which holds that lawyers are generally barred from acting as advocates in trials in which they are likely to be necessary witnesses—\textsuperscript{191} that concern is not uniformly valid. “Successor counsel” may be a firm with several lawyers, such that one lawyer’s likely involvement as a witness would not necessarily preclude others at the firm from litigating the matter.\textsuperscript{192} Whether that tactic is advisable is a separate question that is difficult to answer in the abstract.

\textbf{II. Co-Counsel Referral Liability and Joint or Vicarious Liability}

In many co-counsel representations, each lawyer has an attorney-client relationship with their mutual client. The lawyers are fellow agents of the client, each owing the client independent duties of care, confidentiality,

\textsuperscript{186} \textit{Mirch}, 295 F. Supp. 2d at 1185.

\textsuperscript{187} \textit{Id.} at 1186 (citing Holland v. Thacher, 245 Cal. Rptr. 247, 251 (Cal. Ct. App. 1988)).

\textsuperscript{188} \textit{Id.} at 1185 (citing Goldfisher v. Superior Court, 183 Cal. Rptr. 609, 614-15 (Cal. Ct. App. 1982)).

\textsuperscript{189} See Restatement (Third) of the Law Governing Lawyers \S 53 cmt. i (2000) (prohibiting the first lawyer from seeking contribution or indemnity from successor counsel “in the same action in which the successor lawyer represents the client”) (citations omitted).

\textsuperscript{190} See \textit{id.} (discussing conflict posed for successor counsel when contribution or indemnity claims are litigated in same action in which prior counsel is being sued) (citations omitted).

\textsuperscript{191} Model Rules of Prof’l Conduct R. 3.7(a) (2009).

\textsuperscript{192} \textit{Id.} at 3.7(b).
and loyalty. But how is the co-counsel relationship formed? Sometimes the client retains multiple lawyers for a single matter. Often, it is essentially what transpired in *Mazon v. Krafchick*; the client retains one lawyer who, with the client’s consent, associates another lawyer with desired expertise, and the two lawyers then cooperate to achieve their mutual client’s objectives in the representation.\(^\text{193}\) In other matters, the lawyer securing co-counsel intends that the lawyer she involves will be principally responsible for the matter—perhaps exclusively so. Some lawyers market their services as co-counsel to other lawyers. Regardless of how the first lawyer identifies co-counsel or the nature of their relationship thereafter, the first lawyer may face liability for negligent referral if the second lawyer breaches duties to the client.\(^\text{194}\) Lawyers may also face joint or vicarious liability for co-counsel’s errors.\(^\text{195}\) Finally, in co-counsel relationships characterized by one lawyer’s service as “local counsel,” questions may surface concerning the existence and scope of the local counsel’s duties to the client and to the court.

### A. Referral Liability

When lawyers arrange for co-counsel to represent a client, they are serving as their client’s agents and accordingly owe their client a duty of care in the process.\(^\text{196}\) This is true regardless of whether the original lawyer cedes responsibility for the matter after making the referral, or retains some level of responsibility in cooperation with co-counsel; the lawyer’s duty relates to the referral itself.\(^\text{197}\) From a professional responsibility standpoint, “[a] lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.”\(^\text{198}\)

In *Tormo v. Yormark*, Karen Tormo was injured in a New Jersey boating accident in early July 1968.\(^\text{199}\) Tormo’s father consulted his regular lawyer, Edward Devlin, about the accident, but time crept by and Devlin was unable to settle Tormo’s accident claim.\(^\text{200}\) In June 1970 Devlin, who was licensed to practice only in New York, asked New Jersey lawyer Milton Yormark to file suit on behalf of Tormo in New Jersey.\(^\text{201}\) Devlin had briefly

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196 *Id.* § 5:9, at 682-83.
197 *See Rainey v. Davenport* (*In re Davenport*), 353 B.R. 150, 180 (Bankr. S.D. Tex. 2006) (recognizing a negligent referral as a valid cause of action and explaining that “bringing an incompetent attorney on board” would violate a lawyer’s fiduciary duty to a client).
198 *Model Rules of Prof’l Conduct* R. 1.5 cmt. 7 (2009).
200 *Id.* at 1165-66.
201 *Id.* at 1166.
met Yormark in late July 1968 when Yormark approached him about the accident. Yormark claimed to have gotten Devlin’s name from Tormo’s father, said that he specialized in personal injury litigation, and expressed an interest in handling the case. In making the referral, Devlin’s only inquiry into Yormark’s qualifications consisted of looking in a legal directory to confirm his admission to practice in New Jersey. Devlin did not discover—as was prominently and repeatedly reported in the Newark newspaper—that Yormark had been indicted in 1969 for insurance fraud. Yormark was convicted on those charges and sentenced to prison in January 1971, and then disbarred in February 1972. Sadly, in the interim, he settled Tormo’s accident claim for $150,000 and stole the settlement funds.

Tormo sued the banks involved in the disposition of her settlement funds in federal court in New Jersey and, in turn, the banks filed a third-party action against Devlin for negligence in selecting and supervising Yormark. Devlin moved for summary judgment on the banks’ claims. With respect to the negligent referral allegations, Devlin argued that he was not liable because he did not have actual knowledge of Yormark’s indictment and, as a New York lawyer, knowledge of the indictment could not be imputed to him.

The court was persuaded by Devlin’s argument. While Devlin, as his clients’ agent, had a duty to exercise care in retaining Yormark to “ensure that he was competent and trustworthy,” he could not be held to have breached that duty by failing to inquire into Yormark’s background beyond his active bar registration. Yormark’s indictment was reported in New Jersey, but there was no evidence that it was reported more widely and, in the court’s view, Devlin’s liability would at least require the latter. The court explained:

A contrary conclusion would subject out-of-state lawyers to possible liability for negligence for failure to consult not only a New Jersey lawyer’s personal references and the legal ethics committee in the county in which he practices, but also the offices of local prosecutors. Yet a reference may be unaware of an attorney’s criminal misadventure, and proceedings before the

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202 Id.
203 Id.
204 Id. at 1167.
205 Id. at 1166-67 & 1167 n.9.
206 Id. at 1166-67.
207 Id. at 1168.
208 Id. at 1165.
209 Id. at 1169.
210 Id. at 1170-71.
211 Id. at 1170.
State’s committees on ethics are required to be kept confidential. Thus the burden of these additional inquiries greatly exceeds the risk that a referring attorney may cause harm to his client by entrusting his affairs to a lawyer who is known to be licensed by the State. . . . Devlin relied, in making the referral, upon the State’s judgment that Yormark was fit to practice law. State regulation of the legal profession is extensive . . . . Under the circumstances, he could not be found negligent simply for failing to make further inquiries into Yormark’s background.212

Unfortunately for Devlin, the court’s favorable ruling concerning Yormark’s criminal history did not completely answer the question of his potential liability for negligent referral. According to Devlin’s testimony, when Yormark first approached him, he told Devlin that he had obtained his name from Tormo’s father.213 Devlin should have realized that ethics rules prohibited the solicitation Yormark described.214 As the court noted, soliciting clients is a serious ethics breach and lawyers who do this are “[unworthy] of the trust and confidence essential to the attorney-client relationship.”215 Further, “[a]n attorney who knowingly entrusted his client’s business to a lawyer who he had reason to believe [had solicited the client] would be clearly negligent either in making the referral at all, or in doing so without advising his client of his suspicions.”216 As a result, Devlin’s potential liability presented a question of fact for the jury.217

Tormo is an interesting case because of its timing. It was decided in 1975, before the Internet and the widespread use of computerized legal research services, such as Findlaw, LexisNexis and Westlaw. Today, a lawyer in Devlin’s shoes would be able to locate reports of Yormark’s alleged dishonesty nearly effortlessly. Accordingly, knowledge of Yormark’s misconduct would likely be imputed to Devlin as any reasonable person doing even cursory research into his co-counsel could have uncovered this fact.

Lawyers who intend to refer clients to other lawyers should attempt to learn as much as they reasonably can about those lawyers. This may be unnecessary if the lawyer being referred (hereinafter referred to as the “target lawyer”) is an established collaborator of the referring lawyer or is well known to the referring lawyer. Otherwise, reasonable due diligence would seem to require a referring lawyer to (a) confirm that the target lawyer is admitted to practice in the jurisdiction; (b) conduct an Internet search of the target lawyer by name; (c) conduct a LexisNexis or Westlaw

212 Id. at 1170-71 (citations and footnote omitted).
213 Id. at 1171.
214 Id.
215 Id.
216 Id.
217 Id. at 1172.
search of the target lawyer by name in federal and state databases; (d) review the target lawyer's Martindale-Hubbell listing; and (e) appropriately question the target lawyer about her qualifications. With respect to the final step, the target lawyer's ethical duty of honesty entitles the referring lawyer to rely on her answers absent contrary indications. Beyond these basic measures, qualifications such as fellowship in the esteemed American Academy of Appellate Lawyers, American College of Trial Lawyers, or American College of Trust and Estate Counsel are reasonable indicators of a lawyer's worthiness for referral, as is membership in other selective professional associations or societies. If reasonably possible, a lawyer considering a referral should talk to lawyers who are familiar with the target lawyer. These lawyers may know things about the lawyer to whom a referral might be made that are not apparent from other sources, or that might be masked by the target lawyer's reputation. Overall, these steps impose a minimal burden on a referring lawyer.

In any event, a lawyer may be held liable for a negligent referral only if it can be shown that he knew or reasonably should have known that the lawyer who was referred posed a foreseeable risk of harm to the client in the representation. Absent some contrary history, it is not foreseeable that a lawyer to whom a referral is made will miss routine deadlines or fail to make scheduled appearances. Referring lawyers must be able to assume some rudimentary competence on the part of lawyers to whom they send matters, lest they be burdened with a continuing duty of supervision leading to duplicative work and increased costs to clients. Referring a client to another lawyer, or even engaging another lawyer on a client's behalf, does not imply a duty by the referring lawyer to supervise the second lawyer in that representation.

On the other side of the coin, a lawyer to whom a matter is referred or who is added as co-counsel is entitled to place some reliance on the referring lawyer's investigation or preparatory work. Similarly, a lawyer to whom a matter is referred or who affiliates as co-counsel is generally entitled to rely on the referring lawyer's statements concerning key facts or aspects of

218 See Model Rules of Prof'l Conduct R. 8.4(c) (2009) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation).

219 Lea, supra note 11, at 22.


the representation. The reasonableness of the referred lawyer’s reliance understandably depends on the circumstances. For example, lawyers who handle Fair Debt Collection Practices Act (FDCPA) cases arguably must have an independent factual basis for relying on a referring lawyer’s statements or work. Lawyers may never turn a blind eye to the obvious. As a general rule, the more deeply the referred lawyer becomes involved in the representation, the less justifiable or reasonable her reliance on the referring lawyer becomes. Lawyers who are contemplating the acceptance of a referral or the affiliation with co-counsel are therefore wise to perform due diligence on referring attorneys.

B. Joint or Vicarious Liability

Once a lawyer refers a matter to another lawyer or involves a referred lawyer in a representation as co-counsel, the question then becomes whether either lawyer can be held jointly or vicariously liable for the other’s breach of duty to the client. As a rule, a lawyer is not liable for co-counsel’s negligence because the referred lawyer is “an independent agent of the client over whom the [referring lawyer] has no control.” A lawyer may be liable for co-counsel’s negligence or fiduciary breach, however, if the lawyers (1) share responsibility for the representation, or (2) agree to divide a fee. The fact that an agreement to divide a fee may be unenforceable as between the lawyers because it violates ethics rules will not defeat an aggrieved client’s malpractice claim alleging joint or vicarious liability.

There are few reported cases on the joint liability of co-counsel, but, even if there were many, it is unlikely that any would illustrate the foregoing exceptions to the general rule better than Duggins v. Guardianship of Washington. In Duggins, a little boy, Maurice Washington, was blinded in one eye by the alleged negligence of an ophthalmologist, Dr. John

224 See Scott v. Francis, 838 P.2d 596, 598-99 (Or. 1992) (allowing an indemnity claim by referred lawyer when referred lawyer alleged that he relied on a referring lawyer’s statement that there were no time pressures when, in fact, the statute of limitations was quickly running).

225 1 MALLIN & SMITH, supra note 12, § 5:9, at 683.


227 See Pratt v. California, 11 F. App’x 833, 836-37 (9th Cir. 2001) (discussing co-counsel’s joint and several liability for sanctions by the court).


Ederington.\textsuperscript{232} The boy’s parents hired W.B. Duggins, a lawyer in Vicksburg, Mississippi, to sue Ederington for malpractice on their behalf and on behalf of a guardianship established for their son.\textsuperscript{233} Duggins and the parents entered into a contingent fee agreement for him to represent them and the guardianship.\textsuperscript{234} The agreement gave Duggins the unfettered right to engage co-counsel at no additional expense to the clients.\textsuperscript{235} Duggins recognized his need to associate with an experienced medical malpractice lawyer and he so informed Washington’s parents.\textsuperscript{236} He then sought out Douglas Barfield, a lawyer in Jackson, Mississippi, with medical malpractice experience.\textsuperscript{237} Barfield agreed to become involved in the case and met with Washington’s parents, who were satisfied with his involvement and qualifications.\textsuperscript{238} Duggins and Barfield agreed that Duggins would compile the necessary medical bills and records and communicate with the family, and Barfield would prosecute the action and handle settlement negotiations with Ederington’s medical malpractice insurer, St. Paul Insurance Company.\textsuperscript{239} Also, “Duggins and Barfield agreed to divide any attorneys’ fees equally.”\textsuperscript{240} Regrettably, Barfield never filed the intended complaint.\textsuperscript{241} To cover his tracks, he sent Duggins a copy of a fake complaint, complete with a case number (later determined to be from a case he had filed two years earlier), a stamp from the court clerk, and a purported filing date.\textsuperscript{242} Other than the fact that the clerk’s stamp was not initialed, as was customary in Hinds County where the suit was purportedly filed, there was nothing about the fake pleading to alert Duggins to trouble.\textsuperscript{243} A few months later, Duggins was in the Hinds County Courthouse on other business and decided to check on the case.\textsuperscript{244} The clerk could not locate the file, but that was not alarming because Duggins did not have the case number handy, which limited the clerk’s ability to search for it.\textsuperscript{245} Still, Duggins was not worried because Barfield had told him that the case was not set for trial for several

\textsuperscript{232} Id. at 422.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 422-23.
\textsuperscript{238} Id. at 423.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
Meanwhile, Barfield was negotiating a settlement with St. Paul, but, in doing so, he hid Duggins' involvement in the case.\textsuperscript{247} When Duggins inquired about the negotiations, Barfield told him that he expected to settle for between $161,000 and $165,000.\textsuperscript{248} At Barfield's suggestion, "the two attorneys agreed to cap their attorneys' fees at $48,000 from the guardianship and $6,000 worth of fees from the insurance company's [expected] $15,000 settlement with Maurice's parents."\textsuperscript{249} Duggins thus anticipated a fee of $27,000, i.e., one half of the total $54,000 contingent fee.\textsuperscript{250}

A settlement conference was convened on May 3, 1987, and there Duggins saw for the first time a settlement agreement stating that the total settlement was only $95,500.\textsuperscript{251} He pointed out the discrepancy to Barfield, who allegedly told him that it was a typographical error.\textsuperscript{252} Duggins did not voice his concerns to anyone else at the time because he claimed that he felt pressure to settle the case.\textsuperscript{253} Immediately afterwards, however, Duggins told Washington's parents that he thought the settlement agreement was inaccurate, and the next morning he called the judge presiding over the settlement conference to express the same concern.\textsuperscript{254} The judge told him there would be no problem amending the agreement and instructed Duggins to prepare an order for the judge's signature.\textsuperscript{255} Duggins relayed this information to Barfield, who promised to draft the necessary documents.\textsuperscript{256} Unbeknownst to Duggins, the lawyer representing St. Paul at the settlement conference had given Barfield two settlement checks, neither of which named Duggins as a payee.\textsuperscript{257} In fact, Barfield was scheming to steal the settlement funds by setting up a trust account for the guardianship on which he wrote multiple checks for his personal use.\textsuperscript{258}

A week later, Barfield's dishonesty began to percolate to the surface when the lawyers and Washington's parents met at a local bank to file some guardianship papers. Upon leaving the bank, Barfield gave Washington's father a receipt showing the total attorneys' fees to be $53,589, which

\begin{itemize}
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id. at 424.
\item \textsuperscript{258} Id.
\end{itemize}
struck the father as an odd figure, but he said nothing about it. 259 On May 11, Barfield came by Duggins’ office to deliver him a check for his fee of $27,000, and Duggins realized, after looking at the check, that Barfield had opened a trust account that did not identify him as an account holder. 260 When Duggins asked Barfield about the amount of the fee given that the settlement amount still appeared to be only $95,500, Barfield told him that he had decided not to take a fee in light of his looming success in another case. 261 Duggins then deposited the check. 262

In August 1987 Washington’s father asked Duggins for a copy of the contingent fee agreement and told him that Barfield owed the guardianship money. 263 Duggins professed ignorance, but promised to get in touch with Barfield. 264 Before he could do so, he received a memo in the mail from Barfield, which explained that he was moving to Tennessee but would be back through Vicksburg later in the month to deposit the remainder of the money due the guardianship. 265 Now seriously worried, Duggins retrieved the case number from the fake complaint and checked again with the Hinds County Circuit Court Clerk, who was then able to find Barfield’s earlier case and informed Duggins that Barfield had never filed Washington’s case. 266 Barfield eventually pleaded guilty to felony theft and was disbarred for his misappropriation of the guardianship’s money. 267

The guardianship sued Duggins, Barfield, and the bank that disbursed the settlement funds to Barfield. Barfield did not appear at trial and thus suffered a default judgment for both compensatory and punitive damages. 268 The trial court found Duggins vicariously liable for Barfield’s misconduct, and therefore subject to punitive damages. 269

Duggins appealed to the Mississippi Supreme Court, asserting that he could not be vicariously liable for Barfield’s actions because Barfield was an independent contractor. 270 The guardianship contended, however, that Duggins was vicariously liable for Barfield’s misconduct as a matter of joint venture and partnership law. 271 In resolving this disagreement,
the Duggins court began by analyzing the “key issue” of control. The court noted that it was Duggins who decided to affiliate with Barfield, and Duggins’ contingent fee agreement afforded him the sole discretion to engage co-counsel. In short, he alone was responsible for Barfield’s participation in the case. Moreover, “[w]hen Duggins associated Barfield, it was not as an independent contractor, but an equal.” Duggins and Barfield divided responsibility for preparing the case and, while there was no written contract, they agreed to split fees equally. It was therefore plain “that each attorney would have an equal stake in the outcome of the case and there would be joint control of the case.”

The court reasoned that Duggins’ and Barfield’s relationship fit the description of a joint venture. Joint ventures are governed by partnership law and, under the Uniform Partnership Act (“UPA”) as adopted by Mississippi, Barfield’s acts could clearly be imputed to Duggins as being within the joint venture’s business. Even if that were not the case under the UPA, Duggins could still be held accountable for Barfield’s misconduct under settled vicarious liability principles.

Duggins countered that he could not be held vicariously liable because Barfield’s criminal conduct was committed outside the scope of their joint venture, analogizing it to an old case in which one partner shot a burglar outside the partnership’s store. The court disagreed. Unlike the actors in the case cited by Duggins, Barfield’s misconduct was part and parcel of the lawyers’ joint venture. The court noted that “[t]he handling of client funds is clearly within the realm of an attorney’s representation of a guardianship.” As for Duggins’ related contention that he was a victim of Barfield’s dishonesty, the court would have none of it and stated:

[T]here were sufficient “red flags” which should have caused Duggins to realize that something was amiss. Duggins’ negligence and inaction in investigating Barfield’s suspicious conduct allowed the guardianship to be

272 Id.
273 Id.
274 Id.
275 Id.
276 Id.
277 Id. at 426-27.
278 Id. at 427.
279 Id. at 427-28.
280 Id. at 428.
281 Id. (citing and discussing Idom v. Weeks & Russell, 99 So. 761, 763-64 (Miss. 1924)).
282 Id.
283 Id.
stripped of all its assets. Contrary to Duggins’ claims of being victimized by Barfield, he is not the true victim. The true victim is the guardianship that Duggins was sworn to protect. . . . Rather than spending his time trying to save his own dollars, Duggins should have given more energy to the efforts which would have restored all guardianship assets.  

The court next addressed Duggins’ vicarious liability for punitive damages. It began by observing that a partnership can have imputed liability for fraud committed by a partner acting within the scope of his actual or apparent authority. “The other partners, though innocent without knowledge of the act or omission, can be vicariously liable.” Here, Duggins’ vicarious liability for Barfield’s misconduct logically extended to the resulting punitive damages, yet, luckily for Duggins, the trial court had awarded a paltry $500 in punitive damages against both lawyers. 

A different scenario played out in Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey. There, DeGraff, Foy, Conway, Holt-Harris & Mealey (“DeGraff”) had represented Alice Whalen in an attempt to recover her interest in a partnership, and, in doing so, the firm had obtained a judgment of nearly $1.236 million against Julius Gerzof. Before the judgment was satisfied, Gerzof moved to Florida, where he died. Four months later, DeGraff sought assistance from a Florida law firm, Bailey, Hunt, Jones & Besto (“Bailey”), to preserve Whalen’s rights against Gerzof’s estate. In the beginning, DeGraff asked Bailey only to “determine whether an estate had been opened [for Gerzof ] and advise as to the time in which it would be necessary to make a claim against the estate.” Bailey reported that an estate had not been opened and that it would take no further action until instructed to do so. However, in August 1995, DeGraff informed Whalen that it had retained Bailey “to follow the Gerzof estate and file any claims [against it] required with respect to [her] judgment.” 

Meanwhile, DeGraff was negotiating with lawyers for Gerzof’s estate in an effort to settle Whalen’s case. DeGraff learned that Gerzof’s estate

284 Id. at 429.
285 Id.
286 Id.
287 Id. at 430.
289 Id. at 101.
290 Id.
291 Id.
292 Id.
293 Id.
294 Id.
295 Id.
was opened in early 1996 and, in February 1996, instructed Bailey to file a notice of claim against the estate.\textsuperscript{296} Regrettably, Bailey failed to do so in the time required.\textsuperscript{297} When the lawyers for Gerzof’s estate realized Bailey’s mistake, they terminated settlement negotiations.\textsuperscript{298} Accordingly, Whalen was unable to satisfy any portion of her judgment from the substantial assets in Gerzof’s estate. She then sued DeGraff, alleging that the firm was “vicariously liable for the negligence of Bailey and/or negligently failed to supervise Bailey in filing the notice of claim in Florida.”\textsuperscript{299}

Whalen contended that DeGraff had a non-delegable duty to file the required notice of claim or, alternatively, that it negligently failed to supervise Bailey’s efforts.\textsuperscript{300} DeGraff maintained that it fully satisfied any duty it had with respect to perfecting a claim against Gerzof’s estate when it retained Bailey, and that it was entitled to rely on Bailey to file the notice of claim.\textsuperscript{301} The court sided with Whalen. DeGraff solicited Bailey’s assistance in Whalen’s representation without Whalen’s prior knowledge, Whalen had no engagement agreement with Bailey, and Whalen had no contact with anyone at that firm.\textsuperscript{302} DeGraff acknowledged that Whalen “completely relied” on it “to take the necessary steps to satisfy her judgment” out of the Gerzof estate.\textsuperscript{303} Accordingly, DeGraff assumed responsibility to Whalen for filing the notice of claim in Florida, and Bailey acted as its subagent.\textsuperscript{304} DeGraff therefore had a duty to supervise Bailey’s activities and was negligent in failing to do so.\textsuperscript{305}

In summary, lawyers are generally not liable for the fiduciary breaches or negligence of their co-counsel, since co-counsel are considered independent agents of the lawyers’ mutual client and are not subject to the referring lawyers’ control.\textsuperscript{306} Like all general rules, this one carries exceptions. A lawyer may be jointly or vicariously liable for co-counsel’s misconduct where he or she (1) shares responsibility for the representation or (2) divides fees; Duggins nicely exemplifies this line of authority.\textsuperscript{307} Whalen illustrates another exception based on agency law principles. There, Bailey was DeGraff’s subagent, and DeGraff (the appointing agent) was thus liable to

\textsuperscript{296} Id.
\textsuperscript{297} See id.
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} Id. at 102.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Id. (quoting Restatement (Third) of the Law Governing Lawyers § 58 cmt. e (2000)).
\textsuperscript{307} Duggins v. Guardianship of Washington, 632 So. 2d 420, 426-30 (Miss. 1993).
Whalen (the principal) for Bailey’s (the subagent) conduct.\textsuperscript{308} It is easy to see how co-counsel might be classified as subagents in many relationships and, if they are, the lead or primary lawyers who effectively appoint co-counsel as subagents will be vicariously liable for co-counsel’s mishaps in the scope of their subagency.

Courts and commentators discussing lawyers’ vicarious liability for the acts of co-counsel have asserted that “[i]f the client’s consent is not obtained for an association, then vicarious liability is the rule. . . . [I]f the client consents, then the associated attorney is also personally liable for malpractice.”\textsuperscript{309} But that nutshell version of agency law is not altogether accurate. First, subagents may owe fiduciary duties to their ultimate principals just as they do to their appointing agents.\textsuperscript{310} Obviously, the subagent must know who the ultimate principal is in order to owe a fiduciary duty to that person or entity.\textsuperscript{311} The point here is simply that client consent is not the sole determinant in establishing or evaluating a lawyer’s liability in the co-counsel context. In Whalen, for example, the plaintiff might have sued Bailey in addition to DeGraff, since Bailey clearly knew who she was before botching the subject filing and thus owed her a duty of care.\textsuperscript{312} Her decision not to do so likely had more to do with litigation strategy than it did with legal standing.

Furthermore, a client might consent to a lawyer engaging co-counsel, but still hold the original lawyer responsible for the task or matter requiring co-counsel’s involvement pursuant to an agreement.\textsuperscript{313} In that case, vicarious liability would remain the rule. Returning again to Whalen as an example, DeGraff told Whalen of Bailey’s co-counsel role several months before the fatal error.\textsuperscript{314} Whalen either impliedly consented to Bailey’s retention or ratified it. Still, she wholly relied on DeGraff to take the steps necessary to satisfy her judgment and the firm knew as much.\textsuperscript{315} As a result, DeGraff was vicariously liable for Bailey’s error.

Second, while a client may sue the lawyer who engages co-counsel as a subagent on a vicarious liability theory, that does not mean that the co-counsel will escape responsibility for her negligence or fiduciary breach.


\textsuperscript{313} See, e.g., id. at 102.

\textsuperscript{314} Id. at 101.

\textsuperscript{315} Id. at 102.
Subagents owe duties to their appointing agents. A lawyer functioning as a subagent is still “personally liable” for her own negligence—that liability simply flows to the referring lawyer rather than to the client. Returning to Whalen once more, DeGraff presumably planned its own claim against Bailey, and it is reasonable to assume that Bailey will ultimately be held liable for its error.

For lawyers who wish to avoid joint or vicarious liability, salvation potentially lies in carefully-crafted engagement letters spelling out for clients the division of responsibilities between co-counsel. This practice should defeat allegations of joint or vicarious liability based on alleged subagency or shared responsibility for a representation, although it is doubtful whether it will be effective where co-counsel must assume joint responsibility for a representation to be able to divide fees. While it might be argued that a lawyer could be professionally disciplined for dividing fees with co-counsel, if she and the other lawyer craft insulating engagement agreements and still avoid joint or vicarious liability, because ethics requirements and tort liability are separate concerns, that argument should fail. To rule otherwise would allow lawyers to flaunt their ethical obligations.

Finally, there are times when clients, rather than lawyers, retain co-counsel. In such matters, it is generally the case that neither lawyer should be vicariously liable for the other’s alleged negligence or misconduct.

C. Local Counsel Relationships

The term “local counsel” typically describes a lawyer who practices in the city, county or state in which litigation is pending and who handles tasks requiring local knowledge or presence on behalf of a client whose


319 Compare 1 MALLEN & SMITH, supra note 12, § 5:9, at 680 (“An agreement . . . with the client concerning the division of legal representation can prevent the liability for errors committed by the other attorney.”), with MODEL RULES OF PROF’L CONDUCT R. 1.5(e)(1) (2009) (permitting the division of fees between lawyers in different firms only if “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation”), and Aiello v. Adar, 750 N.Y.S.2d 457, 465 (N.Y. Sup. Ct. 2002) (finding that “joint responsibility” in analogous professional conduct rule “is synonymous with joint and several liability”).

320 See Noris v. Silver, 701 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1997) (refusing to allow a lawyer to avoid vicarious liability where fee splitting agreement violated ethics rule).

lead counsel practices elsewhere. Local counsel’s specific duties and responsibilities are generally determined by agreement between local counsel, lead counsel, and their mutual client, as well as by court rules. Local counsel owe a duty of care to their clients even if they are playing a secondary role to lead counsel. The standards to be applied to local counsel’s performance are the same as those applied to lead counsel. The difference in most cases is that local counsel’s services are more limited than those provided by lead counsel, and any duties they owe to clients are generally confined to the responsibilities or tasks delegated to them by lead counsel.

Controversies involving local counsel often relate to their alleged duty to the client when lead counsel is negligent or guilty of a fiduciary breach. The claim here is that local counsel should have prevented the other lawyer’s error or misconduct. The problem for aggrieved clients is that local counsel generally have no duty beyond the scope of the representations to which they agree. ‘To hold otherwise would contradict the parties’ agreement and knowledge and increase clients’ costs. That said, local counsel may not contractually limit their duties or responsibilities to the point that they fall below those “expressly or impliedly imposed by the relevant rules of practice pertaining to the association of local counsel.”

This principle typically applies to representations in which local counsel move to admit lead counsel pro hac vice and thus become subject to court rules governing local counsel’s role in the case.

In Curb Records v. Adams & Reese L.L.P., the plaintiff retained a California lawyer, Peter Strong, to defend it in litigation in the U.S. District Court for the Eastern District of Louisiana. Curb Records authorized Strong to employ local counsel in Louisiana and to fix local counsel’s authority as he saw fit. Strong accordingly engaged Richard Goins, a partner with

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323 Id.
324 Id.
325 See, e.g., Macawber Eng’g, Inc. v. Robson & Miller, 47 F.3d 253, 256-58 (8th Cir. 1995) (construing Minnesota law and a local federal court rule); Glantz v. Rosenberg, 633 N.Y.S.2d 77, 78 (N.Y. App. Div. 1995) (holding that local counsel had no duty to appear at a hearing lead counsel missed); Armor v. Lantz, 535 S.E.2d 737, 750 (W. Va. 2000) (finding no breach of duty where local counsel did not agree to perform legal analysis that lead counsel botched); Ortiz, 278 S.E.2d at 838-40 (finding no malpractice by local counsel).
326 Armor, 535 S.E.2d at 749.
327 Macawber Eng’g, Inc., 47 F.3d at 257-58.
328 Armor, 535 S.E.2d at 749.
331 Id. at *2.
Adams & Reese in New Orleans. Strong told Goins that his role as local counsel would be limited to “[1] receiving discovery requests, pleadings and court orders, and forwarding them to Strong . . . [and] [2] filing and serving pleadings and documents, such as Strong might instruct.” Strong expressly instructed Goins not to communicate with Curb.

Discovery proceeded, with Goins forwarding plaintiffs’ discovery requests to Strong as directed at the outset. Goins soon became aware that Strong was not responding to the discovery requests and the district court thereafter sanctioned Curb for its refusal to participate in discovery; Strong paid the sanctions by personal check. Eventually, the district court struck Curb’s defenses as a discovery sanction. Curb was forced to settle the litigation on unfavorable terms and it thereafter sued Goins for legal malpractice. The district court granted Goins summary judgment and Curb appealed to the Fifth Circuit.

The district court had granted Goins summary judgment based on his contract with Strong, which narrowly limited Goins’ duties and forbade him from communicating with Curb. As the district court saw it, Goins owed Curb no duty as a matter of basic agency and contract law. The Fifth Circuit Court of Appeals disagreed, reasoning that under Louisiana law, “the duties owed by an attorney to his client transcend the bounds of an ordinary contractual relationship.” Forced by a lack of precedent to predict how the Louisiana Supreme Court would rule, the Fifth Circuit framed the issue as whether Louisiana law imposed “an inherent and nondelegable duty requiring local counsel to report directly to its client any known instances of malfeasance or misfeasance on the part of lead counsel.”

In making this prediction, the court was first persuaded by the testimony of Curb’s expert witness, who testified that standard practice in the venue precluded Goins from placing reliance in discovery matters on Strong. The expert further opined that a lawyer’s fiduciary duty, as locally understood, included a duty to advise a client “in a manner to protect [the

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332 Id.
333 Id.
334 Id.
335 Id.
336 Id.
337 Id.
338 Id. at *2 n.4.
340 Id.
341 Id. at *4.
342 Id.
343 Id. at *5.
client] from itself.” 344 Second, Louisiana case law supported the expert’s
testimony by indicating that a lawyer serving as local counsel has a duty
“to insure that the client is not being misguided or relying on erroneous
advice that will result in an uninformed or unadvised decision.” 345 Third,
the court was persuaded by Louisiana Rule of Professional Conduct 1.4,
which obligated Goins to keep Curb informed of significant developments
in the representation. 346 While none of these factors squarely addressed
the issue at hand, the court concluded that Louisiana law imposed on local
counsel “an inherent nondelegable duty to report directly to [a] client any
known instances of malfeasance or misfeasance on the part of lead counsel
that an objectively reasonable lawyer in the locality would conclude are
seriously prejudicial to the client’s interests.” 347

Continuing, the Fifth Circuit observed that “when the client has vested
lead counsel with primary responsibility for controlling and conducting the
litigation, local counsel’s direct obligations to the client are substantially
lessened.” 348 Further, local counsel have no duty to notify the client when
they disagree with lead counsel’s ordinary professional judgments or
strategies. 349 Local counsel cannot, however, “turn a blind eye” to lead
counsel’s willful disregard of court orders when it should be clear that such
misconduct will seriously impair the client’s interests. 350

The court recognized that imposing such a duty on local counsel would
raise a number of potential concerns related to the duplication of efforts,
increased costs to the client, additional burdens on local counsel, and the
like. 351 Nonetheless, where “it is clear to a reasonable attorney” that a client
will be substantially prejudiced by lead counsel’s misconduct or neglect,
“the duty of care under Louisiana law requires local counsel to notify the
client of lead counsel’s action or inaction,” regardless of lead counsel’s
excuses, instructions, or strategies. 352 Accordingly, the court reversed the
district court’s grant of summary judgment for Goins and remanded the
case for further proceedings. 353

Goins knew that Strong was performing erratically and that Curb’s
case could suffer as a result. 354 In this context, imposing upon similarly

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344 *Id.*
345 *Id.*
346 *Id.* (citing LA. RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2009)).
347 *Id.* at *6.
348 *Id.*
349 *Id.*
350 *Id.*
351 *Id.* (quoting Macawber Eng’g, Inc. v. Robson & Miller, 47 F.3d 253, 257-58 (8th Cir. 1995)).
352 *Id.*
353 *Id.* at *7.
354 See *id.* at *2.
situating lawyers a duty to inform clients of lead counsel’s misconduct or to share their concerns with a client seems reasonable. Even so, courts must recognize that lawyers serving as local counsel are not guarantors of lead counsel’s good conduct, as Masone v. Levine illustrates.\footnote{355}{Masone v. Levine, 887 A.2d 1191, 1197 (N.J. Super. Ct. App. Div. 2005).}

In Masone, Leon Grauer agreed to serve as local counsel in New Jersey for an out-of-state lawyer, Carl Levine.\footnote{356}{Id. at 1192.} Grauer supported Levine’s pro hac vice admission so they could defend a company called ATI in environmental litigation, with Levine as lead counsel and Grauer as local counsel.\footnote{357}{Id. at 1193.} At a settlement conference in the ATI litigation, Levine spoke with an adjuster for ATI’s insurer out of Grauer’s earshot and thereafter represented that the insurer would fund the environmental remediation costs underlying the litigation.\footnote{358}{Id.} The insurer’s participation in the settlement was critical to the plaintiff, Nicolas Masone, who otherwise feared that ATI would not honor its bargain.\footnote{359}{See id. at 1195.} In fact, Levine was lying; ATI’s insurer had not authorized the settlement.\footnote{360}{Id. at 1194.} Masone’s fears were realized when ATI went bankrupt without completing the remediation and its insurer denied coverage.\footnote{361}{Id.} Masone then sued Levine and Grauer for negligence and negligent misrepresentation.\footnote{362}{Id.}

Masone insisted that Grauer’s service as local counsel made him responsible for Levine’s misrepresentation.\footnote{363}{Id.} This argument rested on a New Jersey court rule concerning pro hac vice admissions that made local counsel responsible “for the conduct of the cause and of the admitted attorney therein.”\footnote{364}{Id. (quoting N.J. Ct. R. 1:21-2(c)(4)).} The court in Masone disagreed, thinking it unreasonable to read the rule as imposing “virtually absolute liability” on local counsel for pro hac vice counsel’s misdeeds.\footnote{365}{Id. at 1197.} There was no evidence that Grauer knew of Levine’s misrepresentation at any relevant time, and the court was unwilling to extend Grauer’s rule-imposed responsibility for the conduct of the ATI litigation to that of an indemnitor or insurer of Levine’s acts.\footnote{366}{Id.} Accordingly, it affirmed summary judgment for Grauer.\footnote{367}{Id.}

In conclusion, lawyers who serve as local counsel must exercise care in doing so. By signing pleadings, local counsel are generally warranting
to a court that the pleadings have a proper purpose, set forth legitimate contentions, and are factually supportable. Local counsel may be sanctioned for violating related court rules if these things prove to be false. This is true even if lead counsel prepared the pleadings or provided all of the information on which a pleading was based. Lawyers who function as local counsel assume all ethical duties that attend any other representation in litigation, as courts routinely note. While they cannot contract out of obligations imposed by court rules, lawyers who serve as local counsel are wise to clearly limit or condition their representations in their engagement agreements. If they do not, they risk assuming duties far exceeding their expectations or well beyond those commensurate with their compensation. Lawyers should probably decline local counsel engagements that relegate them to “mail drop” roles, or that make them uncomfortable because of the description of their intended roles or the nature of the litigation. The risks of a representation should never outweigh the rewards.

III. COMMON PROFESSIONAL RESPONSIBILITY CONCERNS

So far, our discussion of co-counsel’s duties has primarily focused on professional liability. It is now time to examine some key ethical aspects of co-counsel relationships. These include (a) the duty to inform a client of another lawyer’s malpractice or fiduciary breach, (b) lawyers’ supervisory duties under Model Rule of Professional Conduct 5.1, and (c) the division of legal fees between lawyers in different firms, or “fee-splitting.”

A. The Duty to Inform the Client of Co-Counsel’s Misconduct

Lawyers’ duty to communicate with their clients is essential to the attorney-client relationship, regardless of the specific nature of the representation. This duty is primarily enforced through Model Rule 1.4, which provides:

(a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these

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Rules;
(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.371

Of course, lawyers would have a duty to communicate with their clients even in the absence of Rule 1.4 because the attorney-client relationship is a fiduciary relationship, such that the lawyer must communicate to the client information that the client needs to know.372 The attorney-client relationship is also characterized as an agency relationship, and agents generally must provide their principals with information related to the subject of the agency.373

Lawyers’ duties under Rule 1.4 are mandatory, not aspirational.374 Moreover, the duty to communicate is an affirmative obligation in the sense that lawyers must initiate communications; they generally cannot rely on clients to do so. At the same time, the obligation to keep a client informed about the status of a matter is tempered by reason.375 Lawyers need not apprise clients of all details of their representations. A lawyer is not required to communicate with a client as often as the client desires, “as long as the attorney’s conduct [is] reasonable under the circumstances.”376 This rule of reason applies both to the lawyer’s duty to initiate communications or volunteer information, and to respond to a client’s inquiries.377

It is generally accepted that a lawyer’s ethical duty to communicate includes a duty to inform the client of the lawyer’s conduct giving rise to a potential malpractice claim.378 Lawyers’ fiduciary duties to clients also

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375 Ronald D. Rotunda & John S. Dzenkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility § 1.4–1, at 134 (2009-10 ed.).
require them to disclose acts of malpractice.\textsuperscript{379} These duties exist in co-counsel representations just as in all others. The errant lawyer’s duty to inform the client exists regardless of another lawyer’s involvement in the representation. The more interesting issue is whether a lawyer filling a co-counsel role has an ethical duty to inform the client of the other lawyer’s potential malpractice or substantial misconduct. Such a duty seems to clearly exist in light of a recent New Jersey case, Estate of Spencer v. Gavin.\textsuperscript{380}

In Estate of Spencer, Kathryn Spencer, as executrix, retained Daniel Gavin to represent the estates of her mother and sister who predeceased her.\textsuperscript{381} Kathryn also named Gavin as administrator in her own will.\textsuperscript{382} Accordingly, when Kathryn died, Gavin became the administrator of all three estates as planned.\textsuperscript{383} At about the same time, Gavin was looking to reduce his workload, so he asked other attorneys in the building where he kept his office to handle discrete tasks and transferred client files to them.\textsuperscript{384} Dean Averna was one of the lawyers to whom Gavin often turned for assistance, which led to the perception that Averna was slowly assuming charge of Gavin’s practice.\textsuperscript{385} With particular respect to the Spencer estates, Averna (1) formed a related entity to manage and disburse assets of Kathryn’s estate for charitable purposes, the Spencer Foundation, at Gavin’s request, and (2) drafted a contract between the Spencer Foundation and a builder.\textsuperscript{386} Gavin paid Averna for his work by checks drawn on the account of one of the estates.\textsuperscript{387} Averna, however, had no formal engagement agreement with Gavin or the estates for either project.\textsuperscript{388}

Unfortunately, Gavin pillaged the Spencer estates, and Averna was allegedly aware of Gavin’s thefts.\textsuperscript{389} Gavin died of cancer less than a year after Kathryn’s death and a substitute administrator, Erik Shanni, was appointed for the Spencer estates several months later.\textsuperscript{390} Shanni discovered the massive thefts and, after obtaining partial reimbursement from the New Jersey Client Protection Fund, sued a number of defendants on behalf of the estates, including Averna.\textsuperscript{391} The trial court granted summary

\textsuperscript{379} Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007).
\textsuperscript{381} Id. at 1055.
\textsuperscript{382} Id.
\textsuperscript{383} Id. at 1057.
\textsuperscript{384} Id. at 1056.
\textsuperscript{385} Id.
\textsuperscript{386} Id. at 1058.
\textsuperscript{387} Id. at 1065.
\textsuperscript{388} See id.
\textsuperscript{389} Id. at 1058.
\textsuperscript{390} Id. at 1059.
\textsuperscript{391} Id. at 1059-60.
judgment for Averna, reasoning that he did not share an attorney-client relationship with the estates and had no duty to police Gavin’s conduct.\textsuperscript{392} The plaintiffs appealed.

The critical issue on appeal was whether Averna had a duty to the Spencer estates to report Gavin’s misappropriations.\textsuperscript{393} The court noted that a lawyer, as a fiduciary, has a duty to look out for a client’s best interests and communicate information that the client needs to know.\textsuperscript{394} Be that as it may, Averna argued, he did not have an attorney-client relationship with the Spencer estates and thus owed them no duty.\textsuperscript{395} The court rejected this “myopic contention” for several reasons.\textsuperscript{396} First, Averna prepared the documents forming the Spencer Foundation pursuant to a specific directive in Kathryn Spencer’s will.\textsuperscript{397} Second, Gavin paid him for his work in his capacity as executor of Kathryn Spencer’s estate by checks drawn on the estate’s account.\textsuperscript{398} Third, Averna could not have represented only the Spencer Foundation at the time of its formation because it did not then exist.\textsuperscript{399} Instead, had Averna been unable to form the Spencer Foundation, he still had one or more clients to whom he was accountable in the undertaking.\textsuperscript{400} It was therefore possible that he represented the plaintiffs and, indeed, the court was satisfied that Averna represented Kathryn Spencer’s estate in forming the Spencer Foundation.\textsuperscript{401} Regardless, all of the Spencer estates plainly relied on Averna to represent their best interests, and he therefore owed them a duty of care even if they were not clients.\textsuperscript{402}

Once the court determined that Averna owed the Spencer estates fiduciary duties as clients or non-client beneficiaries of his services, it easily concluded that he had a duty to report Gavin’s misappropriations if he indeed knew about them.\textsuperscript{403} This conclusion was buttressed first by Averna’s “close and regular working relationship with Gavin,” which “reinforce[d] the fairness of imposing certain duties upon [Averna] as a consequence of that proximity.”\textsuperscript{404} Second, the court found support in New Jersey Rule of Professional Conduct 8.3(a), which requires lawyers

\begin{itemize}
  \item \textsuperscript{392} Id. at 1061.
  \item \textsuperscript{393} Id. at 1054.
  \item \textsuperscript{394} Id. at 1064.
  \item \textsuperscript{395} Id.
  \item \textsuperscript{396} Id.
  \item \textsuperscript{397} Id. at 1064-65.
  \item \textsuperscript{398} Id. at 1065.
  \item \textsuperscript{399} Id.
  \item \textsuperscript{400} Id.
  \item \textsuperscript{401} Id. at 1066-67.
  \item \textsuperscript{402} Id. at 1067.
  \item \textsuperscript{403} Id.
  \item \textsuperscript{404} Id. at 1068.
\end{itemize}
to report serious misconduct by other lawyers to appropriate professional authorities. While violations of New Jersey ethics rules are not themselves civilly actionable, Averna’s alleged failure to honor his duty under Rule 8.3(a) strengthened the court’s conclusion that his inaction should expose him to liability to the Spencer estates.

The *Estate of Spencer* court vacated the summary judgment for Averna and remanded the case to the trial court for further proceedings. The critical issues on remand would be whether Averna knew of Gavin’s dishonesty and, if so, when he learned of it.

*Estate of Spencer* supports the recognition of a duty to inform a client of co-counsel’s negligence or other misconduct as an aspect of a lawyer’s fiduciary duty of loyalty. In fact, this must be the case, because a lawyer’s fiduciary duty of loyalty includes the obligation to “mak[e] known to the client all information that is significant and material to the matter that is the subject of [their] relationship,” and a lawyer’s potential malpractice or fiduciary breach is plainly the failure to do just that. The same duty clearly exists under Model Rule 1.4, as well. Rule 1.4(a)(2) obligates a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and the lawyer’s potential malpractice is a critical component of those means. Rule 1.4(b) compels a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,” and the lawyer’s potential malpractice will surely influence the client’s decisions concerning the representation—such as whether to retain the lawyer.

Model Rule 8.3(a) is a much less certain basis for imposing a duty to inform a client of co-counsel’s stumble or dishonesty. Rule 8.3(a) provides that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” This rule was arguably relevant in *Estate of Spencer* because Gavin’s misappropriation unquestionably implicated his honesty, trustworthiness, and fitness as a lawyer, but many cases do not involve such glaring misconduct. For example, an isolated incident of negligence seldom evidences a lawyer’s unfitness to practice and would not compel co-counsel to report the offending lawyer

405 *Id.* at 1069.
406 *Id.* (citing Baxt v. Liloia, 714 A.2d 271, 274 (N.J. 1998)).
407 *Id.* at 1072.
408 *Id.* at 1071.
410 *Model Rules of Prof’l Conduct R. 1.4(a)(2) (2009).*
411 *Id.* at 1.4(b).
412 *Id.* at 8.3(a).
to professional authorities. For these reasons, there are stronger bases for requiring lawyers to inform clients of malpractice or other misconduct by co-counsel than Rule 8.3(a).

B. Lawyers’ Supervisory Duties

Co-counsel ordinarily have no duty to supervise one another’s performance. But a client may structure a co-counsel relationship such that one lawyer supervises the other, or co-counsel may so agree between themselves. In addition, co-counsel who are not in the same firm and who are not both performing services must accept “joint responsibility” for a representation in order to divide a fee, which “entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” All of this points to the potential application of Model Rule 5.1 to co-counsel relationships. Rule 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take

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414 See Model Rules of Prof’l Conduct R. 8.3(a) (2009).
415 See CVC Capital Corp. v. Weil, Gotshal, Manges, 595 N.Y.S.2d 458, 458 (N.Y. App. Div. 1993) (holding that even if the attorneys owed a duty to supervise a firm retained by the client, no duty existed to independently verify factual reports made by those attorneys).
416 Model Rules of Prof’l Conduct R. 1.5(e)(1) (2009) (allowing division of fee if joint responsibility assumed or if “division is in proportion to the services performed by each lawyer”).
417 Id. at 1.5 cmt. 7.
Although Rule 5.1 is typically applied to conduct involving lawyers in the same firm or organization, it is not so limited.\(^5\)

Rule 5.1(a) potentially applies only to co-counsel relationships in which the lawyers are dividing a fee but not each performing services in proportion to the way the fees will be allocated, because it is only in that situation that they each must assume joint responsibility for the representation.\(^5\) Even then, its application is sketchy. If Rule 5.1(a) does apply, the most that can be said is that co-counsel must make “reasonable efforts” to ensure that their respective firms have policies and procedures “designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property [in connection with the representation] and ensure that inexperienced lawyers are properly supervised.”\(^5\) Alternatively, if one lawyer arranges for a second lawyer’s participation, the first lawyer must do the following: (1) remain “sufficiently aware” of the second lawyer’s performance in order to be able to ascertain whether the second lawyer’s conduct conforms to applicable ethics rules, including being available to the client to respond to questions or concerns; (2) select the second lawyer based solely on legal ability and not on willingness to enter a fee splitting agreement; and (3) assume financial responsibility for the matter, even if ancillary to that assumed by the second lawyer.\(^5\)

Rule 5.1(b) requires a lawyer with “direct supervisory authority over another lawyer” to “make reasonable efforts to ensure” that the supervised lawyer conforms to ethics rules.\(^5\) Whether one lawyer has direct supervisory authority over another depends on the facts.\(^5\) A lawyer need not be the day-to-day supervisor of the other lawyer for the rule to apply.\(^5\) A supervisory lawyer may violate the rule even if she did not control the details of the other lawyer’s work or is unaware of the misconduct.\(^5\) Regardless, lawyers’

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\(^{418}\)\textit{Id. at 5.1.}


\(^{420}\)\textit{Model Rules of Prof’l Conduct} R. 1.5(e)(1) & R. 1.5 cmt. 7 (2009).

\(^{421}\)\textit{Id. at 5.1 cmt. 2.}


\(^{423}\)\textit{Model Rules of Prof’l Conduct} R. 5.1(b) (2009).

\(^{424}\)\textit{Id. at 5.1 cmt. 5; see also In re Anonymous Member of the S.C. Bar}, 552 S.E.2d 10, 13 (S.C. 2001).

\(^{425}\)\textit{In re Anonymous}, 552 S.E.2d at 13 (citing \textit{In re Moore}, 494 S.E.2d 804, 807 (S.C. 1997)).

\(^{426}\)See, e.g., \textit{In re Wilkinson}, 805 So. 2d 142, 145-47 (La. 2002) (suspending lawyer for violating Rules 5.1(b) and 5.3(b) when law clerk-turned-associate never told the lawyer of
liability under Rule 5.1(b) is direct rather than vicarious.427

Under Rule 5.1(e), a lawyer is responsible for another lawyer’s violation of ethics rules if (1) “the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved,” 428 or (2) the lawyer has “direct supervisory authority” over the other lawyer, and knows of the other lawyer’s conduct “at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”429 Rule 5.1(c)(1) is consistent with Model Rule 8.4(a), which makes it “professional misconduct” for a lawyer to “knowingly assist or induce” another lawyer to violate ethics rules, or to violate such rules through the acts of an agent.430 A lawyer who violates Rule 5.1(c)(1) necessarily violates Rule 8.4(a) as well.431 As noted above, Rule 5.1(c)(2) imposes corrective or curative duties on supervisory lawyers in certain circumstances. The nature of those duties and remedial actions to be taken depends on the “immediacy” of the supervisory lawyer’s involvement and the “seriousness of the misconduct” to be avoided or mitigated.432

Although Rule 5.1(e) superficially appears to make lawyers vicariously liable for misconduct by lawyers they supervise, that perception is incorrect.433 Liability under Rule 5.1(e) is not vicarious “because the obligation does not arise merely from the relationship between the attorneys.”434 Lawyers’ violation of Rule 5.1(e) depends on their participation in the subject misconduct or their failure to prevent or mitigate it.435

C. Fee-Splitting

In many co-counsel representations, the lawyers agree to divide fees between themselves. This is typically the case when the lawyers are to be compensated through a contingent fee. Unfortunately, these arrangements go wrong with alarming frequency, leaving the lawyers destructively pitted against one another like scorpions in a bottle.436
Lawyers in different firms may divide fees under narrow circumstances, a practice commonly referred to as “fee-splitting.”437 For example, Model Rule 1.5(e) provides:

(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 agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
   (3) the total fee is reasonable.438

California, which does not follow the Model Rules, has its own rule:

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
   (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
   (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.439

The restrictions on fee-splitting found in Model Rule 1.5(e) and similar provisions are supported by at least two rationales. First, courts and the legal profession as a whole have long found commercial methods of obtaining clients to be distasteful.440 In this vein, restrictions on fee-splitting are intended to prevent lawyers from “brokering in clients.”441 Second, restrictions on fee-splitting aid in policing conflicts of interest. They do this by preventing lawyers who cannot handle matters because of conflicts from nonetheless collecting fees for them,442 and by controlling against conflicts of interest inherent in representations in which lawyers...
divide fees.\textsuperscript{443}

Returning now to Rule 1.5(e), which has been adopted in most jurisdictions, the first question to be answered in any fee-splitting dispute is whether the lawyers involved are “in the same firm.”\textsuperscript{444} If they are, fee-splitting is no concern.\textsuperscript{445} Lawyers who are otherwise independent contractors may be deemed to be in the same firm if they hold themselves out to clients as having such a relationship, or practice together “as a single, collective business entity.”\textsuperscript{446} This is a fact-dependent inquiry.\textsuperscript{447} A lawyer who maintains a solo practice may also be in the same firm with other lawyers by virtue of an “of counsel” relationship with that firm.\textsuperscript{448} On the other hand, lawyers who merely share office space are not in the same firm for fee-splitting purposes as long as they do not “divulge or share client confidences to take advantage of the collective experience of [their association].”\textsuperscript{449} In short, determining whether lawyers are in the same firm in this context is not always the simple task that one might presume it to be.

Assuming that the lawyers are not in the same firm, they may divide a fee only if (1) the division is in proportion to the services that each performs or (2) they each assume joint responsibility for the representation.\textsuperscript{450} These are alternative requirements.\textsuperscript{451} Regarding the first, there is no uniform measure of proportionality. Courts are generally reluctant to inquire into the “precise worth” of each lawyer’s services absent a glaring discrepancy between their contributions.\textsuperscript{452} The services performed may be the actual handling of the case or, in some states, may also be the assumption of financial responsibility for the matter.\textsuperscript{453} Either way, each lawyer must

\begin{thebibliography}{99}
\bibitem{Model Rules of Prof'L. Conduct R. 1.5(c)} Model Rules of Prof’l. Conduct R. 1.5(c) (2009).
\bibitem{Tomar, Seliger, Simonoff, Adourian & O’Brien} Tomar, Seliger, Simonoff, Adourian & O’Brien, P.C. v. Snyder, 601 A.2d 1056, 1059 (Del. Super. Ct. 1990) (“By its own terms, Rule 1.5(e) does not apply to lawyers who are in the same firm.”).
\bibitem{Welch v. Davis} See Allison, 751 N.E.2d at 890-91; see also Duff v. Gary, 622 N.E.2d 727, 729 (Ohio Ct. App. 1993) (involving two lawyers who shared office and secretarial expenses, but did not practice together; there, the court noted that even if they associated on some cases, they were not in the same firm for division of fee purposes).
\bibitem{In re Hailey} See In re Hailey, 792 N.E.2d 851, 862 (Ind. 2003).
\end{thebibliography}
do her fair share. With respect to the second requirement, “joint responsibility” means both responsibility of a “supervisory lawyer” under Rule 5.1 and assumption of malpractice liability. As a comment to Rule 1.5 explains, “[j]oint responsibility for [a] representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” It should be noted, however, that it is not the division of fees that creates joint responsibility; rather, lawyers who are not both providing services must accept joint responsibility in order to divide fees. The lawyers are simply assuming duties that would otherwise not exist in order to achieve a desired financial result. When circumstances permit, therefore, it is safer from a professional responsibility and liability perspective for lawyers to structure a co-counsel relationship such that each performs discrete services according to a division blessed by the client.

Under Rule 1.5(e)(2), the client must agree in writing to the lawyers’ division of fees, including the share that each will receive. The writing requirement protects clients’ best interests by ensuring that they control the selection of their counsel and know the details of their representations. Rule 1.5(e) is silent with respect to the timing of the agreement and it therefore follows that the client may agree any time before the fee is divided. If lawyers initially obtain a client’s agreement to X division and later change their minds and opt for Y division, they must obtain the client’s agreement to the new arrangement as well. The writing requirement may be satisfied by a document prepared by any lawyer involved or by one to which all lawyers subscribe, or even by a document prepared by the client. Written confirmation need not take the form of a stand-alone document; lawyers may provide for the division of fees in their engagement agreements.

454 Id. (citing Risjord v. Lewis, 987 S.W.2d 403, 406 (Mo. Ct. App. 1999)) (“If an attorney wants a share of the fee, he must perform an appropriate share of the legal services in the case.”).

455 ROTUNDA & DZIENKOWSKI, supra note 375, § 1.5–4(e), at 188.

456 MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. 7 (2009).

457 Id. at 1.5(e)(2).

458 Christensen v. Eggen, 577 N.W.2d 221, 225 (Minn. 1998).


Finally, the total fee to be divided must be reasonable. The lawyers cannot ratchet up the total fee to recover compensation lost in division. The reasonableness of the total fee charged to the client will generally be judged according to the factors in Rule 1.5(a). The Rule 1.5(a) factors are not exclusive, however, and courts and disciplinary authorities may consider other factors in appropriate cases.

Lawyers who violate rules against fee-splitting face discipline even if their conduct does not harm clients. Lawyers whose conduct in dividing fees is challenged, however, are rarely as concerned about professional discipline as they are with the enforceability of their agreements and the attendant effect on their compensation. As a rule, agreements to divide fees that violate Rule 1.5(e) are unenforceable. This is consistent with the view that ethics rules express public policy, such that a contract violating them is unenforceable as against public policy. Some courts, however, refuse to allow lawyers to invoke Rule 1.5(e) as a defense to breach of contract claims by co-counsel. Thus, a lawyer who violates Rule 1.5(e) cannot use that violation as a shield to avoid sharing fees. Other courts allow recovery between lawyers based on quantum meruit even though their agreement to divide fees violates Rule 1.5(e) or a similar rule. While lawyers seeking fees from co-counsel based on quantum meruit naturally must prove their entitlement to recovery, those denied compensation

463 Id. at 1.5(a) (including, but not limited to, the time required, difficulty of the issues, fee customarily charged, amount involved, time limitations imposed, nature and length of professional relationship, and experience and reputation of the lawyer).
465 See, e.g., In re Hart, 605 S.E.2d 532, 534 (S.C. 2004) (finding a violation even in the absence of harm to the client).
468 See, e.g., Freeman v. Mayer, 95 F.3d 569, 575-76 (7th Cir. 1996) (interpreting Indiana law).
469 Id. at 576.
because of an unenforceable agreement to divide fees may not recover any fees they claim to be owed directly from the client.\textsuperscript{471} Again, fee disputes between co-counsel are common and often ugly. Brown & Bain, P.A. v. O’Quinn, in which a large Phoenix law firm and Texas trial lawyer John O’Quinn squared off, is a recent high-profile example.\textsuperscript{472} The events leading up to the decision in Brown & Bain began in 1991, when over 900 people in the Phoenix area joined in a class action lawsuit against Motorola known as McIntire.\textsuperscript{473} O’Quinn took over the case in 1993 when the plaintiffs’ prior firm dissolved.\textsuperscript{474} The McIntire plaintiffs agreed that O’Quinn would receive a forty percent contingent fee and that they were to receive sixty percent of the total recovery or settlement, less costs and expenses.\textsuperscript{475} In April 1993, O’Quinn engaged the Phoenix law firm of Brown & Bain to assist in the suit.\textsuperscript{476} Their engagement agreement provided that Brown & Bain would be paid $135 per hour for attorneys’ time and $45 per hour for paralegals’ time at what the parties called the “discount rate.”\textsuperscript{477} The agreement further provided that Brown & Bain would receive additional payments upon termination of the action calculated at $155.25 per hour for attorneys’ time and $51.75 per hour for paralegals’ time if certain conditions for recovery were met.\textsuperscript{478} Basically, O’Quinn and other lawyers working on the case had to recover more than the cost of the discount rate payments from the proceeds of the litigation, after which Brown & Bain would receive additional payments in accordance with a specified formula.\textsuperscript{479} Brown & Bain eventually billed just under $2.921 million for its work on the McIntire case at the discount rate.\textsuperscript{480}

In 1998, Brown & Bain and O’Quinn parted ways; Brown & Bain claimed that it withdrew because its role in the case was being “marginalized,” while O’Quinn contended that the firm got cold feet when success in the McIntire case seemed doubtful.\textsuperscript{481} Whatever the reason, Brown & Bain withdrew without opposition from O’Quinn and was replaced by a small firm, Allen & Price, which was formed by two former Brown & Bain partners, one

\textsuperscript{472} Brown & Bain, P.A. v. O’Quinn, 518 F.3d 1037 (9th Cir. 2008).
\textsuperscript{473} Id. at 1038.
\textsuperscript{474} Id.
\textsuperscript{475} Id.
\textsuperscript{476} Id.
\textsuperscript{477} Id.
\textsuperscript{478} Id.
\textsuperscript{479} Id. (“[T]he remainder of [the] respective recoveries [were to] be divided one-half to [O’Quinn] and the other plaintiffs’ counsel working on the matter and one-half to Brown & Bain until [its] additional payments [had] been fully paid.”).
\textsuperscript{480} Id.
\textsuperscript{481} Id.
of whom had worked on the *McIntire* case. O’Quinn opened his own Phoenix of Fice, which curiously billed hourly fees of nearly $4.6 million and expenses of nearly $3 million in connection with the *McIntire* litigation.

O’Quinn settled the *McIntire* case in 2002 for just over $26.3 million. O’Quinn treated roughly $13.7 million of this amount as “costs chargeable to its clients” (including more than $7 million in salaries and expenses for his Phoenix office). After also drawing his $10.1 million contingent fee, O’Quinn paid the plaintiffs just under $2.5 million. When Brown & Bain asked to be paid the additional fees called for by its engagement agreement, O’Quinn, who had made out like a bandit, refused. Brown & Bain sued to recover its additional fees and won, but O’Quinn then appealed to the Ninth Circuit.

O’Quinn claimed that he had no obligation to pay additional fees to Brown & Bain because he had actually lost roughly $3 million on the *McIntire* case, which he calculated based on his claimed expenses of over $13 million versus his contingent fee of just over $10 million. This was a patently absurd argument. It was obvious that O’Quinn’s $10.1 million contingent fee far exceeded Brown & Bain’s discount rate fee, and O’Quinn was thus obligated to pay Brown & Bain the additional fees due under their agreement.

O’Quinn’s fallback position was that Brown & Bain’s additional fee request was ethically improper. O’Quinn’s expert, Professor Geoffrey Hazard, had opined that Brown & Bain’s additional compensation would violate Arizona Rule of Professional Conduct 1.5 by being unreasonable. As Hazard conveniently saw it, O’Quinn had lost approximately $3.2 million on the case, while Brown & Bain’s recovery of additional fees would push its total compensation to $6.2 million. In Hazard’s opinion, this disparity rendered Brown & Bain’s fees unreasonable under Rule 1.5. ‘The Ninth Circuit disagreed. It explained that Rule 1.5 governs the reasonableness of fees charged to clients; it does not control fee disputes between lawyers.'
Brown & Bain’s additional fees would come out of O’Quinn’s contingent fee and would therefore have no effect on the fees charged to the clients.495 Hazard also opined that Brown & Bain was not entitled to additional fees because the firm’s withdrawal amounted to “quitting,” and thus was “a breach of its contractual obligations with O’Quinn.”496 He further suggested that in withdrawing, Brown & Bain had failed to consider its clients’ interests.497 Unfortunately for O’Quinn, he offered no evidence that Brown & Bain’s withdrawal burdened a single client.498 To the contrary, the firm gave “ample notice of its desire to withdraw” and arranged for substitute counsel.499 Accordingly, the Ninth Circuit affirmed the judgment for Brown & Bain.500

*Brown & Bain* amply illustrates lawyers behaving like scorpions in a bottle. O’Quinn received a $10.1 million fee, plus he had no overhead associated with the case, because he also charged his clients hourly to cover his firm’s salaries and office expenses.501 Thus, his $10.1 million fee was the purest of pure profit. He still could not bring himself to share any of it with Brown & Bain, despite their contract. Brown & Bain, which had a fight forced upon it, nonetheless managed to get its pincers on some $3 million in extra cash despite withdrawing from the representation. The clients, who almost as an afterthought received on average a paltry $2100 each,502 were left to marvel at their lawyers’ battle.

**Conclusion**

Co-counsel relationships offer many substantial advantages to clients. Clients are often best served by the involvement of specialists in their representations, and co-counsel arrangements allow for that while permitting the continued involvement of clients’ regular counsel, whom they trust and who are familiar with their affairs or special requirements. In other instances, co-counsel relationships provide clients with local access, knowledge, or insight unavailable from their other counsel, no matter how skilled or diligent they may be. On the other side of the coin, co-counsel affiliations greatly benefit lawyers by allowing them to accept representations for which they would otherwise be unqualified, or which they would otherwise have to decline because of a lack of time or resources. For all these reasons, co-counsel relationships are extremely common in

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495 Id.
496 Id.
497 See id.
498 Id. at 1042.
499 Id.
500 Id.
501 Id. at 1041.
502 Id.
many areas of the law.

Despite their many advantages, co-counsel relationships sometimes go terribly awry and the lawyers, who initially saw themselves as joint venturers in beneficial and profitable service to their mutual client, wind up pitted against one another like scorpions in a bottle. Some common subjects of dispute have gained little traction. For example, courts have been unwilling to recognize legal malpractice or breach of fiduciary duty claims between co-counsel. Local counsel generally have no duty to ensure lead counsel’s competence or diligence. On the other hand, courts have been willing to permit contribution and indemnity claims between co-counsel. Moreover, many states have yet to address key areas or subjects of dispute between co-counsel, meaning that the law remains unsettled.

Because co-counsel representations will remain an important feature on the legal landscape for years to come, it is important for courts and lawyers to understand the professional liability and responsibility traps common to them. These subjects have so far received little scholarly attention and merit far more.