ETHICAL AND PRACTICAL CONSIDERATIONS OF ENGAGING LOCAL / CO-COUNSEL

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Introduction

Need for Local / Co Counsel

- Activity in Foreign Justifications not licensed to practice law
- Need to source and screen qualified local counsel
- Differ on nature of legal practice
- Clients are increasingly cross border

Ethical and Practical Considerations

- **ABA Model Rule 1.1 Competence:**
    - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
        - Determine if attorney has the skill and knowledge
            - Factors
                - Complexity of matter
                - General Experience
                - Training and experience in field
                - Ability to prepare and study to get knowledge
                    - If it's feasible to refer or associate with a lawyer in the particular field.
                        - A lawyer my get competent by associating with a locally qualified counsel.

- Due Diligence: Sourcing & Screening/Vetting Counsel
    - Start with general review of candidates reputation
        - COntact other lawyers and get opinions on coucluel
        - Check with local bar associations
        - See if any disciplinary actions
        - Simple internet search
    - **ABA Model rule 1.3 Diligence**
        - A lawyer shall act with reasonable diligence and promptness in representing a client.
- Bios/Experience
    - Request a full team bio
    - Applicable credentials
    - References
    - Cases that lawyer has engaged in
    - Get on phone/video conference for interview process
- Insurance
    - Seek evidence of firm's professional liability insurance
    - Many foreign jurisdictions don't require it.
- Conflicts of Interest
    - Ensure co-counsel do not have any actual or potential conflicts of interest from your client or underlining mandate.
    - **ABA model Rule Conflicts of Interest 1.7**
        - (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
        - (1) the representation of one client will be directly adverse to another client; or
        - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
        - (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
        - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
        - (2) the representation is not prohibited by law;

        - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
        - (4) each affected client gives informed consent, confirmed in writing.
- AML / KYC Client On-Boarding Requirements
    - Anti-Money Laundering
    - Know your client
    - Could cause a delay in onboarding a client

Client Consent

- Get client express written prior consent
- Mitigates Liability

Duggins v. Guardianship of Washington - 632 So. 2d 420 (Miss. 1994)

- Lawyer was held vicarious liability of council who engaged in malpractice

Craft Detailed Engagement

- Work with client when working with engagement terms
- Ultimately up to client on whether to hire co-counsel
- Clear who the client is and who the duties and privileges belong.
- Ethical and professional duties belong to the client
- Play hands on role and who is the lead counsel and their role acting on behalf of the client

Terms

- Who is the Counterparty
- Scope of Work
    - Specific instruction providers
    - Agreed line of communication
    - Division of labor and subject matter
    - Who is liable under the laws
    - Output and deliverables
- Deadline Tracking
    - Critical deadline dates - who is responsible?

        - Ensuring no deadlines are missed
- Fees / Charges / Expenses
    - Be sure these are covered and detailed.
    - Fee caps with assumptions
    - Fee updates
    - Have client engaged with the local counsel if possible. - may pass invoices to co counsel.
    - If contingent -
        - Ethical Considerations
            - Proportional and assume joint liability
            - Client agrees
            - Total fee itself is reasonable under the circumstances
        - ABA Model Rule 1.5 Fees
            - (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
            - (d) A lawyer shall not enter into an arrangement for, charge, or collect:
                - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
                - (2) a contingent fee for representing a defendant in a criminal case.
            - (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.
- Fee issues
    - Discounts
        - Establish with Co Counsels apply the same standard with regards to discounts
    - Billing arrangements and invoicing. May need to consolidate billing. Contact and forms.
    - Currency
    - May need certificate of tax residency
    - How fee overruns will be dealt with and how that is dealt with. Fees may go beyond original estimates
    - Is there clent restrictions on time and expenses they believe are non billable.
        - Example
            - Invoice preparation time
            - Running conflicts
            - Maintaining files
            - Faxing
            - Making copies
            - Phone calls
            - Travel expenses
                - More reasonable accommodations
            - Proofreading
            - scheduling
- Staffing Requirements
    - Team continuity
    - Senior level involvement
    - Experts
    - Approval of team change by client?
    - What staff members may have billable hours?
- Third Parties / Sub-Contracting
    - Prior written consent needed before undertaking by co counsel
    - May have confidentiality issues - what it's done
    - Quality control over third parties which might be engaged.

Ownership of Work Product & Privilege Considerations

- Beneficiary and who privilege runs to
- Work product Remains property of the client
- Privileged communities are intact
    - Stamping of communications of privilege and confidentiality and you want to maintain that across jurisdictions

Data Security Requirements for Local Counsel

- Be sure local counsel is using appropriate IT and Data safeguards that are instructed standard
- Part of due diligence of vetting co counsel
- Who is liability of data breach and how it is dealt with
- Certain data that can't be transferred between jursication

Disclaimer of Liability / Indemnification

- Vary on jurisdiction and type of matter involved.
- Might not always be enforceable.
- Check with carousel to see what is permissible.

Termination of the Local / Co Counsel Engagement

- Under what circumstances and when to discharge co counsel - typically any reason or no reason
- Ensure smooth transition of files

Liability Considerations

- In context of local counsel arrangements
- Type of matter and jurisdiction
- Take steps in advice to clarify responsibility and liability in advance

Monitoring the Relationship

- Keeps clients protected
- Manage expectations
- Keep things from falling through the cracks
- Frequent conference calls with co counsel

    - Holidays, billing arrangements - avoids missteps
    - Dealing with different cultures and time zones
- Builds trust and better protects the clients

Conclusion

- Engaging competent co couself
- Due diligence is needed
- Conflicts of interest
- Professional liability insurance
- Instruty starads of data protection
- Client internet with co counsel
- Client written content