Class action cases are often prosecuted by two or more law firms working together. Sometimes this results from court orders coordinating or consolidating multiple class action cases involving the same or similar wrongdoing.

Even when only one case is involved, lawyers frequently decide to co-counsel with another firm (or several firms) to prosecute a class action case. There are several potential advantages to co-counseling. Some of those advantages—such as sharing of the time and cost required to litigate the case, availability of the skills and expertise of different lawyers, and the value of different perspectives on case strategy—apply to any complex case, not just to class actions.

There are additional reasons to find co-counsel for class actions. One of the factors considered by the courts in deciding whether to certify a class action is whether the interests of the class are “adequately” protected. This includes the consideration of whether plaintiff’s counsel is qualified, experienced, and generally able to conduct the litigation vigorously. Thus, inexperienced counsel may benefit from association with more experienced lawyers because it improves the likelihood that the whole team of lawyers will be approved as being adequate to represent the class. Furthermore, if the decision is made to file the action in a jurisdiction where plaintiff’s counsel is not admitted, it will generally be necessary to retain local counsel admitted to practice in that jurisdiction.

However, the disadvantages of co-counseling must also be considered. Coordination and communication between firms may in some cases involve a substantial expenditure of time not otherwise necessary to prosecute the action. Even smart lawyers can disagree about important strategic considerations or how to best advance the client’s case. Moreover, a sharing of the costs and effort of litigating a case means that the prospective fee upon success will have to be shared as well.

When co-counseling occurs, it is wise to clearly set forth in writing the respective rights and obligations of the various participating law firms and how fees will be shared. Indeed, many states’ ethics rules require that clients agree, in writing, to the terms of any proposed fee-sharing between lawyers of different firms. An understanding before suit is filed avoids both disputes as to fees and work falling between the cracks. The agreement between firms should set forth procedures to eliminate waste and unnecessary duplication of effort by counsel. This will help avoid later disputes between counsel or the court denying on that basis part of the fees requested.

A written document is essential in helping to avoid misunderstandings or disputes between counselors to quickly resolve disputes should they arise at the conclusion of a case. Topics to be covered include the expected role and responsibilities of each firm in prosecuting the case, how fees will be divided between the firms, and how the burden of advancing litigation costs will be shared. The working agreement should clearly state who will be responsible for coordinating the litigation, discovery, document management, locating and preparing experts, and making work assignments. It may also state how decisions will be made in the event that the lawyers disagree about how to proceed. It is also advisable that the co-counsel agreement call for the submission of time and work records on a periodic basis. If all counsel are aware of the work and time being spent by co-counsel on the case as the case progresses, there should be no surprises and no disputes when the attorney fees are distributed.

A sample co-counseling agreement is provided in Appendix E, infra, and another is available online as companion material to this treatise.

Footnotes

32 [32] See § 10.3.4.2 [2], infra.
34 [34] In addition, state codes of professional conduct may require written disclosure to the client of any co-counseling or fee-splitting agreements.
Source: National Consumer Law Center, Consumer Class Actions [10th Ed.], updated at www.nclc.org/library
Source URL: https://library.nclc.org/class/0105-0

Links
[2] https://library.nclc.org/nclc/link/CLASS.10.03.04.02