Taking action to end poverty

COMMENTS?
We invite you to fill out the comment form at http://tinyurl.com/MarchAprilSurvey. Thank you.
—The Editors

Realize the Promise of McKinney-Vento
Improve Access for Limited-English-Proficient Clients
Know About Hospice Care
Understand Medicare
Use the Inter-American Human Rights System
Gain More Tenant Rights in Foreclosure
Cocounsel with Private Law Firms

STOP the School-to-Prison Pipeline
Cocounseling with Private Law Firms on Major Litigation

By Greg Bass and Jocelyn Larkin

[Editor’s Note: This column, appearing from time to time, aims to give practical help on litigation issues that advocates encounter in federal or state court. It outlines the problems, offers some basic legal research results and analyses, and suggests possible approaches to resolving the issues. The columnist Greg Bass (litigation director at Greater Hartford Legal Aid, 999 Asylum Ave., 3d Floor, Hartford, CT 06105-2465) welcomes reader feedback. Send your comments, questions, and suggestions for topics to gbass@ghla.org. Jocelyn Larkin (director of litigation and training at the Impact Fund, 125 University Ave. Suite 102, Berkeley, CA 94710, JLarkin@impactfund.org) is a guest columnist.]

The Question

You are preparing to file an employment-discrimination action in federal court on behalf of ten female plaintiffs who used to work for a national electronics retail chain. Your clients are alleging discrimination based on sexual harassment and other gender-based discrimination; they are also alleging violations of their rights under the Family and Medical Leave Act.

Your program has not handled litigation of this magnitude for some time. You hope to achieve some law-reform objectives through the restructuring of employment practices in the defendant’s industry. You need the assistance of a firm that can commit significant resources to the case, such as the time and expertise of experienced litigators, document-management services, and funding for litigation expenses. You do not know what firms to contact or how to approach them. You are also worried that a private firm will care only about getting money for the clients and not about systemic change and, worse, may try to take the case away from you. How can you get what you need without losing control of the case?

The “Answer” (Actually a Series of Questions)

Do your research, make a persuasive pitch to the firm you select and then—most important—negotiate a written cocounseling agreement. A soundly drafted agreement can serve two key functions. First, the agreement can clarify the basic terms of this working relationship by addressing a number of issues. These may include the overall goals of the litigation, the designation of lead counsel with final say on significant case-related decisions, and payment of litigation expenses. The agreement can also clarify how tasks ranging from legal research and briefing to trial advocacy will be assigned; what document-management methods will be used; who will act as the primary contact for the client and the media; and how counsel will apportion an award or settlement involving attorney fees. Second, by being specific about these critical issues, the agreement can be a trouble-shooting guide to possible solutions for conflicts that may interfere with an effective, cooperative, working relationship between your program and the private firm.

In previous appearances of this column we reviewed the legal bases for various litigation-related issues in the “answer” section. Applying a slightly different approach this time, we focus on the practicalities of making cocounseling relationships work. We

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1See, e.g., Greg Bass, Affirmatively Litigating: Using Federal Rule of Civil Procedure 30(b)(6) to Depose an Organization and Avoid the “Discovery Runaround,” 40 CLEARINGHOUSE REVIEW 672 (March–April 2007).
each respond to a series of questions that highlight the basic factors to consider when forming cocounseling relationships with private firms. A sample cocounseling agreement is found at the end. Let’s start from the beginning.

Why Cocounsel with a Private Firm in the First Place?

Greg: Legal aid programs can’t be expected to routinely do it all, including pursuing impact litigation on behalf of low-income clients, without some assistance. There will be recurring gaps in programs’ capabilities to take on major cases, both financial and substantive. Cocounseling can help extend your program’s advocacy reach to include major litigation it might not otherwise be able to take on.

Whether it’s an employment-discrimination lawsuit against a corporation on behalf of individual clients, or a class action against a state government agency, this type of litigation is expensive. Legal aid programs are clearly not immune from the periodic upheaval of the prevailing economic climate, and their ability to underwrite these cases may be understandably limited. Private law firms, though obviously affected by these same economic conditions, may still be willing and able to help with litigation expenses.

Private firms may bring complex litigation or other substantive legal expertise to the table. Your program may not have an established tradition of affirmative litigation, or it may lack substantive knowledge of a particular area of law, such as employment discrimination. Cocounseling with a firm may help fill this gap.

Your program may also be struggling with its information technology or data-management capacities. The documents in these cases, whether hard copy or electronically stored, start to quickly mount. A private firm with significant data-management capability may be just what is needed.

The sheer size and complexity of a proposed lawsuit may mean that your program could simply use the help of more staff and litigation resources. Some programs routinely cocounsel with other legal aid programs on major cases, but even those relationships may not be enough. A private firm may be able to help with the workload.

Jocelyn: One of the obstacles to establishing a cocounsel relationship with a private firm may be certain stereotypes that we in the nonprofit world have about lawyers in private practice. (Private lawyers have stereotypes about legal aid lawyers as well, which I’ll talk about later.) Let’s get them out on the table because, while we may not be proud of them, these assumptions can affect how we evaluate potential cocounsel. One stereotype is about the motivation of private firms to take pro bono cases—that is, that they do it to assuage their guilt over their paying work. Another assumption is that the private lawyer cares only about large damage awards and not the systemic change that you are seeking. Related to that, the private lawyer doesn’t understand your client or the needs of the community and insists on his own view of their best interest. Finally, when the going gets tough, the pro bono lawyer is eager to settle the case and get back to his “real” clients.

While some of these stereotypes may in fact be accurate as to some private lawyers, they grossly overstate the differences between us. Many pro bono lawyers were once your law school friends and are eager for the opportunities that our work provides. Don’t miss the opportunity to expand your resources and professional relationships.

How Do You Find a Private Firm for Cocounseling?

Greg: If you’re looking for a firm that is geographically close to your service area, there are typically several avenues to pursue. This search depends on the characteristics you’re looking for in a counseling private firm. We consider those under the next question.

To start your search for private cocounsel, consider contacting a firm with which your program already has a relationship. Boards of directors of legal aid programs generally include members from private firms who are already attuned to the work done by the program. Associations can be formed with firms taking pro bono referrals or handling contract legal work through the program. The advantage of mining these relationships is that you may already be familiar with their work and advocacy approach, which can help in matching the firm’s capabilities with your litigation needs.

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3See Peter Page, Economy Delivers Gut-Punch to Some NLJ 250 Firms, NATIONAL LAW JOURNAL, Nov. 10, 2008, at S15.
Jocelyn: I agree that your best bet is with firms with which your program already has a relationship. There are other options. ProBono Net, www.probono.net, allows you to post pro bono opportunities nationally. The American Bar Association’s Division of Legal Services has pro bono resources on its site, www.abanet.org/legal/services/probono/. Local county and state bar associations often have pro bono networks.

You can, of course, contact the Impact Fund for suggestions as well. The Impact Fund is a legal nonprofit organization in Berkeley, California; it provides funding, technical assistance, and cocounseling to lawyers bringing public interest cases. As a result of our work, we have many contacts in the private and public interest bar and are frequently able to match up legal aid programs with private cocounsel. We also have a docket of social justice class actions that we litigate ourselves; one case is the long-running Dukes v. Walmart Stores, the largest gender-discrimination class action in history.

**What Kind of Firm Should You Consider for Cocounseling?**

Greg: There is no uniform answer. Much depends on the needs of the case, the capabilities of your program, and the makeup of the private firm. There’s a wide variety of private firm cocounseling possibilities, which you should consider when contemplating forming the relationship.

In what areas does the firm concentrate its substantive legal work? For our employment-discrimination hypothetical, a firm oriented primarily toward transactional corporate investment work would not be the best fit when compared to attorneys concentrating on employment law. Transactional specialists could be ideal, however, for advocacy on behalf of a nonprofit group acquiring a low-income housing development. A private firm that focuses on litigation may provide critical assistance in the case regardless of whether it has handled employment-discrimination cases, personal-injury actions, or shareholder-derivative lawsuits. The attorneys’ litigation expertise itself may be what counts the most.

The actual size of the firm is often an indicator of a number of potentially useful features, including technological capabilities for data management, ability to subsidize litigation expenses, and availability of support staff, litigation assistants, or paralegals to help with various litigation-related functions. While these possibly useful features are not always dictated by a firm’s size, chances are that a solo practitioner does not have the same capabilities as a large firm.

Other features to consider lean more toward the operational culture of the firm, which might have particular relevance to your needs. A historical lack of demonstrated pro bono commitment may be significant if you’re asking the firm to engage for the first time in potentially high-profile public interest or civil rights litigation on behalf of low-income clients. Whether the firm performs individual plaintiff-oriented work or primarily concentrates on defending corporations may have some bearing on how good a fit it would make in a cocounseling relationship. The firm may be more comfortable, for example, representing the organizational interests of business clients. Taking on the litigation needs of low-income individuals may be too much of a departure for it.

On the other hand, don’t be too quick to judge. The firm may be willing to commit the resources of associates, or even partners, who welcome the opportunity to use their legal skills on behalf of disadvantaged persons desperately needing their help.

Jocelyn: I would add a note of caution about private defense firms practicing in the particular area that your case involves. Take our employment-discrimination hypothetical. While an employment-defense firm may have a lot of expertise, its attorneys also have a vested interest in advancing the law in ways that benefit their paying client base—employers. They may quickly find themselves in “issue” conflicts even if not in actual client conflicts. You want a firm that is willing to press all available arguments for your clients and your case.

For this reason, I think it is important to also consider private firms that do primarily plaintiffs’ work. They may not be as large as the defense firms, but they are accustomed to pressing the plaintiff’s perspective and understand the problems of litigation risk. Since they do not rely on business or government actors for their paying cases, they are not concerned about offending them.

In a gender-discrimination class action that the Impact Fund is litigating against Walmart, we have several different cocounsel partners, both private firms and other nonprofits. With multiple partners, you can build the combination of expertise, staffing, and resources (i.e., money for litigation costs) that your case needs. Having more than one cocounsel,
however, increases the time you spend coordinating and communicating among your litigation team. So, before adopting “the more the merrier” concept, be sure to evaluate what each player brings to the table and whether each player’s contribution is something that you really need.

You also need to exercise due diligence in evaluating potential cocounsel. What kind of reputation do they have with judges and in the legal community? If the potential firm just got hit with bad publicity for a high-profile case of discovery abuse, you may not want to put your organization’s reputation at risk. As John McCain would say, use The Google (or is it The Twitter). Talk to other organizations that have cocounseled with the firm. Does the firm assign a revolving door of brand-new associates to pro bono cases? Do the attorneys “disappear” when paying business heats up? Know what you’re getting into.

One final point—be sure that you create a relationship with a partner who is committed to the case. If the firm’s only connection to the case is an associate, and that associate gets passed over for partnership, you may not have the resources and commitment from the firm that you thought you had.

**Will You Have to Do Some Persuading to Get the Private Firm Involved?**

**Greg:** Yes, very possibly. Put yourself in the firm’s shoes and ask, “Why would we want to get involved with this case in the first place? What’s in it for us?” While you’re convinced of the need to bring the lawsuit, some actual “packaging and selling” of the cocounseling proposition may be necessary before the firm is willing to consider getting involved. After all, you may be asking the firm to contribute significant resources to the case. Thinking about what the firm might conceivably gain from committing those resources and forming a working relationship with you will help you tailor your “pitch.”

The firm may have a number of goals that it would like to pursue, which may be met by cocounseling on your case. For example, cocounseling may further a strong pro bono or public interest orientation of the firm, such as a commitment to making government officials responsive to the needs of disadvantaged populations. Conversely, the firm may have more practical goals in mind. The litigation could be an opportunity for the firm’s associates to get much-needed litigation experience and client contact. The lawsuit may also raise the firm’s public profile in its areas of interest, such as taking on civil rights violations by government agencies or predatory corporations. And even if fulfilling a pro bono commitment, the firm may still be understandably interested in the prospect of a share of an attorney-fee award reached through settlement or court verdict.

The firm likely needs to know up front what kind of practical commitment you’re asking its attorneys to make. A threshold issue is whether involvement in the case poses any conflicts of interest with current, former, or prospective clients. If so, this discussion may be pretty short. If no conflicts are posed, be prepared to discuss the kind of contribution you might ask the firm to make toward meeting project-related litigation-related expenses. Will the case involve intensive discovery with a number of depositions? Will expert witnesses be necessary? Will there be large costs associated with document retention and management? Have some preliminary budget estimates in mind.

The possible length of the commitment may also be a topic of discussion. To the extent that you can predict, assess if the case will likely settle, or are you asking the firm to sign on for several years of litigation, capped off by a trial and possible appeal?

The firm also needs to hear your honest assessment of the merits of the case. Will you be relying upon solid legal precedent, or are you pushing a novel, “test case” theory designed to move the law progressively forward? Does the case involve proving a pattern and practice of illegal conduct by the defendant? Will you be able to develop the necessary record of admissible evidence? Will you be doing this through a document trail you feel confident exists, through credible eyewitness testimony, or some combination of the two?

**Jocelyn:** The prospective firm also wants to know something about you and your organization. Just as we have stereotypes about private-firm lawyers, they have stereotypes about legal aid lawyers. They may assume that you spend all your time in navel-gazing about your organization’s mission or that you have unrealistic expectations about what the legal system can accomplish. They may imagine that you will insist on all decisions being “collaborative,” necessitating hours-long conference calls. They might think you are unwilling to work long

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4For an excellent discussion of how to pitch a pro bono case to a private firm, see Karen A. Lash, *Pitching Pro Bono: Getting to First Base with the “Big Firm,”* MANAGEMENT INFORMATION EXCHANGE JOURNAL, Fall 2008, at 3.
hours or don’t have the same skill and education that they have.

Your job is to dispel these stereotypes. What is your experience, and what is the experience of your organization? Do you have a solid track record as cocounsel? What is your organization’s history? Your reputation? Who are on your board of directors? Do you have a reliable funding base so that your cocounsel can be sure you will be around to see the case through? The prospective firm may be considering competing pro bono proposals, so be sure that you put your best foot forward.

Line up references for you that the prospective firm can contact. If you don’t have a lot of litigation experience, emphasize the relationships you have within the community and with clients. Also, be honest about the time and resources that you have to devote to the case. Be clear about the role you expect to play in the case.

Should the Cocounseling Arrangement Be Put in Writing?

Greg: In a word, yes. You should approach the discussion and drafting of an agreement sooner rather than later.

It’s certainly possible to have an effective working relationship without a written cocounseling agreement. You might be asking a firm to take on only discrete tasks in the case, which won’t need to be detailed in writing. You could also have established a cooperative history with a firm or practitioner, with well-defined ground rules that work without a written agreement. For any case that involves multiple, ongoing assignments of tasks and roles, however, a well-drafted cocounseling agreement is critical to getting the parties on the same page at the outset. A written agreement forces you to anticipate and do some problem solving in advance regarding the common conflicts likely to arise over key issues in the case, and how they might interfere with the efficiency of the working relationship.

Obviously a written agreement won’t guarantee the absence of problems. If difficult issues arise, you aren’t going to readily contemplate suing cocounsel for breach of contract. The main benefit of the document is the attempt by both sides to establish mutually agreed-upon roles and expectations for the litigation.

Jocelyn: I would strongly advise that you have a written cocounsel agreement in all circumstances.

Greg outlines lots of important reasons but I would add something. Negotiating a cocounsel agreement requires that you and your cocounsel discuss the entire case from start to finish. It allows you to put on the table a number of “relationship” issues long before they become a problem that would otherwise be rather delicate to raise. In the process you uncover what may be unrealistic expectations, mistaken assumptions, or other time bombs concerning your prospective partnership.

Have lawyers each describe how they work and what the culture is in their firm or organization. Does your prospective cocounsel leave everything to the last minute and then require everyone to pull an all-nighter to meet a deadline? Does he or she insist on staying at five-star hotels on business trips? Does the firm require a particular partner to review every pleading? Does the firm’s named partner think he is arguing the key motions even though he is not involved in the case on a daily basis? Does the private firm assume that, since it is paying the bills, it will call the shots?

Recognize that you have the most leverage to negotiate the cocounsel relationship that you want before the case is filed. You still have the opportunity to walk away from the table and look for other cocounsel. Once the case is filed, you may well have to muddle through—however painfully—because the client’s interests are paramount and might be jeopardized by a midcase change of counsel.

What Terms Should Be Included in the Cocounseling Agreement?

Greg: You can’t possibly anticipate every issue that might come up. A sample cocounseling agreement follows our discussion. The following factors, while by no means a comprehensive list, are ones you should consider addressing.

1. Decision Making and Designation of Lead Counsel. Decision making should ideally be collaborative, and you may want to specify whether key matters are to be determined by consensus, majority, or some other means. Consider specifying a process for soliciting the views of all counsel before finalizing major decisions.

In any event the agreement should designate the legal aid program or the firm as lead counsel that functions as a case manager for the litigation and that has final say, if necessary, on major decisions affecting the overall direction of the case. Lead counsel is needed to resolve any basic differences
or conflicts that might arise over the direction of the litigation and to make sure that critical tasks are accomplished in a timely, competent manner, from putting together the basic theory of the case to completing routine daily tasks. For example, if the attorneys are encountering difficulty in fashioning the overall goals and objectives of the lawsuit and how evidence will be gathered to support the case theory, who will make the necessary final decisions? Who will coordinate the assembly of case strategies into legal arguments contained in well-researched and drafted briefs? Who will make sure that assigned portions of the brief are completed on time, and who will be responsible for final edits? Who will orally argue any major pretrial motions in court, conduct depositions of key players, and serve as lead attorney at trial? How will the strategies and positions for settlement negotiations with opposing counsel be shaped and defined, and who will conduct them? Decisions about delegating responsibilities regarding other substantive divisions of labor, such as responsibility for overall summary judgment strategy and coordinating expert witness testimony, may also have to be made.

The lead counsel’s role as case manager also involves assigning the routine but necessary day-to-day tasks that help ensure the ongoing, smooth functioning of the litigation. Documents must be properly served and filed, legal cites checked in briefs, and logistics for meetings arranged. At the same time lead counsel must make sure the same attorneys aren’t always assigned these types of tasks (this is often phrased as “Who gets to do the ‘fun’ stuff versus the ‘grunt’ work?”).

2. Expense Sharing. The agreement needs to address the up-front payment of litigation-related expenses, which can be considerable, and how they will be allocated between the legal aid program and the firm. Typical items include fees for case filing, expert witnesses, and depositions as well as related expenses for travel and document management. The agreement should specify the expenses each entity will shoulder exclusively and which will be shared.

3. Communication, Document Sharing, and Document Management. Consider setting out the basic forms of communication that will be used to maintain regular contact between counsel, and how case developments will generally be tracked. For example, litigation team meetings may be periodically sched-

uled to discuss case developments and work assignments. Counsel may also be asked to participate routinely in conference calls and to timely respond to e-mail and telephone contacts.

Counsel should also know the basic document-management methods to be used to track the case. The attorneys will obviously keep individual files, but responsibilities for maintaining a central record of the case should be described, including pleadings, briefs, meeting minutes, and notes regarding fact investigation, legal research, and contacts with the court and opposing counsel. Will the legal aid program or the private firm be responsible for the data input and maintenance of any electronic document-management system for virtual files? Who will house any repository for hard copies of discovery and other documents?

4. Primary Contact with the Client. As with the formation of any attorney-client relationship, the informed consent of the clients to the addition of the private firm needs to be documented. You can note this in the agreement itself, along with the signatures of the clients. If your program’s client retainer includes a provision permitting the association of cocounsel, that fact should be referenced. The agreement should also specify who bears the primary responsibility for maintaining regular contact with the clients concerning case developments and obtaining their informed consent when necessary.

5. Media Contact. The agreement should designate responsibility for coordinating media or public relations contacts for the litigation. This will help ensure that the lawyers on the case give a cohesive message.

6. Attorney Fees. The agreement should specify the allocation of any attorney fees that may be recovered either through settlement or court verdict.\(^5\) It should state both the method and order of priority, if any, of apportioning fees and costs between the program and the firm. It should also describe the method counsel are to use to reasonably bill attorney fees and costs to the case, according to hourly billing rates to be claimed and hours of case-related work to be contemporaneously recorded.

It goes without saying, of course, that the firm is engaging in representation of the client free of charge. Any recovery of fees and costs will be sought against the defendant.

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\(^5\) Recipients of Legal Services Corporation funds are, of course, generally prohibited from seeking attorney fees in litigation (45 C.F.R. §§ 1642.3, 1642.4 (2009)).
Jocelyn: That is a very good list. Let me add a few other items.

1. **Goals of the Case.** While you can never know how a case will turn out, it still makes sense to articulate the goals for the case at the outset. The goals might be injunctive relief to change a corporate practice or government regulation, make-whole relief for the plaintiff, the largest punitive damage award in history, or another objective.

2. **History of the Case.** If you have invested substantial time developing the case at the point that the cocounsel relationship starts, you might want to recite this in the agreement.

3. **Commitment.** Each firm should commit in writing that it has the time and resources to pursue the matter.

4. **Exchange of Time Records.** As a practical way to ensure that all cocounsel are actually keeping their daily time records, we include a provision in our cocounsel agreement that the firms will exchange their time records quarterly. This disclosure also ensures that if one firm is overbilling, you catch the problem early on in your relationship and address it. Don’t wait until the fee petition to discover that the lawyer whom you never saw is submitting a hefty bill.

5. **Exchange of Hourly Rates Annually.** For the same reason that you exchange time records, the organizations should exchange their hourly rate sheets annually. For legal aid offices, this might seem like a foreign concept since no one is ever paying you an hourly rate. However, courts set hourly rates using the lodestar method, which is based on the market rate for an attorney of comparable skill. That is multiplied by the number of hours worked. So legal aid offices should annually conduct a survey of what rates are paid to attorneys in the community with the same year of graduation as your attorneys.

6. **Sanctions and Defense Fees.** You need to consider the worst-case scenario, however unlikely it is. What happens if not only do you lose the case but also sanctions and fees are awarded against one or more attorneys or plaintiffs? Are these costs shared? This brings me to my final suggestion.

7. **Dispute Resolution.** Include in your agreement some dispute-resolution mechanism. It need not be as formal as mediation or arbitration, although those are perfectly good options. As an alternative, designate the equivalent of the tribal elder—a respected law professor or lawyer—to whom you agree to take disputes.

**Does the Client Have a Say in the Selection of Cocounsel?**

Greg: It’s a good idea to discuss with the client your reasons for cocounseling with a private firm—to provide reassurance that the relationship will only strengthen the handling of the case. The sample cocounseling agreement included here contains a client signature line, which documents the client’s informed consent to the addition of the private firm. The agreement also contains a provision noting that the agreement is effective only upon signing by the client. This is not meant to give the client absolute veto authority over the cocounseling relationship. Under ABA Model Rule of Professional Conduct 1.2(a), the allocation of decision making generally grants the client authority regarding the “objectives of representation” and directs consultation with the client “as to the means by which they are to be pursued.” You may instead want to include a provision in the retainer agreement that allows for the addition of cocounsel and forgo altogether having the client sign the cocounseling agreement itself. Either way, the important thing is to keep the client informed.

Jocelyn: The attorney’s ethical obligations regarding agreements to divide fees are clear, at least in situations where the client is paying a fee for the representation or the fee is contingent. ABA Model Rule of Professional Conduct 1.5(e)(2) requires that if there is going to be a division of fees among lawyers not in the same firm, the client must agree “to the arrangement, including the share each lawyer will receive, and the agreement [must be] confirmed in writing.” Beyond the fee-sharing arrangement, it certainly makes sense to ensure that the client is comfortable with the cocounsel you have selected.
Sample Cocounseling Agreement

This Agreement is entered into by and between Legal Aid Inc. (“Legal Aid”) and [Law Firm]. These law firms are jointly designated in this Agreement as “Cocounsel.” The client, whether a single individual, multiple individuals, or a class of persons, is designated in this Agreement as “Client.”

Cocounsel agree as follows:

I. Purpose of Agreement

This Agreement sets forth Cocounsel’s rights and responsibilities regarding their joint legal representation of the Client, ____________________________ [and the class of persons that the clients seek to represent].

II. Client Representation

1. Cocounsel agree to associate and provide joint legal counsel and representation concerning the following matter: _______________________________________________________________________.

2. Legal Aid and [Law Firm] will appear jointly as counsel on all court filings and will jointly make all significant decisions regarding strategy and conduct of the case in reasonable consultation with the Client in conformance with the Rules of Professional Conduct. Cocounsel will attempt, reasonably and in good faith, to make these decisions by consensus. Should consensus not be reached, lead counsel, as designated in paragraph 5, will make the final decision.

3. Cocounsel will jointly act as litigation counsel in the case. Cocounsel will jointly be responsible for keeping each other reasonably informed of developments in the case; the drafting of pleadings, briefs, motions, and other documents for filing in court; preparing for and conducting discovery; appearing and arguing motions on behalf of the Client; and, if required, trying the case in the trial court.

4. Drafts of important papers, such as complaints, briefs, and dispositive motions, will be circulated between Cocounsel reasonably in advance of filing, except in emergency situations. Routine, nonsubstantive filings need not be circulated in advance. Significant meetings or discussions with defendants or others will be discussed in advance between Cocounsel.

5. Legal Aid will act as lead counsel in the case and will be responsible for

(a) coordinating reasonable communications of case-related developments to the Client in conformance with the Rules of Professional Conduct;

(b) coordinating teleconferences, meetings, and other communications between Cocounsel as needed to timely discuss case developments, strategy, and tasks;

(c) ensuring that all counsel’s views are solicited before significant decisions are made in the case;

(d) ensuring that court filings and other litigation-related actions occur in a timely fashion;

(e) coordinating the development and implementation of a discovery plan and court appearances, including trial;

(f) coordinating communications and case-settlement negotiations with defendants, and negotiation and litigation of claims for attorney fees and costs; and

(g) coordinating media strategy.

6. Any decision to hire other persons or entities to perform necessary services in the case, or to associate with other counsel, will be made by mutual agreement of Cocounsel.

7. This Agreement is limited to representation of the Client in the trial court. Cocounsel do not agree to jointly pursue or defend an appeal of a trial court decision without the execution of a subsequent cocounseling agreement to provide additional representation of the Client.
8. Cocounsel each represent that they have no conflicts in their representation of the Client in this matter.

III. Costs, Fees, and Expenses

9. Cocounsel acknowledge that they are providing legal services to the Client free of charge. Cocounsel agree that they will seek payment of costs and attorney fees from the defendants as part of a recovery ordered or approved by the court, as appropriate and as consistent with applicable law.

10. Cocounsel agree to contribute equally toward advancing up to $___ in litigation costs associated with the case. For purposes of this Agreement, these litigation costs include, as appropriate, deposition costs; filing and witness fees; charges for expert witnesses’ time and travel; investigator fees; court reporters’ fees; translation and interpreter fees; mediator and arbitrator fees; and costs paid to defendants for documents or electronically stored information produced in discovery.

11. Cocounsel must jointly approve any litigation cost item in excess of $___. If Cocounsel anticipate that litigation costs will exceed the amount referred to in paragraph 10, they agree to confer and determine the apportionment of responsibility for payment of future expenses. As of the date of this Agreement, Cocounsel reasonably estimate the litigation costs of this case to be approximately $___.

12. For purposes of this Agreement, litigation costs do not include expenses for Cocounsel’s travel-related costs; long-distance telephone calls; cellphone charges; photocopying; facsimiles; postage; overnight mail; courier service; message service; and computer-aided legal research. Cocounsel will each bear these nonlitigation costs associated with their respective work in connection with representation of the Client.

13. Hourly rates for attorney fees sought by Cocounsel, whether in a fee petition filed with the court or through settlement negotiations with the defendants, will be based upon those prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation. Cocounsel agree that any attorney fees awarded by the court or recovered through a negotiated settlement will be distributed in proportion to the lodestar amount, based upon actual hours reasonably expended, as appropriate, by their attorneys and paralegals who participate in the case, multiplied by the applicable hourly rates.

14. Any costs and attorney fees recovered in the case as the result of a decree or judgment will be distributed to Cocounsel as ordered by the court. If the court award does not clearly identify the amounts of costs or attorney fees attributable to the attorneys and paralegals of each Cocounsel, or if reimbursement is obtained as the result of a negotiated settlement with defendants, the costs and fees will be distributed proportionally to the Cocounsel that actually incurred them in the following order: (1) payment of litigation costs; (2) payment of nonlitigation costs; (3) payment of attorney fees in the order and lodestar amounts referred to in paragraph 13.

15. Cocounsel agree to litigate the case in a reasonably cost-effective manner, avoiding unnecessary duplication of work and expenditures.

16. Cocounsel agree to maintain complete and contemporaneous written records of all costs and all hours of advocate time reasonably spent in connection with the prosecution of the case to the nearest one-tenth of an hour. Cocounsel will exchange copies of these records with each other on a quarterly basis or upon request. All fee petitions to the court will be jointly filed following review by Cocounsel.

17. Any negotiated settlement of the case that includes the recovery by Cocounsel of costs and attorney fees shall be subject to the informed consent of the Client in conformance with the Rules of Professional Conduct.

18. Should there be a withdrawal or termination of representation, as referred to in paragraphs 21 and 22, the provisions of this Cocounsel Agreement concerning reimbursement of costs and payment of attorney fees shall apply to expenses incurred and time expended up to the termination.
IV. Liability for Judicial Sanctions and Professional Insurance

19. In the unlikely event that any attorney of record in the case is the subject of judicial sanctions, Cocounsel agree that the applicable entity will be responsible for payment or other resolution of the sanctions.

20. Cocounsel represent that they currently maintain adequate professional liability insurance coverage for any acts, errors, and omissions in the rendering of professional services. Cocounsel further represent that they will continue to maintain this professional insurance during the term of this Agreement.

V. Withdrawal by Cocounsel

21. Cocounsel agree that, upon written notice, either firm and its attorneys may withdraw from providing legal representation in this case for any cause or reason or for no cause or reason, subject to the Rules of Professional Conduct and order or other action by the court. Cocounsel also agree that, upon written notice, either firm and its attorneys must withdraw from providing legal representation in this case if any nonresolvable ethical conflict of interest arises, subject to the Rules of Professional Conduct. Cocounsel further agree that, apart from filing the appropriate withdrawal in court, the withdrawal of representation will be accomplished without public comment or statement.

After withdrawal, each firm remains bound by all applicable provisions of this Cocounsel Agreement.

VI. Termination of Cocounsel Agreement

22. This Agreement may be terminated by either Cocounsel, except as otherwise required by the Rules of Professional Conduct or the rules of the applicable court, provided that seven (7) days’ advance written notice is given.

VII. Construction of Agreement and Modification

23. This Cocounsel Agreement is the entire agreement and understanding between Cocounsel concerning this case.

24. This Agreement may be amended or supplemented by the Parties through supplemental cocounsel agreements, written addenda, or letter agreements formally agreed to by Cocounsel, with written notice to the Client. Any subsequent modification or alteration of this Cocounsel Agreement shall be effective only if it is in writing and signed by Cocounsel, with written notice to the Client.

25. This Agreement is not effective until signed by the Client.

VIII. Dispute Resolution

26. In the event of any dispute between Cocounsel regarding this Agreement or the distribution of any recovery under this Agreement, Cocounsel shall attempt in good faith to resolve the matter through negotiation. If unsuccessful, Cocounsel shall agree upon a neutral third party to assist them in attempting to resolve the matter informally. [Or insert name of agreed neutral.] [Optional additional steps: If these measures are unsuccessful, the dispute shall be referred for binding arbitration before an individual mutually agreed upon by Cocounsel. If Cocounsel are unable to agree upon an arbitrator, each Firm shall select an individual, and the two individuals shall then select a third individual to serve as arbitrator.] Each Cocounsel shall bear its own fees and costs and shall share any mutual costs (e.g., arbitrator’s fee) regardless of the outcome of the dispute. [Or use prevailing-party standard.]

__________________________________________________  Dated: ________________________
Legal Aid

__________________________________________________  Dated: ________________________
Law Firm

__________________________________________________  Dated: ________________________
Client
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