

**The More the Merrier???**  
***Ethical and Practice Issues in Working with Other Counsel***  
Anthony M. Kennedy Inn of Court, Team #7  
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**California Rules Of Professional Conduct**

**Rule 3-700(C)(3).** Permits withdrawal from representation if “[t]he inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal...”

**Joint Defense Privilege**

*United States v. Henke* (9th Cir. 2000) 222 F.3d 633: Withdrawal or disqualification of counsel may result if cooperating defendant testifies and had been part of joint defense agreement.

**Co-Counsel Liability**

**Breach of Fiduciary Duty/Malpractice**

*Beck v. Wecht* (2002) 28 Cal.4th 289. One attorney may not sue co-counsel for legal malpractice. Co-counsel do not generally owe fiduciary duty to one other with respect to expected fees.

**Contribution and Indemnity**

*Musser v. Provencher* (2002) 28 Cal.4th 274. An attorney may not bring a malpractice action against co-counsel for handling case in negligent fashion (malpractice action is the client’s) but may be able to seek indemnity for proportionate share of damage caused by co-counsel.

**Fraud**

*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282. “A fraud claim against a lawyer is no different from a fraud claim against anyone else. ‘ “If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability.” ’ [Citations.] While an attorney’s professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud. [Citation.] Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations.”

## California Rules of Court

### **Rule 9.40. Counsel pro hac vice.**

(a) **Eligibility.** A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice under this rule if the person is: (1) A resident of the State of California; (2) Regularly employed in the State of California; or (3) Regularly engaged in substantial business, professional, or other activities in the State of California.

## Eastern District Local Rules

**Rule 180(b)(2).** **Attorneys Pro Hac Vice.** An attorney who is a member in good standing of, and eligible to practice before, the Bar of any United States Court or of the highest Court of any State, or of any Territory or Insular Possession of the United States, and who has been retained to appear in this Court may, upon application and in the discretion of the Court, be permitted to appear and participate in a particular case. Unless authorized by the Constitution of the United States or an Act of Congress, an attorney is not eligible to practice pursuant to (b)(2) if any one or more of the following apply: (i) the attorney resides in California, (ii) the attorney is regularly employed in California, or (iii) the attorney is regularly engaged in professional activities in California.

**Rule 182.** (a) **Appearance as Attorney of Record.** Except as permitted in (b) and except as the Court may allow a courtesy appearance in criminal actions, no attorney may participate in any action unless the attorney has appeared as an attorney of record. A single client may be represented by more than one attorney of record to the extent authorized by the applicable Rules of Professional Conduct...

(h) **Local Co-Counsel.** A Judge to whom an action is assigned has discretion in that action, and upon notice, to require an attorney appearing in this Court who maintains an office outside this District to designate a member of the Bar of this Court who does maintain an office within this District as co-counsel with the authority to act as attorney of record for all purposes. In such a case, the attorney shall file with such designation the address, telephone number and consent of the designee...

## Additional Reading

Richmond, Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle? (2010) 90 Ky. L.J. 461.

American Bar Association, Model Joint Venture Agreement Checklist <  
<http://apps.americanbar.org/buslaw/newsletter/0049/materials/book.pdf>> (as of April 14, 2015).