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Ethical Implications of "Of Counsel" Relationships

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There has been, and continues to be, much confusion regarding the characterization and significance of the term "of counsel" as it relates to relationships among lawyers and the many implications such an association has for both parties in the of counsel relationship.

Traditionally, the term "of counsel" was used to describe a partner of a law firm who had retired and was no longer actively involved in the day-to-day practice but nonetheless remained involved in an advisory capacity.

Over the years, the use of the of counsel title has expanded to include various relationships between a law firm and its of counsel attorneys. ABA Formal Opinion 90-357[1] identifies the following four "principal patterns" of the of counsel relationships, to which the title is appropriately applied: 1) part-time practitioners, practicing in association with a firm, on a different basis than the mainstream lawyers of the firm, 2) a retired partner of the firm who remains associated with the firm and available for occasional consultation, 3) a lawyer who is in effect a probationary partner to be, and 4) a permanent status in between those of partner and associate lacking an expectation of likely promotion to full partner status.

In addition to the foregoing, the term "of counsel" is often used to describe a lawyer, usually but not always a sole practitioner, who has a separate practice but is engaged by the principal law firm (i) either to meet temporary staffing needs or provide special expertise not available in the firm or vice versa, and/or (ii) because the law firm and the of counsel lawyer jointly represent certain clients on a recurring basis. In any of the foregoing situations, of counsel attorneys may either use the office facilities of the law firm with which they are associated or maintain their own separate office.

Advertising. Of counsel lawyers and the firms they are associated with must be careful not to advertise or otherwise hold themselves out in a manner that would mislead the public to believe the of counsel lawyer is a partner[2] or employee lawyer of the firm.

Rule 1-400 of the California Rules of Professional Conduct—governing advertisements or other "communications" with clients or the public at large—provides that the designation of "of counsel" may only be used when there is a "close, personal, continuous, and regular relationship" between the law firm and the of counsel lawyer. As explained below, the courts have held that these relationships are such that they preclude either the law firm or its affiliated of counsel from representing adverse or potentially adverse interests (except as authorized by Rule 3-310 of the California Rules of Professional Conduct).[3]

Of counsel lawyers, when performing services for clients not connected to the firm to which the of counsel is associated, should always use their own stationery on all matters relating to such services, so as not to mislead clients and others that the lawyer has the backing of the firm. When working on matters in common with the law firm, it is generally required that of counsel use firm letterhead that confirms their of counsel status and

relationship with the firm.

Conflicts. While there is no express provision in the California Rules of Professional Conduct adopting the tenet of imputed conflicts, the California Supreme Court in *Flatt v. Superior Court*[4] created a judicial imputation doctrine that conflicts are imputed to partners and associates within a firm. *Flatt* left open the question of whether the same imputation applies to of counsel relationships.

In *The People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc., et al.*,[5] the California Supreme Court addressed the issue and concluded that of counsel are to be treated the same as partners and employee lawyers of the law firm for purposes of the judicial doctrine of imputed conflicts.[6]

Confidentiality. The extent to which the duty imposed on attorneys by Section 6068(e) of the California Business and Professions Code "to maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets of his or her client"[7] applies to of counsel relationships is an important consideration in forming and maintaining such relationships. The issue of confidentiality has not yet arisen in litigation involving the of counsel status of attorneys; nevertheless, there is every reason to expect that the courts will follow the teachings of *SpeeDee Oil* and treat of counsel as having the same duty to protect confidential information as any other partner or employee lawyer of a firm, and certainly for conflicts and disqualification purposes the confidences acquired by a firm will almost certainly be imputed to the of counsel lawyer (and vice versa).[8]

Fee splitting. Careful consideration should be given to the financial arrangements between the parties to an of counsel relationship. Specifically, in a situation where fees are divided between the of counsel lawyer and the firm with which he or she is associated, either by way of referral fees or for work performed jointly, does Rule 2-200 of the California Rules of Professional Conduct apply? [9]

The answer to this question hinges on the unresolved issue of whether an of counsel lawyer is considered a partner or employed lawyer of the firm such that Rule 2-200 does not apply.

In *Chambers v. Kay*,[10] the California Supreme Court adopted a literal interpretation of Rule 2-200 that a joint venture relationship in the context of a specific case is not a "partnership" and the other attorney—though cocounsel of record—is not considered an "associate." The teachings of *Chambers* strongly suggest that of counsel lawyers would most likely be treated in a similar manner, and therefore it is strongly recommended that lawyers ignore the dichotomy[11] and simply comply with the client disclosure and written consent requirements of Rule 2-200 when it comes to sharing fees or paying referral fees in such relationships.

Other implications. Other issues that may arise out of the of counsel relationships, include those relating to malpractice insurance and the supervision of associates, may have other implications but are beyond the scope of this article, which is limited to the ethical considerations of such relationships.

It is important to clear all conflicts when an of counsel relationship exists and to document all aspects of such a relationship to avoid the many complications, including use of letterhead, Web sites and other forms of advertising, financial arrangements, and conflicts. It is more important to disclose the of counsel relationship and its consequences to clients and potential clients, and where appropriate obtain the client's written consent.

So long as all of the rules and requirements relating to of counsel relationships are complied with, such associations may help expand a law practice and can prove to be beneficial to both parties in the relationship, financially and otherwise.[12]

[1] ABA Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, May 10, 1990—Use of designation "of counsel"; withdrawal of Formal Opinion 330 (1972) and Informal Opinions 678 (1963), 710 (1964), 1134 (1969), 1173 (1971), 1189 (1971), and 1246 (1972) provides: "That core characteristic properly

denoted by the title 'counsel' is, as stated in Formal Opinion 330, a 'close, regular, personal relationship'; but a relationship which is neither that of partner (or its equivalent, principal of a professional corporation), with the shared liability and/or managerial responsibility implied by the term; nor, on the other hand, the status ordinarily conveyed by the term 'associate,' which is to say a junior non-partner lawyer, regularly employed by the firm" and reiterates the position in Informal Opinion 678 and Formal Opinion 330 that it is not ethically permissible to apply the term "Of Counsel" to relationships involving (a) only referrals of legal business, (b) individual cases, or (c) occasional collaborative efforts and the relationship of an outside consultant (Informal Opinion 678 and Formal Opinion 330).

[2] The term "partner" as used herein means a lawyer with an ownership interest in a law firm.

[3] Rule 3-310 precludes a member from accepting or maintaining the representation of adverse interests without providing written disclosure to and/or receiving informed written consent from the member's client.

[4] Flatt v. Superior Court (Daniel), 9 Cal. 4th 275 (1994).

[5] The People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc., et al., 20 Cal. 4th 1135 (1999), 980 P. 2d 371, 86 Cal. Rptr. 2d 816.

[6] "This close, fluid, and continuing relationship, with its attendant exchanges of information, advice and opinions, properly makes the Of Counsel attorney subject to the conflict imputation rule, regardless of whether that attorney has any financial stake in particular matter."

[7] Rule 3-100(A) of the California Rules of Professional Conduct states, "A member shall not reveal information protected from disclosure by Business and Professions Code Section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."

[8] It would be more likely that such imputation would be made in the case where an of counsel attorney has unrestricted access to the files (electronic or otherwise) of the principal law firm, irrespective of whether they are engaged in joint representation of a client.

[9] Rule 2-200 of the Rules of Professional Conduct states, "(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."

[10] Chambers v. Kay, 29 Cal. 4th 142 (2002).

[11] It seems rather anomalous at first blush that for the purposes of conflicts "Of Counsel" lawyers are considered lawyers of the firm, but for the purposes of fee splitting they are not. The reconciling principle is client protection.

[12] One resource for agreements governing of counsel arrangements is "The Of Counsel Agreement: A Guide for Law Firm and Practitioner" by Harold G. Wren and Beverly J. Glascock (3rd ed. 2005).