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Division of Fees Between Firms and Lawyers Who are ‘Of Counsel’

Adopted December 2019

Syllabus

Question: Must a law firm comply with the requirements of Colorado Rules of Professional Conduct (Colo. RPC or the Rules) 1.5(d)(1)-(3) when dividing legal fees with a lawyer who is “of counsel” to the firm, and may a lawyer be “of counsel” or otherwise associated with more than one firm at the same time?

Answer: The term “of counsel” refers to a lawyer who has a close, regular, personal relationship with a law firm. “Of counsel” describes a form of association between lawyers in a firm. Because a lawyer who is “of counsel” is considered to be in that firm for purposes of dividing fees, the firm need not comply with the requirements of Rule 1.5(d)(1)-(3). A lawyer may be “of counsel” (or otherwise associated with) more than one firm. However, the imputation of conflicts of interest among the firms with which the lawyer is associated present practical limitations on such arrangements.

Analysis

Law firms in Colorado and elsewhere often use the term “of counsel” in marketing and on letterhead, yet neither the Model Rules of Professional Conduct nor the Colo. RPC define that term. For purposes of this opinion, the Colorado Bar Association Ethics Committee

(Committee) regards the terms “of counsel,” “special counsel,” “senior counsel,” and similar variations as interchangeable.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has opined that law firms ethically may use the term of “of counsel” to refer to a lawyer who has a close, regular, personal relationship with the firm. *See* ABA Formal Op. 90-357, “Use of the Designation ‘Of Counsel’” (May 22, 1990). The term clearly denotes a form of association between the “of counsel” lawyer and other lawyers in the firm. “Of counsel” commonly and appropriately is used to describe the following types of relationships.

- A lawyer practicing in association with, but on different terms from, other lawyers in the firm (*e.g.*, on a part-time basis).
- A lawyer who has retired from partnership status but who remains associated with the firm and available for consultation.
- A lawyer who joined the firm laterally and who is not yet, but is expected to become, a partner.
- A lawyer who has a permanent status between an associate and a partner.

See ABA Formal Op. 90-357. A lawyer may have an “of counsel” relationship with more than one firm. *See id.* However, use of the term “of counsel” is misleading and improper if used to describe a lawyer who merely refers work to or receives referrals from the firm, whose relationship with the firm is limited to a single case or occasional collaboration, or who is an outside consultant. *See id.*

The Committee previously cited ABA Formal Op. 90-357 when it considered the ethical requirements associated with the employment of temporary lawyers. *See* CBA Formal Op. 105,

“Opinion on Temporary Lawyers” (1999). “Of counsel” signifies a closer, more regular, permanent, and personal relationship between the lawyer and the firm than “temporary lawyer.”

Assuming that a law firm appropriately uses the term “of counsel” to refer to a lawyer who has a close, regular, personal association with the firm, it follows that the firm and the lawyer may share legal fees without complying with the requirements of Colo. RPC 1.5(d), which provides as follows:

Other than in connection with the sale of a law practice pursuant to Rule 1.17, 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 basis upon which the division of fees shall be made, and the client’s agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Colo. RPC 1.5(d). A lawyer who is “of counsel” to a law firm—that is, who maintains a close, regular, personal association with the firm—is “in the same firm” for purposes of Rule 1.5(d).

The corollary conclusion is that a lawyer who is “of counsel” to a law firm must be taken into consideration for purposes of the imputation of conflicts of interest among lawyers practicing law in the same firm.

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing

alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Colo. RPC 1.10(a).

Although there is no ethical prohibition against a lawyer being associated with more than one law firm in an “of counsel” role or otherwise, the Rules on conflicts of interest may impose practical limitations on a lawyer who attempts to associate with more than one firm in of counsel relationship. If a lawyer is “of counsel” to Firm A and Firm B, the firms will effectively become one firm such that a conflict imputed among lawyers in Firm A will be imputed to lawyers in Firm B under Rule 1.10(a).

The process of clearing conflicts is subject to Rule 1.6. Rule 1.6(b)(7) allows a lawyer to disclose information related to the representation of a client “to detect and resolve conflicts of interest arising from the lawyer’s *change of employment or changes in the composition or ownership of a firm*, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client . . .” Colo. RPC 1.6(b)(7) (emphasis added). Under Rule 1.6(b)(7), the “of counsel” lawyer can share information with Firm A and Firm B at the start the “of counsel” relationship with each firm. Rule 1.6(b)(7), however, does not authorize Firm A and Firm B to share information to clear imputed conflicts created by their association with the “of counsel” lawyer.¹ If Rule

¹ See e.g., Philadelphia Bar Association Ethics Opinion 2001-5 (referring to conflicts created by the association of a lawyer with more than one firm, the committee stated, “the dictates of confidentiality under Rule 1.6 require each firm to obtain a client’s or potential client’s

1.6(b)(7) is construed as listing all circumstances in which information relating to the representation may be disclosed between firms to detect conflicts, every client of both firms would have to consent to the disclosure of such information, and that consent must be “informed consent” under Rule 1.6(a).^{2,3}

The Committee therefore concludes the firms with which an “of counsel” lawyer is associated should obtain informed from their clients before exchanging information to identify or resolve potential conflicts. It thus may be feasible for a lawyer to have an “of counsel” relationship with a law firm while maintaining a solo practice on the side; however, the requirement that lawyers screen conflicts of interest presents, and Rule 1.6(b)(7) may impose, practical limits on a law firm’s ability to allow its “of counsel” lawyers to maintain associations with more than one firm.

permission to circulate enough information outside the firm to the other firms involved in order to do the required conflict check”); South Carolina Bar, Ethics Advisory Opinion 10-06 (“The procedure for checking conflicts (or the Of Counsel agreement itself) may require disclosure of client information to the firm with which the lawyer intends to enter such a relationship. Thus, consent to the disclosure must be obtained from each client.”)

² Comment 13 to Rule 1.6 may support a broader reading of Rule 1.6(b)(7). Comment 13 to Rule 1.6 provides:

Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, *such as* when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering purchase of a law practice. Colo. RPC 1.6, Cmt. 13 (emphasis added).

The use of “such as” in Comment 13 may suggest the circumstances listed in Rule 1.6(b)(7) are not intended to be the only circumstances in which information may be disclosed between firms to identify and resolve potential conflicts. However, to the Committee’s knowledge, no ethics opinion or case has adopted an expansive interpretation of Comment 13.

³ The nature of the disclosure that would be required to obtain informed consent to disclosure of confidential information is beyond the scope of this opinion.