



The LIABILITY & ETHICAL CONSIDERATIONS for “Of Counsel” Relationships

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Attorneys and law firms interested in forming “of counsel” relationships should consider the potential ethical, agency, and liability issues inherent in the arrangement. In addition to the lawyer and firm’s duty to not mislead, “of counsel” attorneys and their firms must appreciate the potential for increased conflicts of interest and potential malpractice liability.

The term “of counsel” is a common—but oftentimes misunderstood—term used to describe certain relationships between attorneys and law firms. But what does “of counsel” really mean? Is the term more often used correctly or incorrectly? Did Humpty Dumpty have “of counsel” in mind when he said a word could mean what he chose it to mean? And more importantly, are there ethical and malpractice implications to a seemingly innocent and casual “of counsel” relationship?

According to the American Bar Association, an “of counsel” designation is permissible only when the relationship between the lawyer and the firm is “a close, regular, and personal relationship and the use of the title is not otherwise false or misleading.”¹ There are four common arrangements generally accepted to constitute an “of counsel” relationship: (1) a part-time lawyer, including a retired former judge or government official, (2) a retired partner,² (3) a lateral attorney brought in on a probationary period before being named partner, and (4) an attorney whose tenure and experience suggests a position above associate but who, for one reason or another, is not a partner of the firm.



¹ABA Op. 90-357 (May 10, 1990). As defined by the ABA, “of counsel” relationships are those where there is a holding out to the world at large about some general and continuing relationship between the lawyers and the law firms in question. That is, representation that is implied by the use of the title “of counsel” on letterheads, law lists, professional cards, notices, office signs and the like. Other terms, including “counsel,” “tax (or other speciality) counsel,” “consultant” and the like share the central characteristic of the relationship that is denoted by the term “of counsel.”

A different use of the same term occurs when a lawyer (or firm) is designated as “of counsel” in filings in a particular case. In those circumstances, there is no general holding out as to a continuing relationship, or as to a relationship that applies to anything but the individual case.

²In Ohio, a retired partner may continue with his former firm in an “of counsel” capacity and the firm may include in its name the name of the retired partner. Ohio Op. 91-18 (Aug. 16, 1991). However, lawyers should be cautioned that a retired partner must maintain a close, regular, and personal relationship with his former firm and remain on “active registration status” with the Supreme Court of Ohio. Should the retired partner register under “retired status,” he should not be listed by the firm as “of counsel” or otherwise be represented as being able to engage in the practice of law.

In Michigan, a law firm may retain the name of a retired partner where the firm has been long-established and well-recognized, and communications about the lawyer’s status clearly indicate the lawyer is retired. Mich. Op. RI-90.

While ethical under the Model Rules, the ABA has no opinion as to whether continued use of a retired partner’s name in a firm name would expose that lawyer to malpractice liability.

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Use of an “of counsel” relationship presents two common ethical considerations to attorneys practicing in Ohio, Indiana, Michigan and other states that have adopted the ABA Model Rules of Professional Conduct (“Model Rules”).³ The first consideration is whether use of the term “of counsel” is false or misleading. Does the designation accurately represent—or does it misrepresent—the lawyer’s relationship with his firm? Model Rule 7.5(a) provides that “[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.” Model Rule 7.1 requires that “[a] lawyer shall not make or use a false, misleading, or non-verifiable communication about the lawyer or the lawyer’s services.”⁴ By using the term “of counsel” on its marketing materials, letterhead, directory information and the like, a firm holds out and represents that it has a close, regular, and personal relationship with the lawyer. To use the term “of counsel” where the relationship is attenuated is not proper. A co-counsel arrangement in a single case is not an “of counsel” relationship. Neither are the relationships between forwarders or receivers of legal business, relationships involving only occasional collaborative efforts among otherwise unrelated lawyers or firms, or relationships between firms and other outside counsel.

Ethical considerations also arise in determining whether conflicts of interest exist between “of counsel” lawyers and the clients of their associated firm. Under the Model Rules, clients of the firm are attributed to the lawyer who is “of counsel” for purposes of determining the propriety of a representation. When lawyers are associated in a firm, none may knowingly represent a client when any one of them practicing alone would be prohibited from doing so by other conflict of interest rules. See Model Rules 1.7, 1.8(c), 1.9, and 1.10(a).⁵

Courts have disqualified entire law firms from representing clients with interests adverse to a client of a single “of counsel” attorney. *People ex. rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 980 P2d 371, 384-384 (Cal. 1999), was multi-party litigation involving an oil company, its franchiser, and several intervening franchisees. In *SpeeDee Oil*, the California Supreme Court disqualified a law firm because an attorney who was “of counsel” to the firm had met and discussed the facts of the case with attorneys who represented the oil company. The “of counsel” attorney received confidential information, and because there was an assumption and expectation he would share these confidences with all others in the firm, the firm could not continue its representation. The result is consistent with comments to Model Rule 1.6, which deals with the issue of attorney-client confidentiality. Courts have also disqualified “of counsel” attorneys who join firms that have represented adverse parties in litigation that was concluded months before the attorney came

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³ The Michigan Supreme Court adopted the “Model Rules” on October 1, 1988. The Model Rules in Indiana were amended on September 30, 2004, and became effective January 1, 2005. The Model Rules went into effect in the State of Ohio on February 1, 2007. As such, analysis of the ethical implications of the “of counsel” relationship will be based on the Model Rules.

⁴ Model Rule 7.1 was adopted in Ohio. Michigan, however, has adopted a modified version that provides, in pertinent part, that “[a] communication shall not contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading.” MRPC 7.1(a). Indiana has not adopted Model Rule 7.1, but instead, has a modified version of Model Rule 7.2 which states, in part, “[a] lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.” Indiana Model Rule 7.5 references Model Rule 7.2.

⁵ According to the comments to Model Rule 1.10, if lawyers present themselves to the public in a way suggesting they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. An attorney may serve as “of counsel” to more than one law firm, so long as he maintains a close, regular and personal relationship with each firm. Ohio Op. 97-2 (Apr. 11, 1997). When an attorney serves as “of counsel” to more than one law firm, there is imputed disqualification that extends to all lawyers and firms connected by the “of counsel” relationship.

Does the designation accurately represent—or does it misrepresent—the lawyer’s relationship with his firm?



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onboard. *Monroe v. City of Topeka*, 988 P.2d 288 (Kan. 1999). The test to determine whether an attorney is “of counsel” to a firm for purposes of disqualification is whether the attorney’s relationship to the firm is close, regular, and personal. If the relationship can be so described, the lawyer is considered a member of the firm, just as a partner or associate would be. Attorneys with attenuated “of counsel” relationships to firms are sometimes found not to present a conflict, but—as mentioned above—all should avoid the use of the term where the relationship is attenuated.

The Supreme Court of Indiana admonished an attorney for engaging in the representation of a client that was adverse to the interest of another client of an attorney, finding an implicit firm or “of counsel” relationship. In *re Sexson*, No. 49S00-9208-DI-627, 613 N.E.2d 841 (May 14, 1993). In that case, the respondent attorney shared office space with several other attorneys. The court noted the respondent attorney shared letterhead, phone lines and office personnel with the others in the arrangement, and each had access to the confidential information of the others’ clients. The Indiana Supreme Court found the attorney’s attempted representation (of a wife in a divorce whose husband had been the client of one of his affiliated attorneys in a real estate deal) violated the conflict of interest rules.

The relationships between “of counsel” lawyers and their firms present liability issues as well. An Ohio court of appeals has held that an agency by estoppel relationship can exist by virtue of an “of counsel” attorney. *Trimble-Weber v. Weber*, 119 Ohio App. 3d 402, 695 N.E.2d 344 (11th Dist. 1997). The *Weber* court upheld summary judgment in favor of a firm where the firm’s “of counsel” attorney represented a party to a domestic relations matter. The opposing party to the divorce brought a counterclaim against his wife’s attorney, the “of counsel” lawyer, and his law firm for defamation and libel. The thrust of the counter-claimant’s cause of action against the firm was that the “of counsel” was acting as the firm’s agent and the alleged tortious conduct of the lawyer was imputed to the firm. The court held the issue should be analyzed according to agency law principles. *Id.* at 407, 347.

An agency relationship between two parties is contractual and may be either express or implied. In *Weber*, there was neither evidence of an express contract between the “of counsel” lawyer and his firm giving rise to an agency relationship, nor was there any evidence the firm had any control over the lawyer’s handling of his cases. *Id.* at 408, 347. Finding no express agency relationship between the attorney and his firm, the court analyzed the relationship under the theory of agency by estoppel. In order for an agency relationship to exist by estoppel, one must have been led to rely to his detriment upon the appearance of an agency. In concluding there was the appearance of agency, the court pointed to the “of counsel” lawyer’s name on the firm’s letterhead. *Id.*

The court in *Weber* found, however, the plaintiff presented no evidence of detrimental reliance upon the perceived relationship between the “of counsel” attorney and the firm. The plaintiff had accused the “of counsel” lawyer of intentional and malicious actions; he did not allege that he suffered any damages due to his reliance on the appearance of an agency relationship. *Id.* at 408, 348. Summary judgment for the firm was upheld.

The court did note, however, a factual scenario might exist where a plaintiff would have a cause of action against a law firm grounded in an agency by estoppel theory. Had the plaintiff alleged legal malpractice against the “of counsel” attorney, the court observed he might have been able to claim he entered into the professional relationship in reliance upon the association between the lawyer and his firm. But where a non-client alleges a tort other than malpractice, as in *Weber*, “there is not necessarily the reliance upon the law firm’s relationship with the ‘of counsel’ as could exist with a client.” *Id.*

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In addition to the risk of liability by an express agency or agency by estoppel relationship, law firms and their “of counsel” attorneys should also take care to avoid possible coverage issues relating to their professional liability exposure. While an “of counsel” attorney might be covered under the law firm’s policy, coverage is not always clear. It might be prudent for the attorney to maintain separate coverage as well. In some instances, both policies might apply. Maintaining separate policies for “of counsel” attorneys, in addition to a law firm’s policy, can provide an extra level of protection for both the firm and the associated lawyer.



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