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Of Counsel: More Than Just A Casual Designation

Since the Great Recession in late 2007, law firms have vigorously worked to meet the challenges posed by the evolving market for legal services.[1] Clients increasingly challenge law firms to be price competitive. Inter-firm competition also remains fierce in a market confronting a shrinking demand for legal services, as companies move more work in-house, or individuals turn to online self-help resources. From solo practitioners to large law firms, opportunities are pursued for advantageous relationships to grow businesses, manage profitability and ultimately better serve clients.

Given these trends in the legal marketplace, solo practitioners and small firm lawyers may look to develop ongoing relationships with other firms in order to stimulate business or even to test potential future partnerships. From another perspective, mid-size and large firms continue to feel the pressure to do more with less,[2] resulting in increasing billable hour demands for associates pursuing a partnership track. As a result, many attorneys are opting for a better work-life balance by trading their pursuit of partnership for alternative arrangements such as special counsel roles with the firm. In other words, firms are increasingly open to exploring opportunities beyond the standard "partner-associate" management structure in order to generate business and better meet the demands of their clients.

While the designation "of counsel" has been used by firms for many years, the concept can still be a bit of a paradox, if not often completely misunderstood. Misrepresenting a lawyer as "of counsel"[3] may unnecessarily expand a firm's risk profile, transcend professional rules governing lawyer advertising and fee splitting and, at worst, may create conflicts of interest jeopardizing the firm's relationships with long standing clients.

Special Counsel, Co-Counsel or Something Entirely Different

The American Bar Association ("ABA") Model Rules of Professional Conduct do not directly define or address use of the "special counsel" designation. The leading national guidance on use of the term continues to be *ABA Formal Ethics Opinion 90-357* (1990). According to *Formal Op. 90-357*, "[t]he use of the title 'of counsel,' or variants of that title, in identifying the relationship of a lawyer or law firm with another lawyer or firm is permissible as long as the relationship between the two *is a close, regular, personal relationship* and the use of the title is not otherwise false or misleading" (emphasis added). It is this *close, regular and personal relationship* on which most states base their definition of the special counsel relationship. *ABA Formal Op. 90-357* goes on to provide four leading examples of proper use of the special counsel designation:

1. a part-time practitioner, who practices law in association with a firm, but on a basis different from that of the mainstream lawyers in the firm;
2. a retired partner of the firm who provides institutional recollections of his or her experiences with the firm and is available for consultation;
3. a lawyer, usually a lateral hire, brought into the firm with the expectation that the lawyer will shortly become a member; and
4. a lawyer who occupies a permanent senior position in the firm with no expectation of becoming a partner.

1 *Cf.* Thomson Reuters. 2017 *Report on the State of the Legal Market*, 2017 and Thomson Reuters. *How Small Law Firms Succeed Under the Pressure of Today's Challenges…or Fail*, 2017.
2 Deloitte. *Future Trends for Legal Services: Global Research Study*. July 2016.
3 From this point forward, the article will use the term "special counsel" to denote all "of counsel" variants (e.g. of counsel, special counsel, senior counsel, tax counsel, appellate counsel, etc.).

These four examples underscore that the special counsel designation should not be used to designate more casual relationships which depend on occasional interactions. *ABA Formal Op. 90-357* also provides four examples of *improper* use of the special counsel designation, which includes the following:

- A relationship involving only an individual case;
- A relationship of forwarder or receiver of legal business;
- A relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms; and
- The relationship of an outside consultant.

The opinion goes on to also authorize use of the special counsel designation between a firm and an independent lawyer or firm that have close, regular, personal relationships. There are many different types of interactions between independent lawyers in the joint representation of their clients. To think of this on a spectrum consider, first, a client who independently retains Law Firm X and separately retains Law Firm Z to act as co-counsel in the defense of a claim. While both firms remain fundamentally independent, they may share responsibilities in their representation of the client. Moving along the spectrum, consider Law Firm X, a litigation firm, directly hires Law Firm Z, a firm uniquely skilled to handle complex tax issues, as retained counsel, to assist Firm X in creating a financial plan for a high net worth individual. Continuing along this spectrum, consider Law Firm X finds itself with a number of high net worth clients and *regularly* calling on Law Firm Z to assist. At this point, it might make sense to form a special counsel relationship if the firms routinely represent a similar client base. The final stop along this spectrum would be Law Firm X acquiring, or merging with, Law Firm Z.

The "close, regular, personal relationship" requirement is subject to interpretation, but has routinely been applied by state ethics boards as being close, ongoing, regular and involving frequent contact for the purpose of providing consultation and advice. However, state ethics boards typically have rejected special counsel designations between firms that are merely attenuated alliances for marketing purposes or for lawyers who simply share office space. A Virginia opinion on this point noted that the "of counsel" designation is too often used in a way that is not permissible: to define the relationship between a national plaintiff's firm that solicits cases and, in turn, makes referrals to local firms.[4] The opinion concluded that this relationship was solely a business relationship and that the firms did not collaborate on the legal matters.

An accurate description of a firm's relationship with special counsel is imperative, because that designation imposes professional obligations related to division of fees, advertising, conflicts of interest and confidentiality.

4 *Virginia Ethics Op. 1866* (7/26/2012).

Division of Fees

Lawyers are humble enough to recognize that they may not be able to handle every type of matter that a client presents. However, lawyers also recognize the importance of maintaining strong client relationships and referring clients to another attorney may dilute those relationships. By holding out a lawyer as special counsel to the lawyer's own firm, a lawyer has some control over the brand recognition of the representation. In addition, a lawyer may wish to keep the terms of business referrals to external counsel confidential. The special counsel relationship balances these competing interests by treating the lawyers as a single entity.

The ethical standard that governs division of fees between lawyers who are not in the same firm is *ABA Model Rule 1.5(e)*. Generally, *ABA Model Rule 1.5(e)* states that a division of fees between lawyers not in the same firm may only be made if the division is proportional to the services performed by each lawyer[5], the client confirms the terms of the agreement in writing and the total fee is reasonable. When forming a special counsel relationship, the special counsel is typically considered a member of the same firm for purposes of fee sharing. Therefore, the requirements of *ABA Model Rule 1.5(e)* do not apply.[6] While lawyers may appreciate the business benefit provided by the circumvention of *ABA Model Rule 1.5(e)*, they must weigh this benefit against the other obligations and restrictions that go along with a special counsel designation, as discussed below.

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5 If the division of fees is not proportional then each lawyer must assume joint responsibility for the representation.

6 *Cf. Arizona Op. 16-01* (2016), *New York City Ethics Op. 1996-8* (1996), *Ohio Supreme Court Ethics Op. 2004-11* (2004), *Restatement (Third) of the Law Governing Lawyers* sec. 47 cmt. G (2000).

Advertising

A firm that has a relationship with a special counsel must consider the manner in which they market that relationship, whether through digital media or a standard letterhead. Generally, the ethical rules implicated are *ABA Model Rules 7.1: Communications Concerning a Lawyer's Services* and *ABA Model Rule 7.5: Firm Names and Letterheads*. *ABA Model Rule 7.1* prohibits "false or misleading communications about [a] lawyer or the lawyer's services." *ABA Model Rule 7.5* prohibits the use of "a firm name, letterhead or other professional designation that violates *ABA Model Rule 7.1*." Therefore, whatever special counsel designation is used, the attorney listing must be sufficiently detailed in order to notify consumers of the nature of the relationship.

In addition to notifying the public of the nature of the special counsel relationship, firms also must be scrupulous in expressly stating any jurisdictional limitations if the special counsel practices in a different jurisdiction from the firm.[7] Moreover, out-of-state attorneys on both sides of the special counsel relationship (where authorized) must limit their representations to only the jurisdictions in which they are licensed to avoid the unauthorized practice of law.[8]

When conducting conflict checks, law firms in special counsel relationships should consider obtaining the potential client's consent to disclose sufficient information to the other firm.

Conflicts of Interest

When a lawyer or firm is special counsel to a firm, the parties must continue to act in accordance with all rules of professional conduct including conflicts of interest. Pursuant to *ABA Model Rule 1.10: Imputation of Conflicts of Interest: General Rule*, when a lawyer becomes special counsel to a firm, all conflicts are imputed from the lawyer to the firm and similarly, from the firm to the lawyer.[9] This imputation cannot be avoided by screening the lawyer from other cases within the firm on which the special counsel is not working, unless screening is otherwise permitted by state rules. Therefore, conflicts checks for all new matters for both entities must be cleared by both the firm and the special counsel. It is not sufficient to run a conflicts check solely pertaining to the matters on which both entities are jointly representing clients. For conflicts purposes, in other words, once the relationship is formed the entities are in for a penny in for a pound.

If a firm decides to form a special counsel relationship, then the firm should begin the relationship with an initial conflicts clearance in a manner analogous to its management of a lateral hire. Some opinions recommend disclosing the "of counsel" relationship in an engagement letter, while others require doing so.[10] When conducting conflict checks, law firms in special counsel relationships also should consider obtaining the potential client's consent to disclose sufficient information to the other firm in order to perform a thorough conflicts check.[11]

Accordingly, firms have two choices when it comes to affiliating with external lawyers. First, they can continue working as independent firms through a co-counsel, retained counsel, or contract counsel relationship in which case their fee-sharing must be done in accordance with *ABA Model Rule 1.5(e)*. Alternatively, they can form a special counsel relationship in which case they may keep fee-sharing confidential but, in turn, must accept the imputation of joint firm conflicts.

7 *Cf. California Ethics Op.* 1993-129 (1993) (if California firm lists out-of-state firm as "of counsel," it should identify limitations to avoid being misleading), *Missouri Informal Ethics Op. 20010080* (2001) (out-of-state special counsel to Missouri firm must not enter Missouri and engage in the conduct that constitutes unauthorized practice of law).

8 *Rhode Island Ethics Op. 90-20* (1990) (Rhode Island lawyer who is of counsel to out-of-state firm may not staff office in Rhode Island), *Kansas Ethics Op. 08-01* (2008) (out-of-state special counsel may advise Kansas firm's clients from special counsel's office "on a temporary basis," but if Kansas meetings are "substantial or continuous" then special counsel would be required to seek Kansas license).

9 *Restatement (Third) of the Law Governing Layers Section 123, Comment c(ii)* (2000) states that the rule of imputation ordinarily applies due to the association of lawyers who are of counsel.

10 *Cf. Philadelphia Ethics Op. 2001-5* (2001) and *South Carolina Ethics Op. 10-06* (2010).

11 *Ohio Supreme Court Bd. Of Comm'rs on Grievances & Discipline, Op. 2014-4*, 12/12/2014.

Confidentiality

Law firms affiliated through a formal special counsel relationship also must take steps to preserve confidentiality of client files. While it may seem intrusive, the law firms should engage in due diligence to confirm that the special counsel firm's practice meets the law firm's own security standards. This is a necessary step in today's digital legal environment. Firms should thus ensure that their file sharing and communications, as well as that of their special counsel, comply with their state requirements for technology usage. Recent guidance on this topic was recently issued in *ABA Formal Opinion 477R* (May 22, 2017), which provides guidance on securing communications of protected client information.

Vicarious Liability

ABA Model Rule 5.1(c) limits an attorney's responsibility for another lawyer's misconduct to circumstances where the attorney knew about the misconduct, either ordered or ratified it, or knew of the conduct at a time when its consequences could have been avoided or mitigated, but failed to take reasonable remedial action. Accordingly, a law firm and the special counsel will generally not be liable for one another's misconduct unless they are jointly responsible for such matters. Nevertheless, if the special counsel is planning to handle cases independently of the special counsel relationship with the firm, then the special counsel must procure a separate lawyers professional liability policy to cover acts and omissions in the course of those independent matters.

Conclusion

To meet the demands of today's legal market, law firms may turn to special counsel relationships to better serve their clients. While the relationship may make good business sense, firms must ensure that the related professional obligations and potential risks associated with such relationships are addressed.

This article was authored for the benefit of CNA by:
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