

In this hypothetical, a solo practitioner, the sole member of a professional limited liability company (PLC), who specializes in federal and state income taxes and complex business and real estate transactions wishes to formalize his relationship with a law firm that he works with frequently. Currently, the firm associates him as co-counsel in cases that require his expertise, and he associates with the firm or outright refers it cases that involve litigation or commercial real estate transactions.

The parties wish to modify and formalize their arrangement as follows:

1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either “Of Counsel” or “Affiliated Attorney;”
2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as “Of Counsel” or “Affiliated Attorney,” rather than his PLC, and the lawyer will not enter into this arrangement with more than two firms at any time;
3. When the firm and the lawyer act as co-counsel on a matter, they will provide a joint bill to the client, accompanied by separate invoices of their individual fees and expenses;
4. When the involvement is an outright referral, the referring firm will receive a referral fee, which will comply with Rule 1.5(e); and
5. Other than these specific matters, neither the firm nor the lawyer will communicate or reveal confidences or secrets of any other clients or permit access to any documents or databases that would jeopardize other clients’ confidences or secrets.

QUESTIONS PRESENTED

1. Other than matters on which the firms are co-counsel, are any other clients of the firm deemed to be clients of the solo practitioner for conflicts of interest and other purposes?
2. Other than matters on which the firms are co-counsel, is the referring firm responsible for ethical breaches that may arise in the receiving firm’s representation, and are clients that are referred from the solo practitioner to the firm considered to be clients of the solo practitioner for conflicts of interest and other purposes?
3. If the fee arrangement complies with Rule 1.5(e) (including client disclosure), is joint marketing referring to the solo practitioner as either “Of Counsel” or “Affiliated Attorney” permissible?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.5(e)¹, Rule 1.10(a)², Rule 5.1(c)³ and Rule 7.5(d).⁴ Relevant legal ethics opinions are 1293, 1554, 1712, 1735 and 1850, along with ABA Formal Opinions 330 (1972) (withdrawn 1990) and 90-357 (1990).

¹ Rule 1.5 Fees

ANALYSIS

In order to answer your specific inquiry, the Committee must first review and refine the principles applicable to the “of counsel” relationship. The Committee has consistently defined the “of counsel” relationship as a close, continuing, and personal relationship between a lawyer and a firm that is not the relationship of a partner, associate, or outside consultant. The relationship must involve some element of the practice of law, and cannot be limited to a pure business affiliation; the “of counsel” may not simply be a forwarder or receiver of legal business to or from the firm.

The “of counsel” designation is commonly used to describe several different types of relationships, including a retired partner of the firm who continues to be associated with the firm and available for consultations either with members of the firm or with clients directly, a part-time practitioner who has a different status than other members of the firm, such as a retired judge or former government official, or regular employees of the firm who occupy a status between partner and associate (typically lawyers who are too experienced to be considered associates, but who are not going to become partners for lifestyle or practice reasons). All of these uses of the term are permissible, since each arrangement involves a close, continuing relationship with the firm.

The term is also commonly used in a way that is not permissible: to describe the relationship between a lawyer or firm and a national law firm that solicits cases throughout the country and then makes geographically-based referrals to its designated lawyer or firm in each

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the client is advised of and consents to the participation of all the lawyers involved;
 - (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
 - (3) the total fee is reasonable; and
 - (4) the division of fees and the client’s consent is obtained in advance of the rendering of legal services, preferably in writing.

² Rule 1.10 Imputed Disqualification: General Rule

- (a) 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 1.6, 1.7, 1.9, or 2.10(e).

Comment [1] explains, “Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the 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 information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.”

³ Rule 5.1 Responsibilities of Partners and Supervisory Lawyers

- (c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:
- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

⁴ Rule 7.5 Firm Names and Letterheads

- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

state. In this case, it is not appropriate for the lawyer to be designated as “of counsel” to the national law firm, because the relationship consists only of forwarding/receiving business and there is otherwise no relationship between the lawyer and the national firm.

Accordingly, a lawyer who is “of counsel” to a firm is associated with that firm for the purposes of the Rules of Professional Conduct, including the fee-sharing and conflict of interest rules. Rule 1.5(e) addressing fee-sharing between lawyers not in the same firm does not apply to the firm’s relationship with a lawyer serving as “of counsel.” When a lawyer becomes of counsel to a firm, all conflicts are imputed from the lawyer to the firm and vice versa. This imputation cannot be avoided by screening the lawyer from other cases in the firm or otherwise limiting the information available to him; Rule 1.10(a) provides for an absolute imputation of conflicts between lawyers who are currently associated in a firm.

Applying these general principles to the hypothetical situation presented, it is clear that the lawyer and firm may *either* have an occasional relationship in which conflicts are not imputed beyond specific cases and fee-sharing must be done in accordance with Rule 1.5(e), or the lawyer may become “of counsel” to the firm, which would impute all conflicts of the firm to the lawyer. Once the lawyer and the firm begin to hold the lawyer out as “of counsel” to the firm, conflicts will be imputed between the two regardless of whether the lawyer actually has any information about the clients of the firm or vice versa. However, the lawyer also cannot avoid the imputation of conflicts merely by refusing the title “of counsel;” if the lawyer holds himself out to potential clients as being closely associated with the firm, or if he in fact is closely and regularly associated with the firm, then conflicts will be imputed to him regardless of the title he uses. Likewise, Rule 7.5(d) permits the lawyer and firm to describe their relationship as an “of counsel” relationship if that is the case.

In order to avoid association with the firm for conflicts purposes, the firm may limit the lawyer’s relationship to that of an independent contractor, sharing fees with the firm pursuant to Rule 1.5(e), and working on specific matters in which the firm’s clients require his specialized skills with each client’s consent to the lawyer’s participation at the outset of the representation. This relationship must remain limited though, in order to avoid imputation of conflicts. If the relationship between the lawyer and the firm is limited in this way, then the lawyer and firm would apply the analysis of LEOs 1712, 1735, and 1850, governing lawyer temps and other forms of “outsourcing” of legal services, in determining whether and to what extent the lawyer would be considered to be associated with the firm for conflicts purposes. For example, if the lawyer’s access to information is restricted solely to those matters on which he or she is working on a temporary or occasional basis, the lawyer would not be considered associated with the firm for conflicts purposes.

Although conflicts would be imputed between the firm and any lawyer who is “of counsel” to that firm, the lawyer and firm would not generally be liable for one another’s ethical misconduct on cases that they were not handling together. Rule 5.1(c) limits a lawyer’s responsibility for another lawyer’s ethical misconduct to circumstances where the lawyer knew about the other lawyer’s conduct and either ordered or ratified it, or was in a supervisory position over the other lawyer and failed to take remedial actions. When the “of counsel” lawyer and the firm are not working together on cases, neither the lawyer nor the firm is supervising or directing the other’s behavior, and generally will not be aware of one another’s actions. There would therefore be no basis for holding the lawyer or the firm responsible for one another’s actions when they are not associated on a particular case.

This opinion is advisory only and is not binding on any court or tribunal.