Ethical "of counsel" associations

Based on several recent calls to our ethics hotline, it appears that many Minnesota attorneys are interested in understanding the ethics rules involved when "associating" with another lawyer or law firm as a means to grow a practice or expand the legal services available to clients. Some use the term "of counsel" to describe this association; others consider the term old-fashioned and prefer variants like special counsel, associated counsel, or affiliated counsel. The term can refer either to an individual with whom you associate or to a law firm. While the term can refer to an employee relationship, I will focus on the use of the term to describe non-employee relationships.

The starting point

Minnesota's ethics rules do not define, or specifically mention, the term "of counsel" or its variants. The American Bar Association addressed the term "of counsel" and the types of relationships it's meant to cover in ABA Opinion 90-357. Pursuant to this opinion, the term is a professional designation denoting a "close, regular, and personal" relationship that is more than just a referral relationship, more than an occasional consulting relationship, and more than an association for one case. If you have such a close, regular, and personal relationship with another firm or attorney, you may ethically use the designation "of counsel" or similar variants.

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Conversely, though, if your association is less than close, regular and personal, your use of the designation "of counsel" or its variants may be false or misleading. As everyone knows, the cardinal rule of lawyer advertising is to ensure that all communications about yourself and your legal services are not false or misleading.[1] The ABA opinion provides that this type of relationship may be between individuals or law firms, and you can have associations with more than one lawyer or law firm simultaneously.

Fee-sharing

Rule 1.5(e) regulates the division of fees between lawyers who are not in the same firm. When you have the close, regular, and personal association described above, are you in the same firm for purposes of this rule? I think so, and so do many ethics opinions that have addressed this subject.[2] This position is consistent with the definition of law firm or firm in the rules: "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or *other association* authorized to practice law," and "if [lawyers] present themselves to the public in a way that suggests they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules."[3]

While you may choose to disclose to clients the division of fees with the "of counsel" firm or lawyer, you are not required to do so under Rule 1.5(e), but you would be if you do not have a close, regular, or personal relationship with the entity or individual with whom you are sharing fees. Remember, "of counsel" relationships should not be used to disguise a referral relationship to avoid—or because you cannot meet—the division of fee requirements of Rule 1.5(e). Finally, if you are sharing fees with an associated non-Minnesota lawyer or law firm, you should check the rules of the jurisdiction where that lawyer is located, as those ethics rules may differ.

Conflicts

Perhaps the most significant ethical consequence of this type of association is the imputation of conflicts for purposes of disqualification. Because you are being treated for purpose of the ethics rules as a "firm," Rule 1.10(a) provides that "[w]hile 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 Rule 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."[4]

Please keep this in mind when you are forming an association with another lawyer or law firm—your conflicts are imputed to them, and their conflicts are imputed to you. As part of forming this relationship, you must think through how you are going to detect and address potential conflicts. Note also that blanket screens and broad advance waivers generally do not solve this problem, because some conflicts cannot be consented to, and you usually cannot provide sufficient generic information in advance to obtain the informed consent needed to consent to specific conflicts.

Other considerations

If you are associating with law firms or lawyers not licensed in Minnesota, you should be sure to include jurisdictional limitations when communicating about the association or services being provided.[5] Similarly, some states, like Iowa, do not allow you to form "of counsel" relationships with attorneys not admitted in Iowa.[6] Obviously, you should also not suggest an "of counsel" or closer association if that is not in fact true ("Lawyers may state or imply that they practice in a partnership or other organization only when that is in fact true"[7]).

If you only associate occasionally, using terms that suggest a closer relationship is false and potentially misleading, and, as noted, should not be used to avoid fee-sharing disclosure requirements. Beyond the scope of this article, you should also think about how to minimize your potential vicarious liability for those with whom you are associated, as well as the implications of the association for your malpractice insurance; both are good questions for your malpractice carrier. Finally, if you are associating with a non-Minnesota law firm, you should look at the Professional Firms Act regarding the requirements for that foreign entity to register in Minnesota.[8]

Conclusion

I've enjoyed discussing with several lawyers the various ways in which they are looking to associate with others to grow their practice or expand the services they provide to clients. I also applaud the fact that calling for ethics advice was one of the first things they did! ▲

Notes

[1] Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).

[2] *See, e.g.,* Illinois State Bar Association Opinion No. 16-04 (October 2016); State Bar of Arizona Ethics Opinion 16-01 (April 2016); *But see* Professional Ethics of the Florida Bar Opinion 00-1 (April 20, 2000) (concluding that only if the "of counsel" attorney practices exclusively through the firm is the relationship exempt from the division of fees rules).

[3] Rule 1.0(d), MRPC; Rule 1.0, Cmt. [2].

[4] Rule 1.10(a), MRPC.

[5] Rule 7.5(b), MRPC.

[6] Iowa Ethics Opinion 13-01 (July 2013).

[7] Rule 7.5(d), MRPC.

[8] Minn. Stat. §319B.04 (2018).