E-93-1 Of counsel designation: Withdrawal of E-86-10 and E-86-4 and memo opinions 4/78 A and 6/77 D

Question

Under what circumstances may lawyers and law firms use the designation ''of counsel''?

Opinion

The committee withdraws Formal Opinions E-86-10 and E-86-4 and Memorandum Opinion 4/78 A and 6/77 D, and the committee adopts American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 90-357 as follows:

''The 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.

''In this opinion the Committee revisits the general subject of use of the title 'of counsel.' The subject was last comprehensively addressed by the Committee in Formal Opinion 330 (1972), and one or another aspect of the subject has also been addressed by the Committee in a number of informal opinions, both before and after Formal Opinion 330.[1] The reasons for considering yet again this much-visited subject are several. One is that there has been a proliferation of variants of the term 'of counsel,' and of arrangements that one or another such variant term has been used to designate, not all of which are addressed by the Committee's prior opinions. Another reason is that the Committee's prior opinions may be unjustifiably restrictive with regard to some relationships that are commonly designated by the term 'of counsel.' Finally, it is desirable to consider whether the supersession of the ABA Model Code of Professional Responsibility (1969, amended 1980) by the ABA Model Rules of Professional Conduct (1983, amended 1989) warrants any modification of the Committee's previously announced views, all of which had reference solely to the Model Code or to its predecessor, the Canons of Professional Ethics.

''To address the last question first, it is the Committee's conclusion that there have been no changes involved in the transition from Model Code to Model Rules that have any substantive effect on the use of the term 'of counsel.' The Model Code included a specific reference to the title 'of counsel' in DR 2-102(A)(4), relating to letterheads, and the term does not appear in the Model Rules; but there is no substantive significance to this difference. Moreover, the textual basis in both the Model Rules and the Model Code for determining whether particular uses of the title are or are not ethically permissible is in substance the same—a prohibition against misleading representations—although the particular provisions embodying this prohibition are different in form. Model Rule 7.5(a) provides, in part, that '[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1'; and the latter Rule states in part that '[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.' Similarly, DR 2-101(A) of the Model Code provides that '[a] lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive . . . or unfair statement or claim'; DR 2-102(B) provides that '[a] lawyer in private practice shall not practice under a . . . name that is misleading as to the identity of the lawyer or lawyers practicing under such name'; and EC 2-13 states that '[i]n order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status.' The essence of the ethical requirement under both the Model Rules and Model Code is avoidance of misrepresentations as to the lawyer's status, and the relationship between lawyer and firm.

''Of present concern are the representations implied by the use of the title 'of counsel' on letterheads, law lists, professional cards, notices, office signs and the like: that is, its use in circumstances where there is a holding out to the world at large about some general and continuing relationship between the lawyers and law firms in question. 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 such 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.[2]

''The issues that have been addressed in the Committee's previous opinions and that will be revisited here are, generally speaking, of two kinds, relating respectively to defining the relationship among lawyers and firms that the title

'of counsel' is properly understood to evoke, and to identifying the resulting ethical implications of and limitations on its use.

''As to the meaning of the title, it is appropriate to note preliminarily that, although 'of counsel' appears to be the most frequently used among the various titles employing the term 'counsel' it is by no means the only use of that term to indicate a relationship between a lawyer and a law firm. Other such titles include the single word 'counsel' and the terms 'special counsel,' 'tax [or other specialty] counsel' and 'senior counsel.'[3] It is the Committee's view that, whatever the connotative differences evoked by these variants of the title 'counsel,' they all share the central, and defining, characteristic of the relationship that is denoted by the term 'of counsel,' and so should all be understood to be covered by the present opinion. That core characteristic properly denoted by the title 'counsel' is, as stated in Formal Opinion 330, a 'close, regular, personal relationship'; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term 'associate,' which is to say a junior non-partner lawyer, regularly employed by the firm.[4]

''This core characteristic of the title 'counsel' is shared by several kinds of relationships that in other respects vary in significant ways. There appear to be four principal patterns of such relationships, all of which in the Committee's view are properly referred to by the title 'of counsel' (or one of its variants). Perhaps the commonest of such relationships is that of 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. Such part-time practitioners are sometimes lawyers who have decided to change from a full-time practice, either with that firm or with another, to a part-time one, or sometimes lawyers who have changed careers entirely, as for example former judges or government officials. A second common use of the term is to designate a retired partner of the firm who, although not actively practicing law, nonetheless remains associated with the firm and available for occasional consultation. A third use of the term is to designate a lawyer who is, in effect, a probationary partner-to-be: usually a lawyer brought into the firm laterally with the expectation of becoming partner after a relatively short period of time. A fourth, relatively recent, use of the term is to designate a permanent status in between those of partner and associate—akin to the category just described, but having the quality of tenure, or something

close to it, and lacking that of an expectation of likely promotion to full partner status.[5]

''In the Committee's view, the 'of counsel' designation, or one of its variants, is appropriately applied to any of the four kinds of relationships just described. Prior opinions of the Committee may, however, be read as finding the term inapplicable to one or more of these relationships. For example, Formal Opinion 330 states that the relationship implied by 'of counsel' would not be that of an employee of the firm, yet both the third and fourth of the relationships identified in the preceding paragraph involve, as a technical matter, the status of an employee. Insofar as Formal Opinion 330 may be read to conclude that neither the probationary partner model nor the permanent between-partner-and-associate model are permissibly designated of counsel, that conclusion is disavowed. Additionally, Formal Opinion 330 may be read as limiting the permissible use of the term 'of counsel' by retired partners of a firm, because of possible implications from language in that opinion that an of counsel lawyer must be compensated for such legal work as the lawyer does, but only for that legal work—which, if strictly read, would exclude both a retired partner whose sole income from the firm is the partner's pension or other retirement benefit and counsel who share in some degree in the firm's profits. *See also* Informal Opinion 710. It is the Committee's view that, the other conditions just described having been met, it is not relevant to the permissibility of use of 'of counsel' what the compensation arrangements are.[6] Similarly, some retired partners might be deemed to be excluded by the suggestion in Formal Opinion 330 that an of counsel's relationship to the firm must be 'so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm' (citing Informal Opinion 1134). Again, insofar as Formal Opinion 330 carries any implication that the contact must be so frequent as to verge on daily, the Committee now disavows it.

''Nonetheless, the Committee remains of the view, as stated in earlier opinions, that it is not ethically permissible to use the term 'of counsel' to designate the following professional relationship: a relationship involving only an individual case, *see* Informal Opinion 678, Formal Opinion 330;[7] a relationship of a forwarder or receiver of legal business, *see* Formal Opinion 330; a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms, *see id.*; and the relationship of an outside consultant, *see id.*

''The characteristic of continuing and frequent professional contact bears particular emphasis in the context of use of the variant of the term 'of counsel' that indicates a field of concentration: 'tax counsel,' 'antitrust counsel' and the like. Such terms, although in the Committee's view as permissible as other variants of the term 'counsel,' must like them be confined to relationships that in fact involve frequent and continuing contacts, and not merely an availability for occasional consultations.[8] There is, moreover, in the term designating a specialty, a clear representation that the of counsel lawyer in fact has a special expertise in the designated area; and, for the firm, that it also has, by reason of the of counsel relationship, that special expertise.[9] It bears emphasis also that the use of a title indicating a specialty counsel, like the other uses here discussed, involves mutual attribution of all disqualifications of both the lawyer and the firm—and not just attribution with respect to matters falling within the designated area of specialty.

''The Committee's previous opinions have expressed the view that a lawyer cannot properly be of counsel simultaneously with multiple firms, because the necessary 'close, regular, personal relationship' cannot exist on a plural basis. Thus, the Committee's initial view, expressed in Informal Opinion 1173, was that a lawyer could not be of counsel to more than a single firm; this was modified in Formal Opinion 330 to set a limit of two firms. On further consideration, the Committee finds the conclusion it reached on this subject in Formal Opinion 330 to be a doubtful one. The proposition that it is not possible for a lawyer to have a 'close, regular, personal relationship' with more than two lawyers or law firms is not a self-evident one. A lawyer can surely have a close, regular, personal relationship with more than two clients; and the Committee sees no reason why the same cannot be true with more than two law firms. There is, to be sure, some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two, but the controlling criterion is 'close and regular' relationships, not a particular number. As a practical matter, nonetheless, there is a consideration that is likely to put a relatively low limit on the number of 'of counsel' relationships that can be undertaken by a particular lawyer: this is the fact that, as more fully discussed below, the relationship clearly means that the lawyer is 'associated' with each firm with which the lawyer is of counsel. In consequence there is attribution to the lawyer who is of counsel of all the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm of each of those disqualifications. *See* Model Rule

1.10(a). In consequence, the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.

''The Committee has also previously held that a *firm* cannot be of counsel to another lawyer or law firm, *see* Informal Opinion 1173; Formal Opinion 330. The reasoning here was that the term connotes an individual rather than a firm. This may be still so as a matter of current usage,[10] but semantics aside, the Committee's prior opinions do not suggest, and the Committee does not now perceive, any reason that a firm should not be of counsel to another firm. Moreover, the Committee held in Formal Opinion 84-351 (1984) that two law firms could ethically present themselves as 'affiliated' or 'associated' with each other, and in Informal Opinion 1315 (1975), the Committee gave its approval to arrangements whereby two firms effectively became 'of counsel' to each other by each designating a partner of the other firm as 'of counsel' to itself. As with multiple of counsel relationships of a single lawyer, the relationships between firms addressed in Formal Opinion 84-351 and Informal Opinion 1315 would of course entail complete reciprocal attribution of the disqualifications of all lawyers in each firm.

''A final issue regarding permissible use of the title 'of counsel' is presented by the question whether the name of a lawyer who is of counsel may also be included in the name of the firm to which the lawyer is of counsel. This question may arise in two different sorts of circumstance, which in the Committee's view lead to two different results. The first is where a name partner in a firm retires from active practice and, as is of course permissible, the firm retains the lawyer's name in the firm name, *see* Model Code DR 2-102(B), *cf.* Model Rule 7.5(a) and Comment; but the retired partner also assumes of counsel status of the sort that has been described above. The second is a situation where the affiliation is altogether new, and where although the lawyer lends his or her name to the firm, the lawyer is not undertaking the responsibilities of a partner or principal.

''The issue raised by both of these circumstances is whether they entail implicit representations to the public that are misleading. The Committee believes that in the case of a new or recent firm affiliation there is no escaping an implication that a name in the new firm name implies that the lawyer is a partner in the firm, with fully shared responsibility for its work. On the other hand, the Committee also believes that there is not a similar misleading implica-

tion in the use of a retired partner's name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized.[11]

''To turn from consideration of the circumstances where use of the titles under discussion is or is not proper and address the ethical implications of and limitations on their use, the most important implication has already been adverted to. There can be no doubt that an of counsel lawyer (or firm) is 'associated in' and has an 'association with' the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules and the imputation of disqualifications resulting from former government service under Rules 1.11(a) and 1.12(c); and is a lawyer *in* the firm for purposes of Rule 3.7(b), regarding the circumstances in which, when a lawyer is to be a witness in a proceeding, the lawyer's colleague may nonetheless represent the client in that proceeding. Similarly, the of counsel lawyer is 'affiliated' with the firm and its individual lawyers for purposes of the general attribution of disqualifications under DR 5-105(D) of the Model Code. *See* Formal Opinion 330; Formal Opinion 84-351.

''An additional ethical consequence of the relationship implied by the term 'of counsel' is that in any listing, on a letterhead, shingle, bar listing or professional card, which shows the of counsel lawyer's name, any pertinent jurisdictional limitations on the lawyer's entitlement to practice must be indicated. *See* Model Rule 7.5(d); Model Code DR 2-102(D).''

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[1] Informal Opinion 678 (1963), Informal Opinion 710 (1964), Informal Opinion 1134 (1969), Informal Opinion 1173 (1971), Informal Opinion 1189 (1971), Informal Opinion 1246 (1972), Informal Opinion 1315 (1975) and Informal Opinion 84-1506 (1984). The present opinion supersedes both Formal Opinion 330 and the referenced informal opinions that preceded it, and those opinions are hereby withdrawn.

[2] The distinction between use of the term ''counsel'' on the filings in a particular case on the one hand, and in general announcements implying a continuing relationship on the other, is significant because, as discussed below, its use in the latter connection is improper when it rests on no more than collaboration in a single case. See note 7 below and accompanying text.

[3] This opinion does not endeavor to address other terms of similar import that do not include the word counsel, such as ''consultant,'' ''consulting attorney'' and ''corresponding attorney.''

[4] Formal Opinion 330 relied in part on the one passage in the Model Code that comes close to providing a definition of the term, DR 2-102(A)(4), which provides in part that ''A lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate.''

[5] Other terms sometimes used to designate this status are ''senior attorney'' and ''principal attorney.''

[6] The Committee expresses no view, however, on whether an arrangement under which the of counsel lawyer shares in the profits of the firm may expose the lawyer to malpractice liability as a partner.

[7] The reference here is not to the appearance of a lawyer or firm on the court filings of a particular case, but rather to representation of an ''of counsel'' relationship on firm letterhead, professional cards and the like on the basis of collaboration on a single case. See text at note 2 above.

[8] The use of such terms may also be subject to ethical provisions of a particular jurisdiction limiting the use of terms designating specialization. See Model Rule 7.4(c).

[9] As on other points mentioned in this opinion, the Committee expresses no view as to the malpractice liability implications of such a representation of special expertise.

[10] It may be noted that firms are quite conventionally identified as of counsel to other lawyers or firms on the signature page of court filings.

[11] The Committee does not express a view as to whether, when the retired partner's name remains included in the firm name, the retired partner may on that account be exposed to malpractice liability as if he or she were still a general partner.

