NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 936 (9/21/12)

Topic: Designation of departing former name partner, who is taking an in-house counsel position, as "Special Counsel" on letterhead.

Digest: Whether a law firm may designate a departing name partner as "Special Counsel" after removing his name from the firm name depends on the level of his continuing involvement with the firm and its clients.

Rules: 1.10(a) & (e), 7.1(a), 7.5(a)

FACTS

1. One of the founding name members of the inquiring lawyer's firm recently left to take a position as in-house counsel to a regional hospital center. The firm has changed its name by eliminating the name of the departing attorney. The firm would, however, like to list the departing attorney's name on the firm's letterhead. The inquirer states that the departing attorney's relationship to the firm remains "sufficiently robust and close to justify including him on the letterhead with an appropriate footnote."

2. Specifically, the inquirer states that the departing attorney will continue to do meaningful, substantive work through the firm, but only for certain firm clients with whom he had developed a close relationship during his tenure as a member of the firm, and only at their request for his involvement. The departing attorney will not provide legal services through the firm in any other cases. Thus, he will not provide legal services through the firm to clients with whom he did not develop a close relationship, and will not provide legal services to a firm client with whom he did develop a close relationship unless that client has requested his involvement.

3. When the departing attorney provides legal services through the firm, he will consult directly with the client and bill for his services through the firm. The firm will retain 10% of the amount billed for the departing attorney's time, and the remainder will be paid to the departing attorney. The departing attorney (1) will not have access to firm files for any clients other than those with whom he had a prior close relationship and who request his further involvement, (2) will not have an office at the firm, and (3) will not participate in firm management decisions.

4. The inquiry claims that an "Of Counsel" relationship "is a close, regular, personal relationship implying broader access to general firm files, general availability of the attorney to firm clients, and more involvement in day-to-day affairs of the firm than will be present here." Thus the firm will not designate the departing partner as being "Of Counsel," but instead proposes to designate him as "Special Counsel" with a further explanation.

QUESTION

5. May the inquirer's firm designate the departing partner as "Special Counsel" on its letterhead and include one of the following two explanations in a footnote:

> Alternative 1: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm.")
>
> Alternative 2: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm. He is currently General Counsel for [Name of institution] Hospital Health Center.")

OPINION

6. The New York Rules of Professional Conduct (Rules) do not explicitly address use of the term "Special Counsel," but do address use of the term "Of Counsel." Rule 7.5(a) provides in pertinent part:

> "A lawyer or law firm may use … letterheads … provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following: ….
>
> > "(4) …. A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate."

7. While Rule 7.5(a)(4) on its face broadly includes any "continuing relationship," this term has been interpreted to require a certain threshold level of involvement. "An of counsel relationship is one in which the of counsel lawyer is available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 853 (2011) (citation and internal quotes omitted); N.Y. State 793 (2006); N.Y. City 1995-8 (noting that term "continuing relationship" has been characterized for purposes of this provision as a "close, regular, personal relationship" other than that of partner or associate).

8. Several variations of the term "Of Counsel," including "Special Counsel," have come into use by law firms.[1] The meanings of these various terms are similar and for practical purposes may be indistinguishable. One ethics committee has opined that while there may be "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,'" which is

[1] "[A]lthough '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.'" ABA 90-357.

"a close, regular, personal relationship" which is neither that of a partner nor that of an associate. ABA 90-357. One treatise indicates that "counsel" and "of counsel" are terms that "should be considered synonymous," and 'special counsel' may also mean about the same thing, though sometimes it refers to a lawyer who is associated with the firm only for a particular type of matter." *Simon's New York Rules of Professional Conduct Annotated* 1205 (2012 ed.).

9. "Of counsel" and other designations of professional status must not be used in misleading ways. Rule 7.5(a) explicitly provides that use of such designations is subject to Rule 7.1. A provision in the latter rule prohibits a lawyer or law firm from disseminating advertising that contains statements or claims that are false, deceptive or misleading. Rule 7.1(a)(1).

10. Rule 7.1 would apply to this inquiry only when letterhead is used in a communication that constitutes an "advertisement" as defined by Rule 1.0(a). But there are also more general rules governing use of misleading statements.[2] Although Rule 7.5(a) is written in the permissive terms of a safe harbor, we do not believe it serves to allow professional designations that would otherwise violate these more general rules just because the designations are not used in advertising. Ethics committees have set forth criteria for use of particular designations such as "of counsel" so as to avoid the risk of misleading the public.[3] There is no apparent reason to limit that purpose and those criteria to the context of advertising. *See* Rule 7.5, Cmt. [1] ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status").

11. The inquiry before us posits that the departing lawyer's ongoing new relationship to the firm "is sufficiently robust and close" to justify including him on the letterhead as a "Special Counsel," but not so extensive as to allow his designation as "Of Counsel." More particularly, the inquiry points to three factors claimed to be essential to an Of Counsel relationship. The inquiry argues that this terminology implies "[1] broader access to general firm files, [2] general availability of the attorney to firm clients, and [3] more involvement in day-to-day affairs of the firm than will be present here." We do not adopt this analysis, as it does not completely follow the established principles set forth above.[4]

12. What is essential is that the Of Counsel lawyer be available to the firm for consultation and advice on a regular and continuing basis. This standard is necessarily a matter of degree.

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[2] *See* Rule 4.1 (in course of representing a client, lawyer shall not make a false statement of fact to a third person) & Cmt. [1] (a misleading statement or omission can constitute a misrepresentation); Rule 8.4(c) (lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

[3] Such criteria protect against misleading marketing. "Otherwise, law firms could raise the price of their stock (so to speak) by listing a famous lawyer or retired judge or public official as 'of counsel' even though the 'of counsel' lawyer had little or nothing to do with the firm." *Simon's New York Rules of Professional Conduct Annotated* 1204 (2012 ed.).

[4] The inquirer's analysis purports to distinguish between terms that are extremely close, if not identical, in meaning. We believe that a relationship close enough to justify a "Special Counsel" designation would generally also justify a designation that the lawyer is "Of Counsel." Moreover, we doubt that any fixed set of a few factors will answer the question whether a relationship is sufficiently close, regular and personal as to justify any form of "counsel" designation.

See N.Y. State 853 ¶¶ 8-9 (2011) (opining that lawyer who "minimizes" his participation in a firm would not qualify as Of Counsel if he works "full time" as in-house lawyer at a corporation). As applied to the current inquiry, the standard will turn in part on how many clients use the services of the departing lawyer, and to what extent.

13. If the departing lawyer is expected to, and ultimately does, represent a number of former clients in multiple matters on an ongoing basis, that might well justify designating him, on letterhead and otherwise, as Of Counsel (or if the firm wishes, Special Counsel, with or without an explanatory footnote). On the other hand, if the departing lawyer is expected to, and ultimately does, represent only a few former clients in a small number of matters or in very limited ways, then designation as Special Counsel could well be impermissibly misleading. *See* N.Y. State 853 (2011); N.Y. State 262 (1972) (if relationship only existed for one particular case, "of counsel" designation on letterhead would be misleading "even though the case might be of great importance and over an extended period of time"). To give an extreme example, it would be misleading for the departing lawyer to maintain a "counsel" designation if, during the first year of the arrangement, no clients at all used his services and his relationship with the firm were purely theoretical.[5]

14. Accordingly, the term "Special Counsel" is permissible only if the departing lawyer's actual practice includes the regular and continuing level of consultation and advice for the firm and its clients that is necessary to justify a "counsel" designation. This conclusion does not depend on compensation arrangements, *see* ABA 90-357, or on whether the firm explains the departing lawyer's relationship to the firm in a footnote. If the departing lawyer meets "counsel" standards, then the firm may use the "Special Counsel" designation and may explain his relationship in an accurate footnote if it wishes, but if he does not meet those standards, an explanatory footnote will not make such a designation permissible.

15. Finally, although the inquiry does not raise the question of imputed conflicts, we believe the issue merits discussion. When a lawyer would be prohibited from representing a client by virtue of certain kinds of conflicts, the prohibition also applies to other lawyers who are "associated in a firm" with the lawyer subject to the conflict.[6] The term "associated" is not defined in the Rules, and it does not apply to all lawyers who are in any way connected or related to the firm. N.Y. State 853 (2011). However, a lawyer with close enough connections to be Of Counsel to a firm is "associated" with that firm for purposes of the imputation rule. See N.Y. State 853 (2011); N.Y. State 793 (2006); N.Y. State 773 (1993); ABA 90-357; N.Y. City 1995-8; Restatement (Third), The Law Governing Lawyers § 123 cmt. c(ii).

16. Moreover, a lawyer who is held out to the public with the term "counsel" or one of its variants – whatever the level of the lawyer's actual involvement – is "associated" with the firm

[5] We understand that the number of matters handled may vary over time, and we are not suggesting that a firm is required to reevaluate a "counsel" designation every week or month. The firm may rely on its long-term expectations, but may not indefinitely maintain a designation based on expectations not borne out in actual practice.

[6] Rule 1.10(a) states: "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 Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

for purposes of the imputation rule. *See* N.Y. State 793 (2006) (recognizing imputation when lawyer holds self out as having Of Counsel relationship and thus "conveys to the public that the lawyer has a continuing relationship with a firm that is close and regular"); *cf*. N.Y. State 807 (2007) ("A law firm may not denominate a lawyer as an associate and then take the position that the lawyer is not an associate for the purpose of imputation of conflicts of interest"). Because variants of the "counsel" formulation are essentially synonymous for ethical purposes, calling the attorney "Special Counsel" as opposed to "Of Counsel" does not change the effect of the designation in imputing conflicts.

17. When two law firms are associated with the same lawyer, they are considered the same firm for conflicts purposes. The legal department of a corporation is considered a law firm, *see* Rule 1.0(h), and is therefore subject to this rule like any other firm. Accordingly, "the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e)." N.Y. State 853 (2011).

18. In some circumstances, conflicts that would personally disqualify an "of counsel" lawyer from undertaking or continuing a particular representation would not necessarily result in disqualification of the entire law firm from litigation. *See Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005). In that opinion, after noting ethics opinions suggesting a *per se* rule imputing conflicts between law firms and their Of Counsel attorneys, the Second Circuit rejected such a *per se* rule for disqualification purposes. For those purposes it adopted a more flexible standard that had been applied in a different context by N.Y. State 715 (imputation of conflicts for contract lawyers "depends on the facts and circumstances of the employment"). This approach to disqualification has been followed in other cases as well.[7]

19. Judicial reluctance to disqualify an entire firm based on imputation of an Of Counsel lawyer's conflict of interest, however, is not inconsistent with our view that such a lawyer's conflicts are always imputed to an entire firm under Rule 1.10(a). Courts considering disqualification motions may have reason to consider whether a conflict violates the Rules, but they may also have reason to consider other factors such as delay, public confidence, increased expense, fairness to the parties, entitlement to choose counsel and the prospect of abusive disqualification motions. Given the availability of procedures for professional discipline, courts have found no need to deal with all ethical violations "in the very litigation in which they surface." *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). Under this approach, while decisions on disqualification motions may benefit from "general guidance" offered by state disciplinary rules, "not every violation of a disciplinary rule will necessarily lead to disqualification" unless it "tends to taint the underlying trial." *Hempstead Video*, 590 F.2d at 132 (quoting *Nyquist*). Accordingly, under this approach, a conflict that does not warrant disqualification may nonetheless constitute a violation of the Rules.

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[7] *See Calandriello v. Calandriello*, 32 A.D.3d 450, 819 N.Y.S.2d 569 (2d Dep't 2006) (previous representation of defendant-husband by a matrimonial attorney now serving as "of counsel" to plaintiff-wife's firm would not justify disqualification of plaintiff wife's firm where, as "of counsel" to the plaintiff-wife's firm, the defendant-husband's prior attorney "did not perform any legal work for the firm or its clients, but merely had office space available to him in its New York office"); *Ciao-Di Restaurant Corporation v. Paxton 350, LLC*, 2008 WL 5582720 (Sup. Ct. N.Y. Co. 2008) (denying disqualification and adopting *Hempstead Video* rule).

20. Thus, an Of Counsel (or Special Counsel) relationship between a lawyer with a conflict and a firm may not always justify the firm's disqualification by imputation in litigation, but as a matter of legal ethics, imputation is required when the lawyer's conflict is one of the kinds specified in Rule 1.10(a). As a corollary, pursuant to Rule 1.10(e), a law firm that maintains a "counsel" relationship with a lawyer must check for conflicts with that lawyer and that lawyer's firm, and vice versa.

CONCLUSION

21. If the departing lawyer's continuing work for the firm rises to the level that the lawyer is available to the firm for consultation and advice on a regular and continuing basis, then the lawyer may be designated as Special Counsel on letterhead. In that case, the lawyer would be "associated" with the firm for purposes of imputation of conflicts of interest.

(18-12)