

Ethics Informational Packet

“Of Counsel”

Courtesy of
The Florida Bar
Ethics Department

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PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 00-1

April 30, 2000

A law firm may continue to use a firm name which contains the name of a former partner of the firm who has retired and become a traditional "of counsel" to the firm, by offering legal services only through the firm.

Opinions: 71-49, 75-41, 94-7, ABA Formal Opinion 90-357, Ohio Opinion 91-18; Michigan Opinion RI-90

A member of the Florida Bar has sought the Committee's guidance on the use a firm name. A partner in the law firm has become "of counsel" to the firm and will continue to represent clients at the firm's office. The firm would like to continue to include the "of counsel" attorney's name in the firm name.

Historically, the appellation "of counsel" designated a retired or semi-retired former partner who continued to be available to the firm. The present use of the term "of counsel" has broadened and can be used to identify an attorney who maintains a close, continuing relationship with a firm, but is neither a partner, an associate nor a shareholder. Opinions 71-49; 75-41; 94-7; ABA Formal Opinion 90-357. In addressing the application of the fee division rules to "of counsel" attorneys, the Committee has made a distinction between an attorney who is "of counsel" as the term was traditionally used, and an "of counsel" attorney who does not practice exclusively through the firm. Opinion 94-7. The Committee concluded that the rules governing the division of fees between attorneys who are not in the same firm apply to the division of fees with an "of counsel" attorney unless the "of counsel" attorney practices exclusively through the firm in the traditional sense of the word.

The Committee has previously considered a proposal to maintain a firm name which contains the name of a former partner who becomes "of counsel" to the firm. Opinion 71-49 concludes that, although a partner who withdraws from a firm to handle the firm's referred trial work at an adjacent independent office may be designated "of counsel" on the firm's letterhead, it would be misleading to continue to include the former partner's name in the firm name. This committee has not, however, addressed the continued use of a firm name that includes the name of a former partner who continues to work at the firm under the traditional use of the term "of counsel." Ethics committees that have considered this issue have found that it is not misleading to include a partner's name in a firm name when the partner retires and becomes "of counsel." ABA Formal Opinion 90-357; Ohio Opinion 91-18; Michigan Opinion RI-90. Both the Ohio and the Michigan opinion require that the firm's name be established and recognized. This committee agrees with those opinions and further requires that the retired partner be "of counsel" in the historical sense, working exclusively through the firm, and that the designation "of counsel" appear with the attorney's name on the firm's letterhead.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 94-7

April 30, 1995

An attorney who is "of counsel" to a law firm is considered to be a member of that firm for purposes of the fee-division rules only if that attorney practices through that firm exclusively.

RPC: 4-1.5(f)(4)(D)(iii); 4-1.5(g)

Opinions: 71-49, 72-29, 75-41; ABA Formal 90-357, Arizona 86-3; California 1986-88; District of Columbia 151 and 197; New Jersey 476; Maryland 87-37

The Professional Ethics Committee has been asked to address two inquiries concerning the division of fees between an "of counsel" attorney and a law firm:

1. A former partner in a law firm is "of counsel" to the firm. The attorney has scaled back his practice, but will continue to practice through the firm. The attorney will not practice law at any other firm. The attorney requests an opinion whether the fee division rules apply to his compensation from the firm.
2. A law firm has inquired whether the fee division rules govern the division of fees between the law firm and an attorney who is "of counsel" when the firm refers a personal injury case to the "of counsel" lawyer. The "of counsel" attorney has an independent practice, although the attorney spends some time working out of the inquiring firm's office. This attorney too requests an opinion concerning the applicability of the fee division rules in this situation.

Traditionally the term "of counsel" was used to designate a semi-retired lawyer who was formerly a regular member of the law firm. Opinion 72-29. The permissible use of the term has since been expanded to include a lawyer who maintains a close, continuing relationship with a law firm in a capacity other than that of a partner or an associate. Opinions 71-49; 75-41; ABA Formal Opinion 90-357. Nevertheless, the relationship must be more than a mere referral arrangement. Opinion 72-29.

No existing formal opinions of this committee discuss whether an attorney who is "of counsel" to a firm is considered to be a member of the firm for purposes of the fee division rules. A number of other jurisdictions have considered this issue, however, and many have concluded that fee-splitting with an "of counsel" lawyer is limited by that jurisdiction's fee division rules. See, e.g., Arizona Opinion 86-3; California Opinion 1986-88; District of Columbia Opinions 151 and 197; New Jersey Opinion 476; Maryland Opinion 87-37.

District of Columbia opinions 151 and 197 conclude that rules governing the division of fees between attorneys in different firms apply unless the "of counsel" attorney functions as a member of the firm and does not have another practice. We agree that, for the purposes of the fee division rules, an attorney is in the "same firm" to which the attorney is "of counsel" only if the attorney is "of counsel" in the traditional sense -- that is, only if the attorney is affiliated with and practices through that one firm exclusively.

Our conclusion finds support in the fact that the Supreme Court of Florida has clearly indicated its intention to regulate fee-division practices in contingent fee personal injury-type matters. The Court has declared that, even in true co-counsel situations, circuit court authorization must be obtained if the fee is to be divided in a manner other than 25% (to secondary attorney) - 75% (to primary attorney). Rule 4-1.5(f)(4)(D)(iii).

Therefore, we conclude that the fee division rules do not apply to the former law partner who continues to work exclusively at the law firm in an "of counsel" capacity. The referral of a personal injury matter to the "of counsel" attorney who continues a practice outside the firm, however, is governed by the fee division rules set forth in subdivisions (g) and (f)(4)(D)(iii) of Rule 4-1.5.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 75-41

March 30, 1976

The designation "Of Counsel" may be used to describe either a continuing relationship between a firm and a former partner or associate or a new relationship formed between a lawyer and another lawyer or law firm.

CPR: DR 2-102(A)(4), DR 2-102(B), EC 2-11

Opinions: 66-64, 70-29, 70-36, 71-49, 72-29 ABA Informal Opinion 1189

Vice Chairman Sullivan stated the opinion of the committee:

This inquiry involves an interpretation of DR 2-102(A)(4) regarding permissible use on letterheads of the designation "Of Counsel."

The inquirer, a member of The Florida Bar, is employed as a professor of law at one of the law schools in the state. He is recognized as an authority in his area of specialization and has consulted on a case-by-case basis with various law firms in the state on problems involving his particular field.

With the consent of the law school, he has entered into a contract with a law firm in the state to make his services available to that firm. He is neither a partner nor associate of that firm and, by agreement, will not be a partner or associate of any other lawyer or law firm nor will he consult with or give legal advice to any client except in his contractual capacity with the firm with which he has become affiliated.

Although he teaches law full time, he will be in the law firm's offices weekends as he is needed and will consult and give legal advice during the week by telephone and letter.

He asks whether he may properly be designated "Of Counsel" to the firm. A majority of the Committee is of the opinion that this designation is permissible, but in approving the designation, does so subject to the prohibitions in DR 2-102(B) and EC 2-11 about practicing under a name that is misleading as to identity of the lawyers and their responsibility and status.

DR 2-102(A)(4) provides only 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 partner or associate.

In prior opinions, the Committee has indicated that the term "Of Counsel" is hardly one of precision but has most frequently been used to describe the relationship for a former member or associate of a firm who continues his relationship with the firm but in a less active role. Opinions 66-64 [since withdrawn], 70-29, 70-36 [since withdrawn], 71-49, 72-29.

Those opinions did not deal with an interpretation of “continuing relationship” as used in DR 2-102(A)(4). The Committee majority would not limit its interpretation to include only lawyers with a prior relationship with the firm either as partners or associates but would allow it to be used to designate a new relationship between a lawyer and another lawyer or law firm, if otherwise appropriate.

Here the lawyer will be available to the law firm on a daily basis, in person on weekends, by telephone and letter during the week. He will not practice law independently or with any law firm other than the firm with which he has contracted. The Committee majority believes that this is sufficient to meet the “continuing relationship” requirement.

A minority of the Committee, relying upon Opinions 66-64, 70-29, 70-36 interpret “continuing relationship” as used in DR 2-102(A)(4) [as referring to] to situations where there was a prior relationship between lawyer and law firm and disapprove the “Of Counsel” designation here for the further reason that they believe approving its use would lead to the danger of law firms hiring former judges, public officials and other luminaries and result in misleading the public about the nature of the relationships. *See* ABA Informal Opinion 1189 (1971).

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 72-41 (Reconsideration)

February 1, 1993

A lawyer who leaves a government prosecutor's office to join a private law firm may not, without the consent of the prosecutor's office, represent any client in connection with a matter in which the lawyer participated personally and substantially while a prosecutor. Even without consent, another lawyer in the firm, or a lawyer who is of counsel to the firm, may represent clients in such matters provided: (1) the former prosecutor is screened from any participation in the case, and is directly apportioned no part of the fee from the case; and (2) the prosecutor's office is promptly given written notice of the representation.

RPC: 4-1.10(a), 4-1.11

Opinions: 71-49, 75-41

The Committee has reconsidered and revised Opinion 72-41 in view of Rule 4-1.11, Rules Regulating The Florida Bar.

The inquiring lawyer has recently resigned as assistant state attorney and gone into partnership with a second lawyer, A.B. The partnership shares offices with another lawyer, C.D., and indicates that C.D. is "of counsel" on the partnership letterhead. C.D. is not a partner but is treated more like an associate.

While serving as an assistant state attorney, the inquiring lawyer participated in the investigation of an individual who was eventually indicted by the Grand Jury. This individual has approached C.D. about representation in connection with the criminal charge. In addition, C.D. represents other persons who were indicted while the inquirer served as assistant state attorney. The inquirer ceased working on such cases as soon as he learned he was joining the partnership. The inquirer plans not to participate with C.D. in any of these criminal cases or share in the fees to be received by C.D. The inquirer asks our advice as to the propriety of his continuing this relationship with A.B. and C.D. under these circumstances.

Ordinarily, the descriptive phrase "of counsel" connotes a lawyer's continuing relationship with a law firm, although not that of a partner or associate. See Opinions 75-41; 71-49. By reason of this continuing relationship, an attorney who is of counsel to another lawyer or law firm usually falls within the proscription of Rule 4-1.10(a), Rules Regulating The Florida Bar. Because the inquirer's conflict question arose as a result of his move from government employment to a private law firm, however, Rule 4-1.11 is the governing ethical standard.

Rule 4-1.11 provides in pertinent part:

(a) Representation of Private Client by Former Public Officer or Employee.

A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in

a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is screened from any participation in the case and is directly apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

* * *

(d) Matter Defined. As used in this rule, the term “matter” means:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Under this rule, the inquirer may not represent, or assist in the representation of, any client in connection with a matter in which the inquirer participated personally and substantially while he was an assistant state attorney, unless he first receives the consent of the state attorney's office. If this consent is not obtained, C.D. or A.B. may represent the accused persons provided: (1) the inquirer is screened from any participation in the case, and is directly apportioned no part of the fee from that case; and (2) the state attorney's office is promptly given written notice of the representation.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 72-41 February 22, 1973

A lawyer who is of counsel to a firm in which a former assistant state attorney has become a partner may not represent criminal defendants in cases on which the new partner had worked as assistant state attorney.

CPR: DR 2-102(A)(4), 5-105(D)

Opinions: 61-20; ABA Informal 855, 995

Vice Chairman Zehmer stated the opinion of the committee:

The inquiring lawyer has recently resigned as assistant state attorney and gone into partnership with a second lawyer, A.B. The partnership shares offices with another lawyer, C.D., and indicates that C.D. is "of counsel" on the partnership letterhead. C.D. is not a partner but is treated more like an associate.

While serving as an assistant state attorney, the inquiring lawyer participated in the investigation of an individual who was eventually indicted by the Grand Jury. This individual has approached C.D. about representation in connection with the criminal charge. In addition, C.D. represents other persons who were indicted while the inquirer served as assistant state attorney. The inquirer ceased working on such cases as soon as he learned he was joining the partnership. The inquirer plans not to participate with C.D. in any of these criminal cases or share in the fees to be received by C.D. The inquirer asks our advice as to the propriety of his continuing this relationship with A.B. and C.D. under these circumstances.

Ordinarily, the descriptive phrase "of counsel" connotes a lawyer's continuing relationship with a law firm, although not that of a partner or associate. DR 2-102(A)(4). By reason of his continuing relationship with the partnership, C.D. falls within the proscription of DR 5-105(D). *Compare* Florida Opinion 61-20 and ABA Informal Opinions 855 and 995.

DR 5-105(D) provides:

If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Since the inquiring lawyer could not ethically accept employment by the accused persons represented by C.D., the Committee concludes that C.D. should not continue such representation so long as his relationship with the firm of which the inquirer is a partner continues. The CPR has not changed the longstanding rule that what one lawyer may not ethically do, neither may any other lawyer in the firm, whether he is a partner, associate or "of counsel."

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 72-29

August 11, 1972

A Florida law firm may not include on its shingle or letterhead the name of a lawyer who is not admitted in Florida even with disclosure of the non-admitted status when the arrangement between the lawyer and the firm does not constitute a true interstate partnership or a true “of counsel” relationship.

CPR: DR 2-102

Opinions: 65-24, 65-53, 66-64, 67-7, 70-35, 70-36, 70-55; ABA Formal 316

Committeeman Kittleson stated the opinion of the committee:

A Florida firm of lawyers asks how it may ethically advertise an affiliation between the firm and a New York patent lawyer, not admitted to practice in Florida, when the New York lawyer will not be a member or associate of the Florida firm, but will occupy space in the Florida firm's offices and will contribute appropriately to the rent and office expenses. The New York lawyer is a member of a New York law firm, and will continue to practice law as a member of the New York firm. The Florida firm's motive for the affiliation is the opportunity for obtaining referrals from the New York lawyer and the New York firm with respect to matters falling outside the patent specialty. The Florida firm seeks especially to list on its letterhead the New York lawyer's name as “Of Counsel,” accompanied by a disclosure of his non-Florida admitted status. There is no suggestion that the arrangement would constitute a true interstate partnership as discussed in American Bar Association Opinion 316 (1967) and Florida Opinion 70-55, and as recognized by DR 2-102(D).

On the facts stated, the Florida firm cannot, on its letterhead or shingle, properly include among the names of the lawyers the name of the New York lawyer. Except with respect to true interstate partnerships (to which special considerations apply), a Florida firm should not list as one of its lawyers a lawyer who is not admitted to practice in Florida, even with disclosure of the non-admitted status. Florida Opinions 70-35 [since withdrawn], 67-7 [since withdrawn], 65-53 [since withdrawn] and 65-24 [since withdrawn]. Moreover, even if a lawyer is admitted to practice in Florida, his name cannot properly be included in a Florida firm's letterhead, shingle or law listing when he is not a member, partner or associate of the firm, unless he is “Of Counsel,” as that term has been sanctioned by custom. See DR 2-102(A)(4). The term “Of Counsel” is hardly one of precision, but as used on letterheads it normally designates a semi-retired lawyer who was formerly a regular member or associate of the firm. It does not embrace the affiliation presented in this inquiry. See Florida Opinions 70-36 [since withdrawn] and 66-64 [since withdrawn]. And this is clearly so when the lawyer in question is not admitted to practice in Florida. Florida Opinion 69-30 [since withdrawn]. Mere arrangements for sharing office space, or for mutual referrals of clients or work, do not create a relationship that may be properly advertised on a law firm's letterhead and professional notices. Henry S. Drinker said in his book, *Legal Ethics*, “A lawyer's stationery should not be used to advertise his connections with lawyers in other places or to bring their names before his correspondents.”

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 71-49

October 18, 1971

When a partner withdraws from his firm, he may not continue to be listed as a member of that firm, even though he will continue to handle its trial work on referral basis. The attorney may be listed "of counsel" with his former firm if he maintains a continuing relationship with it.

CPR: EC 2-11; DR 2-102(A)(4)

Chairman Clarkson stated the opinion of the committee:

A member of The Florida Bar, here identified as "D," has in the past practiced as a partner in the law firm of "A, B, C & D." He now proposes to withdraw from the firm as a partner and to occupy an adjacent but independent office under an arrangement whereby he will continue to handle his former firm's trial work on a referral basis. He inquires whether:

1. The firm name of "A, B, C & D" may properly be continued under these circumstances, and
2. "D" may be listed as "of counsel" on the firm's letterhead.

The Committee has concluded that EC 2-11 explicitly forbids continuing "D's" name in the firm name after his withdrawal as a partner. The obvious reason underlying EC 2-11 is that it would be misleading to include in a partnership name the name of a lawyer who is not in fact a partner and consequently not responsible for the conduct of the business of the partnership.

The inquirer's second question is answered in the affirmative. DR 2-102(A)(4) provides 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." One committeeman dissents from this holding, theorizing that the quoted language was not intended to apply to a lawyer proposing to carry on a regular and active law practice independent of the firm from which he has withdrawn.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-29

October 15, 1970

Whether a Florida attorney may be “of counsel” to or a partner in a law firm in a foreign country is to be determined by the appropriate authority of that jurisdiction.

Opinions: 66-64, 69-30

Chairman Massey stated the opinion of the committee:

A Florida Bar member inquires if he may become “of counsel” to a partnership of lawyers who practice in a foreign country. Further, the question is posed whether The Florida Bar member may enter into a partnership with said lawyers, none of whom are admitted to practice in The Florida Bar.

The Committee assumes that there will be no office of such “foreign” partnership within the state of Florida, nor will there be any holding out of performance of legal services within Florida. Under such assumptions, the questions raised are not within this Committee's jurisdiction and the issues of being “of counsel” or a partner within such firm are necessarily to be answered by the foreign country within which the practice is conducted.

Attention, however, is directed to Florida Opinions 66-64 [since withdrawn] and 69-30 [since withdrawn], wherein it is indicated the term “of counsel” is not one of precision, but such appellation should not be used in professional relationships which may be subject to misinterpretation. Normally a person who is “of counsel” becomes so because of former membership in or association with the same firm.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 61-20

October 16, 1961

It is improper for an attorney to institute an action against a client represented by another who is listed "of counsel" on the letterhead of the first attorney. Full disclosure and consent, or severance of the relationship between the attorneys at the time of retainer, may remove the ethical impropriety.

Canons: 6, 32, 34

Chairman Holcomb stated the opinion of the committee:

A member of The Florida Bar inquires concerning the propriety of his representing the Citizens Bank of _____ County as plaintiff against certain defendants represented by Mr. A, who appears on the firm letterhead as "of counsel." The consensus of opinion is that such representation is improper, with the possible exception that if both parties are fully advised of such representation and consent thereto it might be proper.

Drinker on *Legal Ethics*, page 103, under "Duty Not to Represent Conflicting Interests," recites that "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel," and "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts." At page 106, Drinker says: "The injunction not to represent conflicting interests applies equally to law partners representing different clients who have interests conflicting with one another. . . ."

There is some question as to whether the mere fact that one attorney uses the letterhead on which the other appears as "Of Counsel" is conclusive proof that the two were associated at the time the letter was written. If the relationship had changed so that they were no longer in fact associated, there would of course be no objection to both appearing on opposite sides of the case; but if they are actually associated in the practice of law, we deem it improper for them to appear on opposite sides of the case.

We call attention also to the possible violation of Canon 34 relating to a division of fees, to Canon 32 requiring a lawyer to honor his profession in the best interests of his clients, to Canon 6 making it unprofessional to represent conflicting interests. As to Canon 6, Mr. Drinker says: " 'Attorneys . . . should not voluntarily put themselves into positions where the conditions of their compensation may interfere with the full discharge of their duty to their clients.' " (Page 106.)

Under the circumstances, we believe that representation by Mr. A of the defendants in the case in which the inquirer is representing the plaintiffs while Mr. A appears on the letterhead as "Of Counsel" would be improper.

SUMMARY OF ABA FORMAL OPINION 90-357 (1990) **Use of Designation "Of Counsel"**

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.

Revisiting the general subject of "of counsel," the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 90-357 and withdrew Formal Opinion 330 (1972) and Informal Opinions 678 (1963), 710 (1964), 1134 (1969), 1173 (1971), 1189 (1971) and 1246 (1972). The Committee reconsidered its position in its prior opinions for several reasons: (1) a proliferation of variants of the term "of counsel" which have not all been addressed by prior opinions, (2) prior opinion may be unjustifiably restrictive, and (3) consideration of whether current ABA Model Rules of Professional Conduct warrant modification of the Committee's previously announced views which were based on the Model Code of Professional Responsibility or the Canons of Professional Ethics.

First, although "of counsel" appears to be the most frequently used among the titles using the term "counsel," it is not the only title to indicate a relationship between an attorney and a law firm. Other terms include the single word "counsel," and the titles "special counsel," "tax (or other specialty) counsel," and "senior counsel."

It is the Committee's view that,...they [various titles] all share the central, and defining, characteristic of the relationship that is denoted by the term 'of counsel', and ...that core characteristic is...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.

The opinion describes four relationships which share this core characteristic, the most common of which is the part-time attorney who practices with a firm, but on a different basis than that of the full-time partners and/or associates. These part-time attorneys are often individuals who have decided to change from full-time practitioners to part-time practitioners or sometimes they are individuals who have changed careers entirely, i.e., former judges or government officials. A second common designation is that of a retired partner who remains associated with the firm and is available for consultation, but is not actively practicing law. The last two uses are not as common as the first two, that of a probationary partner-to-be and a permanent status between that of partner and associate. The partner-to-be is usually an attorney who has recently joined a firm with the expectation of becoming partner after a relatively short period of time. The permanent between-partner-and-associate status lacks the expectation of promotion to full partner status, but has a tenure quality unlike an associate.

Secondly, with regard to the Committee's prior opinions, some of the opinions may be read as finding the term "of counsel" inapplicable to the above described relationships. Formal Opinion

330 states that an "of counsel" relationship would not apply to an employee of the firm. However, both the third and fourth types of relationships described above involve the status of an employee. Also, Formal Opinion 330, citing to Informal Opinion 1134, may exclude a retired partner from an "of counsel" relationship because the relationship must be "so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or the firm." Therefore the conclusion that the probationary partner or the permanent between-partner-and-associate are not permissively designated as "of counsel" is disavowed as is the implication that the contact must be so frequent, if not daily.

The Committee's prior opinions have restricted the attorney in an "of counsel" relationship to one firm because of the necessity to maintain a close, personal relationship. See Informal Opinion 1173. This opinion was modified in Formal Opinion 330 to allow a limit of two firms. However, the Committee now, on further consideration, has concluded that because an attorney can have a close, regular, personal relationship with more than two clients, then there is 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.

Another practical factor in limiting the number of "of counsel" relationships one attorney may have is the fact that there is an attribution to the "of counsel" attorney of all the disqualifications of each firm, and, likewise, attribution from the "of counsel" attorney to each firm, of each of those disqualifications. See Model Rule 1.10(a). In prior opinions, the Committee has also stated that a firm cannot be "of counsel" to another attorney or law firm. See Informal Opinion 1173. The Committee does not now see any reason why a firm should not be "of counsel" to another firm. See Formal Opinion 84-351 and Informal Opinion 1315.

The Committee still maintains the opinion, however, as stated in prior opinions, that it is ethically prohibited to use the term "of counsel" to designate the following relationships: (1) a relationship involving only a single case, see Informal Opinion 678, Formal Opinion 330; (2) a relationship of forwarder or receiver of legal business, see Formal Opinion 330; (3) a relationship involving only occasional collaborative efforts, see Formal Opinion 330; and (4) a relationship of an outside consultant, see Formal Opinion 330.

With regard to whether an attorney who is "of counsel" may also be included in the name of the firm, the Committee's view differs depending on the circumstances surrounding the use. Under the circumstances where a named partner retires from active practice, but yet maintains an "of counsel" relationship, it is permissible for the attorney's name to remain in the firm name.

See Model Rule 7.5(a) and Comment. However, where the association is new and the attorney's name is lent to the firm but the attorney is not undertaking the responsibilities of a partner or principal, the use of the attorney's name in the firm name is prohibited because it is misleading the public.

Finally, with regard to whether the current ABA Model Rules of Professional Conduct warrant a modification of the Committee's previously announced views, "[t]he 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." Model Rule 7.5(a) provides that "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." Model Rule 7.1 states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Likewise, DR 2-101(A) of the Model Code provides that "[a] lawyer shall notuse...any form of public communication containing a false, fraudulent, misleading, deceptive...or unfair statement or claim. DR 2-102(B) states 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." EC 2-13 states that "[i]n order to avoid the possibility of misleading persons with whom he deals, a lawyer shall be scrupulous in the representation of his professional status."

"Of Counsel" Relationships - When are They Appropriate?

Ethics Update - Published in *The Florida Bar News* - December 1, 1997

The term "Of Counsel" has no distinct legal definition. Law firms have traditionally used the term as an honorary title bestowed upon a retired or semi-retired firm member. Today, the "Of Counsel" designation is used to identify an attorney who, on a regular and continuing basis, performs legal services for firm clients in a capacity other than that of partner, shareholder or associate.

Before forming an "Of Counsel" relationship, a firm should consider the fact that the "Of Counsel" lawyer is treated as a firm member for conflict of interest analysis. Pursuant to Rule 4-1.10(a) of the Rules of Professional Conduct, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so by other conflict of interest rules, including Rules 4-1.7, 4-1.8 (c), and 4-1.9. Because an "Of Counsel" lawyer is treated as a member of the firm, conflicts will be imputed to and from a firm's "Of Counsel" lawyer. Thus, the firm's system for checking conflicts of interest must include a check against clients represented by the "Of Counsel" lawyer outside the firm if the "Of Counsel" lawyer engages in other practice.

A law firm considering an "Of Counsel" relationship must also realize that for purposes of applying fee division rules, an "Of Counsel" lawyer will be regarded as a member of the firm *only if* the "Of Counsel" lawyer practices law through that firm exclusively. Therefore, if a regular firm member works on a case with a lawyer who not only serves as "Of Counsel" to the firm but also practices outside the firm, the two lawyers must ordinarily: 1) divide fees in proportion to the work performed by each; or 2) enter a written agreement with the client whereby each lawyer agrees to assume joint legal responsibility and agrees to be available for consultation, in accordance with Rule 4-1.5(g). If a case will be handled on a contingent fee basis, Rule 4-1.5(f)(2) requires that both lawyers be under written contract with the client even if the fees will be divided based on work performed. In addition, if a contingent fee matter includes claims for personal injury and the secondary lawyer is to receive more than 25% of the attorneys' fees, the lawyers must also file a petition seeking court approval, pursuant to Rule 4-1.5(f)(4)(D)(iii).

There appears to be no Florida authority concerning the issue of an out-of-state attorney becoming "Of Counsel" to a Florida law firm. The Rules of Professional Conduct of The Florida Bar do not appear to preclude such an arrangement, as long as a bona fide "Of Counsel" relationship exists. As with any "Of Counsel" relationship, it must be more than a mere referral arrangement. If, for example, a Florida law firm wanted to identify a New York attorney as "Of Counsel", there must be legal services the New York attorney can actually perform for the Florida firm's clients. Therefore, if the New York attorney is not licensed in Florida, an "Of Counsel" relationship is appropriate only if the Florida firm has clients who have some need for assistance with New York or Federal law issues about which the New York attorney is authorized to render legal advice. If the Florida firm wishes to list this attorney on its letterhead, it must clearly indicate that the attorney is not admitted to practice in Florida.

This can be done by identifying the "Of Counsel" attorney together with the notation "Not Admitted in Florida" or "Licensed in New York Only." Whether a Florida attorney may be named as "Of Counsel" on a foreign firm's letterhead depends on the law and rules of that jurisdiction.

Finally, The Florida Bar has not previously rendered an opinion about the ability of a law firm to name another firm as "Of Counsel". Use of such designation is sanctioned, however, in a formal opinion published by the American Bar Association.

For an information packet including Florida Ethics Opinions on the proper use of "Of Counsel", as well as ABA Opinion 90-357 (referenced above), please contact the Ethics Department of The Florida Bar at (850) 561-5780.