ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.5(e). See also ABA Formal Opinion 90-357. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 776 **Topic: "Of Counsel"**
March 26, 1982 **Relationships: Referral Fees**

Digest: (1) A firm may not show an "Of Counsel relationship with lawyers who are receivers of legal business.

(2) A firm may accept a forwarding or referral fee.

Ref: Rule 2-107(a)
EC 2-13
Committee Commentary to Canon 2, Rule 2-107
Former ISBA DR 2-102 (A) (4)
ISBA Advisory Opinion No. 373
ABA Formal Opinion 330
ABA Informal Opinion 1378

FACTS

A firm's letterhead and listing on the exterior door to its office show two lawyers as being "Of Counsel" to the firm. The two lawyers who are "Of Counsel" maintain separate offices. The firm's practice is separate from that of the Of Counsel attorney except when they are working together on a particular matter.

When one of the "Of Counsel" lawyers is involved in a particular matter, the firm maintains full and final responsibility to the client with respect to such matters as estimates as to the probable time and cost of the "Of Counsel" lawyer's services, the timing of the legal services provided by the "Of Counsel" lawyer, and the quality of his services. The firm itself works on each such matter both separately and together with the "Of Counsel" lawyer.

The "Of Counsel" lawyers bill the firm at hourly rates that are some percentage (usually 20 percent) below the rate at which they would have billed similar work to their own clients. The firm then bills the work of the "Of Counsel" lawyers to the client at a rate which is substantially the same as the rate at which the "Of Counsel" lawyers would normally have billed his own clients directly for similar work. The firm also bills the client for whatever time the firm itself spends on the client's work.

QUESTION

The firm asks whether the "Of Counsel" relationship and the billing procedures used are proper under the Code of Professional Responsibility.

OPINION

(1) The Illinois Code of Professional Responsibility does not define the term "Of Counsel." However, former DR 2-102(A) (4) of the ISBA Code of Professional Responsibility provided, and current DR 2-102(A) (4) of the ABA Code of Professional Responsibility provides, as follows:

> 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.

There are numerous ISBA and ABA ethics opinions providing guidance on the nature of the "Of Counsel" continuing relationship. ISBA Opinion No. 373 explained the term "Of Counsel" as follows:

> The term "Of Counsel" shown on a firm's letterhead or shingle is customarily used to indicate a former partner who is on a retirement or semi-retirement basis, or one who has retired from another partnership, from general private practice or from some public position and who remains or becomes available to the firm for consultation and advice, either generally or in a particular field.

There, lawyers A and B had different offices in the same city, but attorney A served as co-counsel in trial matters for B on a regular basis. The opinion held that the use of the term "Of counsel" would be improper and that a lawyer who maintains an independent office and law practice may not be shown as "Of Counsel" to any other lawyer or law firm.

ABA Formal Opinion 330 also explained the "Of Counsel" continuing relationship in a similar manner.

> The lawyer who is described as being "Of Counsel" with another lawyer or law firm just have a continuing or semi-permanent relationship with that lawyer or firm, and not a relationship better described as a forwarder-receiver of legal business...His relationship with that lawyer or firm must not be that of a partner...nor that of an employee...His relationship with the lawyer or law firm must be a close, regular, personal relationship like, for example, the relationship of a retired or semi-retired former partner, who remains available to the firm for consulting and advice, or a retired public official who regularly and locally is available to the firm for consultation and advice...While it would be misleading to refer to a lawyer who shares in the profits and losses and general responsibility of a firm as being "Of Counsel," the lawyer who is "Of Counsel" may be compensated either on a basis of division of fees in particular cases or on a basis of consultation fees...He is compensated as a sui generis member of that law office, however, and not as an outside consultant. Generally speaking, the close, personal relationship indicated by the term "Of Counsel" contemplates either that the lawyer practice in the offices of the lawyer or law firm for which he is "Of Counsel" or that his relationship, for example by virtue of past partnership of a retired partner that has led to continuing close association, be so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm...The term obviously does not apply to the relationship which is merely that of a forwarder and receiver of legal business. In short, the individual lawyer who properly may be shown to be "Of Counsel" to a lawyer or law firm is a member or component part of that law office, but his status is not that of a partner or an employee...

In ABA Informal Opinion 1378, two firms shared adjoining office suites with a common entrance, common receptionist, common library and common equipment, and worked together on some legal matters. However, the firms had separate phone numbers, maintained separate bookkeeping records and maintained separate partnership. It was held that the two firms could not show on their stationery that the firms were "Of Counsel" to each other because such a showing could be misleading as to the relationship of the lawyer practicing under the firm name of either firm. The opinion explained that each lawyer owed his loyalties and obligations to the firm of which he was a partner and that this loyalty could not be compromised by some type of an "Of Counsel" association owed to the other firm. The opinion cited EC 2-13 (which is identical to ISBA EC 2-13), which provides that "in order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status."

Under the circumstances, the fact that the firm and the "Of Counsel" lawyers hold themselves out to the public as having such a relationship and that the firm assumes responsibility for the timing and quality of the "Of Counsel" lawyer's work does not create the "Of Counsel" continuing relationship contemplated by the ethics opinions discussed above. The "Of Counsel" lawyers maintained separate offices and appear to be the receivers of legal business forwarded by the firm. Moreover, the method used to compensate the "Of Counsel" lawyers is more in the nature of paying an outside consultant rather than as a sui generis member

of the firm.

We are of the opinion that an "Of Counsel" relationship does not exist and that it is not proper for the firm to show the two lawyers as "Of Counsel" on their letterhead, exterior door listing or elsewhere.

(2) With respect to the billing procedure used by the firm, Rule 2-107(a) provides that a lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his firm, unless (1) the client consents in writing to the employment of the other lawyer after being advised in writing of certain specified relevant facts, (2) the division is made in proportion to the services performed and responsibility assumed by each, except where one lawyer refers work to another, and (3) the total fee of the lawyers does not exceed the reasonable compensation for all legal services they render to the client.

Rule 2-107(a) is intended expressly to sanction payment of a fee to a referring lawyer where that lawyer takes no part in the actual handling of the case, so long as the referring lawyer assumes legal responsibility for the work of the receiving lawyer as though he were the receiving lawyer's partner and the total fee of the lawyers does not exceed reasonable compensation for the legal services performed. The Rule increases disclosure to the client, clarifies the obligations to the client of each lawyer involved, and discourages lawyers from retaining cases which could be better handled by others.

> The public is best served by encouraging lawyers to refer matters to those more skilled in a particular area by permitting them to earn a referral fee so long as there is full disclosure to the client and responsibility is maintained by the referring lawyer. Committee Commentary to Canon 2, Rule 2-107.

In view of Rule 2-107(a), the fee arrangement under which the "Of Counsel" lawyer is paid and the client billed for the work would appear to be permissible so long as (1) the client consented in writing to the employment of the other lawyer after having received written disclosure of certain pertinent facts relating to the referral, and (2) the receiving lawyer discloses to the client that the referring lawyer will receive a referral fee.

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