ILLINOIS STATE BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 16-04
October 2016

Subject: Conflict of Interest; Division of Fees; Fees and Expenses; "Of counsel" Designation

Digest: A lawyer concentrating his or her practice in tax law may be "of counsel" to a law firm if the relationship with the firm is close and continuing. The lawyer will not be considered as being in a separate firm for the purposes of Rule 1.5(e) or for the purposes of disqualification due to a conflict of interest.

References: Illinois Rules of Professional Conduct, Rules 1.5, 1.7, 1.10, and 7.1

ABA Formal Opinion 90-357 (1990)

ISBA Opinion 776 (1982)

ISBA Opinion 817 (1982)

ISBA Opinion 840 (1984)

Ohio State Bar, Op. 2008-1 (2008)

Texas State Bar, Op. 450 (1987)

Virginia State Bar, Ops. 442 (1983) and 1735 (2000).

FACTS

A law firm wishes to take on a lawyer specializing in tax law on an "of counsel" basis. The "of counsel" lawyer will be considered an independent contractor and will receive payment according to the fee at which he is billed out multiplied by the hours billed less twenty percent of such sum, which will be kept by the law firm. Prior to any distribution, all client expenses will be taken out of the fees collected. His name, his status "of counsel" and his rate will be set forth in all relevant engagement letters with the clients. His services will only be utilized on certain matters upon request of the firm and with the consent and approval of the client. The members of the firm will consult with the lawyer on all firm matters as to the need for tax advice to determine whether or not his services will be needed, but at no time will the firm or clients be obligated to use his

services. In any such matters where his services are utilized the client will also engage the firm and the law firm will not be simply referring him work. The firm will collaborate with the "of counsel" attorney and the firm will collect all fees. The "of counsel" lawyer will also maintain a practice that is separate and distinct from the law firm.

QUESTION

1. Can the lawyer be considered "of counsel"?

2. If the "of counsel" designation is appropriate, will the lawyer be considered a separate firm for the purposes of fee division?

3. If the "of counsel" designation is appropriate, will the lawyer be considered a separate firm for the purposes of conflicts of interest?

ANALYSIS

"Of counsel" is a professional designation used by a lawyer to denote a continuing relationship with a lawyer or law firm other than as a partner or associate or the equivalent of a partner or associate. The "of counsel" relationship has as its core characteristic a close, regular, and personal relationship that is more than a mere forwarder or receiver of legal business, more than an occasional consultant relationship, and more than a relationship for the purposes of one case. *See,* ABA Formal Opinion 90-357 (1990); ISBA Ops. 776, 817, 840.

Although the Illinois Rules of Professional Conduct do not specifically address use of the designation "of counsel," a lawyer's use of the designation, as with any professional designation, must not be false or misleading pursuant to Rule 7.1.

Here, the designation of "of counsel" appears to be appropriate and is not misleading. The relationship is continuing and regular and involves more than the mere forwarding of legal business, as the firm will work closely with the "of counsel" lawyer on the relevant client matters.

The question then becomes how the "of counsel" lawyer can be compensated for his or her services. We have never addressed whether an "of counsel" lawyer is in the same firm or in a separate firm for the purposes of fee division, but conclude that given the close nature of the "of counsel" relationship, the lawyers should be viewed as being in the same firm. Accordingly, while the lawyers may choose to disclose the nature of the fee distribution between the attorneys with the client, the lawyers should not be subject to the restrictions set forth in Rule 1.5(e). However, fee agreements with "of counsel" attorneys must always meet the general requirements of Rule 1.5 that a lawyer may not charge or collect an illegal fee or an unreasonable fee. *Cf,* ISBA Op. 776.

Our position is consistent with the prevailing view in other states that restrictions on fee division with lawyers not in the same firm as set forth in Rule 1.5(e) do not apply to "of counsel" lawyers. *See, e.g.*, Ohio State Bar, Op. 2008-1 (2008); Texas State Bar, Op. 450 (1987); Virginia State Bar, Op. 442 (1983) and 1735 (2000).

Similarly, for purposes of conflicts of interest, the "of counsel" lawyer is considered to be affiliated with the firm. If the lawyers are considered to be in the same law firm for purposes of the division of legal fees, it follows that the lawyers should be viewed as being in the same law firm for the purposes of any conflicts of interest, particularly given the close, personal nature of the "of counsel" relationship. Accordingly, the disqualification of one from representation due to a conflict of interest must be imputed to the other. ABA Formal Opinion 90-357.
