FORMAL OPINION 1985-1

For purposes of analyzing and disclosing potential conflicts of interest, an attorney who is "of counsel" to a law firm must be treated as though he or she was a member of the firm. Similarly, even if an attorney is not "of counsel," if he or she shares office space and/or employees with other attorneys, all of them should be considered as one firm for conflict of interest purposes.

OPINION

Disclosure must be made. In the opinion of the Committee, an attorney who is "of counsel" or characterized as such has a sufficient connection with the firm to be considered a member of the firm in analyzing potential client conflicts.

QUESTION

Attorney A is a member of a firm. Attorney B is "of counsel" to the firm. Attorney A is approached by a client concerning a matter in which the client is taking a position adverse to a usual client of Attorney B. Attorney A, the member of the firm, does not intend to consult with Attorney B, the "of counsel" attorney, on this matter. Attorney A notes that Attorney B is neither a partner nor an associate of the firm and thus not a "member" of the firm in the strict sense. Attorney A questions whether disclosure of a potential conflict must be made as if Attorney B were a "member" of his firm.

DISCUSSION

The term "of counsel," when used on a letterhead, refers to a relationship of an individual attorney to a firm which is not that of a partner in the firm; nor a fellow member of a professional legal corporation; nor that of an associate or employed attorney in the firm; nor merely that of a correspondent or forwarder or receiver of legal business. (ABA Formal Opinion 330.) It refers to a continuing long-term relationship of the individual attorney to the firm which is not necessarily inconsistent with the "of counsel" attorney's being "of counsel" to or even a partner in another firm, although such a dual relationship would have to be careful1y scrutinized (ABA Informal Opinion 1315 (1975). See generally, ABA Formal Opinion 330 and the Informal Opinion discussed therein.)

The relationship of an attorney who is not a partner, member of a professional corporation, or associate may not seem significant enough to warrant considering that attorney a member of the firm. However, by stating on its letterhead, shingle or listing that an attorney "of counsel" to a firm, the firm is making an affirmative representation to the public that the servcices of that attorney are available to the firm, although not on the same basis as that of a partner, associate, or member.

With respect to the firm's handling of a particular case, an attorney who is "of counsel" may have a significant role or none. An "of counsel" attorney might serve as co-counsel of record to the firm on a matter within his or her unique area of competence. The "of counsel" attorney might serve an informal consultant on the matter if needed. The "of counsel" attorney may have no involvement at all in the matter, but be present in the firm's offices at times when the firm is representing the client with respect to the matter.

Finally, the "of counsel" attorney may have no involvement at all in the matter and have no contact at all with the firm during the entire pendency of the matter. It should be noted, however, that the same could be said of every partner, associate, or member of a firm of any size: the fact that he or she is not actively involved in the matter does not preclude the possibility that his or her very presence in the firm creates a conflict with respect to the matter. (See William H. Raley Co. v. Superior Court, Imperial County (1983) 149 CalApp.3d 1042, at 1049 [197 Cal.Rptr. 232, at 23'1].)[1]

By characterizing an attorney as ″of counsel" to the firm, a law firm is representing to the public at large and its clients in particular that the attorney's services are regularly available to the firm as co-counsel, if warranted, or

as a consultant, if needed. If, for example, Attorney B has some experience which suggests special competence in an area or with respect to a client of Attorney A, it seems particularly likely that the client may be relying upon the availability of Attorney B, the "of counsel" attorney, with respect to the client's particular matter, without understanding that the services of Attorney B would not in fact be available to the client. In any case, at the outset of a firm's handling of a matter it cannot be predicted with absolute certainty what degree of involvement the "of counsel' attorney will have in the matter because the "of counsel" attorney does have a continuing long-term relationship with the firm and his or her services are held out as regularly available to the firm.

In summary, a firm which lists an attorney "of counsel" on its letterhead. shingle or listing is making an affirmative representation to its clients that the services of that attorney are available to clients of the firm. Consequently, he or she should be considered a member of the firm in determining whether a particular conflict exits.

The "of counsel" relationship clearly is something more than an office-sharing arrangement. (See, for example, A BA Informal Opinions 13'18 (19'16) and 1508 (1984).) However, office sharing or use of common employees are commonly attributes of the "of counsel" relationship. In California, it has long been held that the sharing of office space or employees gives rise to ethical obligations and potential conflicts equivalent to those of an "of counse". (See, for example, California Opinion 1979-50 to the effect that attorneys representing adverse interests may be disquaJified because of disclosure of client information to a common secretary; San Diego Opinion 19'12-15, to the effect that attorneys sharing office space and secretarial help may not represent adverse parties in litigation; Los Angeles Informal Opinion 19'12-15; and Los Angeles Opinion 216 (1953).) Where the relationship between attorneys includes sharing of office space or employees, it seems clear that these factors require that the "of counsel" attorney be treated as a member of the firm for purposes of conflict analysis regardless of the use of the term ″of counsel," and in these cases no further analysis of the issue is required.

Given these opinions, it appears that the potential for a conflict interest cannot be eliminated simply by deleting the "of counsel" designation of an attorney if the attorney continues to use the offices of the firm. Thus, the duty to disclose a conflict can arise either from the useof the term "of counsel", whether or not an actual relationship exists, or from the sharing of office space and employees, whether or not the term "of counsel" is applied to the relationship. In either cue, the attorney should be considered a member of the firm in determining whether a potential conflict exists.

Footnotes:

1. A summary of the various ethical opinions governing the proper use of the term "of counsel" and the situattion in which it is properly used would far exceed the scope of the present opinion. Attorneys or firms having specific opinions questions may want to review specific opinions cited above and the following which have come to the attention of the Committee: ABA Informal Opinion *1506* (1984) Los Angeles Formall Opinion 421 (1983), California Formal Opinion *1979-50,* ABA Informal Opinion 1388 (1977), ABA InformaJ Opinion 1378 (1976), ABA Informal Opinion 1315 (J975), San Diego Opinion 1974-23, ABA Formal Opinion *330,* Los Ange1es Jnformal Opinion 1973-3, Los Angeles Informal Opinion 1973-4, ABA Informal Opinion 1265 (1973), ABA Informal Opinion 1246 (1972), San Diego Opinion 1972-15, ABA Informal Opinion *1205* (1972), ABA Informal Opinion 1189 (197J), ABA Informal Opinion 1173 (1971), ABA Informal Opinion 1134 (1969), ABA Informal Opinion 1007 (1967) and L.A. Opinion 306 (1968) (which appear to be in conflict), ABA Informal Opinion 901 (1965), Los Angeles Informal Opinion 1967-8 and ABA Informal Decision C-710 (1964).

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