THE IOWA STATE BAR ASSOCIATION

Committee on
Ethics and Practice Guidelines

July 9, 2013

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
625 East Court Avenue
Des Moines, IA 50309

RE: IA Ethics OP 13-01 Of-Counsel

Dear Mr. Dinkla,

Historically, the term of-counsel has been used to identify firm partners or other lawyers transitioning from full-time legal practice into retirement. In Iowa, the parameters of the relationship have been set by IA.Ethics. OP 87-11(1987) which was based upon ABA Formal Opinion 330 (1972) and Iowa Code of Professional Responsibility. The ABA opinion has since been withdrawn and replaced by ABA Formal Opinion 90-357 (1990) and the Iowa Code of Professional Responsibility has been replaced by the present Iowa Rules of Professional Conduct. In light of these changes, the Committee has been asked to issue guidance to the Bar regarding the of-counsel relationship.

Preface

At the outset, it is important to appreciate that of-counsel relationships create the potential for disqualification for conflict of interest under Iowa Rules of Professional Conduct 32:1.7; 1.8; and 1.9(c)(2). Furthermore, when a lawyer or law firm is in

multiple of-counsel relationships with different firms, conflicts resulting in disqualification may be imputed to all the firms by operation of Rules 32: 1.10; 32:1.11; 32:1.12 and 32:3.7(b). ABA Formal Opinion 351 (1990) opines that:

> There can be no doubt that an of-counsel lawyer (or firm) is "associated in" and has an "association with" the firm (or firms) to which the lawyer is of-counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules and the imputation of disqualifications resulting from former government service under Rules 1.11(a) and 1.12(c); and is a lawyer in the firm for purposes of Rule 3.7(b) regarding the circumstances in which, when a lawyer is to be a witness in a proceeding, the lawyer's colleague may nonetheless represent the client in that proceeding.

A simple guideline to remember is that your of-counsel lawyer is considered to be a member of your law firm and you are a member of the of-counsel lawyer's law firm, for all ethical purposes.

The Evolving Nature of the Of-counsel Relationship

Central to all the reasons why lawyers form of-counsel relationships is the concept of mutual benefit. The of-counsel lawyer and the law firm perceive that they will each receive benefit from the association. Traditionally the relationship was formed to facilitate the retirement of a member of the law firm. A lawyer could retire and still maintain a relationship with the law firm. Likewise, the law firm could still obtain the benefit of the reputation of the retiring lawyer in their law firm marketing and his or her expertise in servicing clients. But with the passage of time, the use of the of-counsel relationship has expanded. Practicing lawyers, and sometimes whole law firms, have entered into of-counsel relationships. Each seeks to provide benefit to and capitalize on the reputation of the other.

Iowa's Present Requirements for Of-counsel Qualification

IA Ethics. OP 87-11

Iowa Ethics OP 87-11 is the controlling ethics opinion regarding of-counsel relationships. Issued under the prior Iowa Code of Professional Responsibility and based upon ABA Formal Opinion 330 (1972), the opinion held that to qualify as "of-counsel" the relationship must be:

- between lawyers and a law firm and not law firm and law firm;
- close, continuing and personal;
- not that of a partner, associate, employee or outside counsel;
- exclusive in that one could only be "of-counsel" to one firm;
- not simply a referral service of legal business to one or the other; and
- such that the of-counsel lawyer has regular, if not daily, contact with the members of the firm or office.

Furthermore, care was required in the marketing of the of-counsel lawyer's name. For example,

- the name could be used on firm letterheads only if the "of-counsel" designation was used;
- it could not be used in the name of the law firm unless the of-counsel lawyer had a prior association with and had actually retired from the law firm; and
- the of-counsel lawyer could not use the law firm's letterhead on matters that did not involve the law firm.

ABA Formal Opinion 90-357 (1990)

In 1990, the ABA chose to revisit the of-counsel issue, withdrew its prior opinion and issued ABA Formal Opinion 357 (1990). The change was motivated by the fact that confusion existed due to the different uses of the term among the various jurisdictions. The ABA's prior opinions were thought to be unjustifiably restrictive. Likewise, the ABA Model Rules had replaced the Model Code. While the Code made specific reference to "of-counsel" relationships, the Rules were silent with regard to the term.

The new opinion sought to re-define the role of "of-counsel" in relation to the evolving use of the term. In doing so, it kept:

- the core requirement of a close, regular, and continuous relationship as the foundation for the of-counsel relationship;
- the restrictions regarding the use of-counsel's name on letterheads, etc.

It further acknowledged, as is referenced in the preface to this opinion, that of-counsel relationships create the potential for disqualification.

However it chose to reject the prior requirement of frequent contact; the prohibition that an of-counsel lawyer could not be a partner, associate, employee or outside counsel of the firm; the prohibition against multiple of-counsel relationships and the prohibition of firm-to-firm of-counsel relationships.

Importantly, the opinion identified certain relationships that would not support of-counsel status such as:

- a relationship which was nothing more than a mere referral of legal business between the parties;
- an *ad hoc* co-counsel relationship involving occasional collaborative efforts; and
- a relationship where the lawyer was nothing more than an outside consultant.

OPINION

We are persuaded that there is merit in ABA Formal Opinion 90-357 (1990) and that it is time to move beyond ABA Formal Opinion 330 (1972) and IA Ethics Op. 87-11

(1987). We adopt the rationale of ABA Formal Opinion 90-357 (1990), albeit in modified form. Accordingly IA Ethics OP 87-11 (1987) is withdrawn.

Close, Regular and Continuous Relationship

An of-counsel a relationship must meet the following requirement: There must be a close, regular, and continuous relationship between the two entities that involves more than a business referral, an occasional co-counsel relationship or the relationship of a consultant. However, we depart from ABA Formal Opinion 375 (1990) and decline to adopt a business model standard as an indicia of an "of-counsel relationship." We believe that the essence of the relationship should be the close, on-going or continuous nature of the relationship between the parties, not whether one is retired, part-time, probationary, employed or tenured. For example, under ABA Formal Opinion 330 and IA Ethics OP 87-11 a retired lawyer who wished to remain "of-counsel" to the firm but still retain nominal employee status for the purpose of healthcare was denied that opportunity.

Recently, the parameters of the relationship have expanded beyond the traditional use. In some situations of-counsel relationships have even been used as alternatives to full-employment situations or for probationary new hires. See, for example N.J. Ethics OP 689. This creates a new and different view of the relationship that was not contemplated when our prior opinions were issued. We believe once lawyers have met the qualification standards for the of-counsel relationship, the economic aspects of the business relationship should be determined by the respective needs of the parties.

Fee Splitting and Client Consent

Questions often arise regarding whether compensation for of-counsel services constitutes fee splitting within the meaning of Iowa Rules of Prof. Conduct 32:1.5(e). The rule prohibits a division of fee between lawyers "...who are not in the same firm.." without the consent of the client. We do not believe the rule applies. As stated previously, we consider all parties to the of-counsel relationship to be in the same firm for all ethical purposes. The matter of a law firm's internal compensation for its partners or associates, including it's of-counsel members, is not a matter of client concern. Cf. 1998 VA Legal Ethics Op. 1712; 1998 Va. Legal Ethics Ops Lexis 4, D.C. Rules Opinion no. 284 Inquiry No. 97-3-15. Likewise, unless the client specifically reserves the right to determine who provides the legal services, client consent for the assignment of associates, or of-counsel lawyers, is not generally necessary. Iowa Rules of Prof. Conduct 32:1.6 cmt 5.; Wis.Ethics OP. 96-4.

Multiple Of-counsel Relationships

We believe that lawyers and law firms should be free to establish multiple and simultaneous of-counsel relationships. However, in doing so all the lawyers and law firms will be considered as one firm for all ethical purposes including disqualification for conflicts of interest under Iowa Rules of Prof. Conduct 32:1.7; 1.8; 1.9(c)(2) 1.10; 1.11; 1.12 and 32:3.7(b). Accordingly, Iowa Ethics OP 82-19 and 83-12 are withdrawn.

Of-counsel Relationships with Non Iowa Lawyers

One seeking to meet the requirement of a close, regular, and continuous relationship with an Iowa lawyer or law firm so as to offer legal services to the firm's clients would have to be admitted to practice law in Iowa.[1] Of-counsel relationships should not be used as an alternative to bar admission by non-Iowa lawyers. The close, regular and continuous relationship requirement is the very antithesis of the occasional co-counsel relationship which forms the basis for *pro hac* vice admission under IA Sup.Ct.R. 31.14. In the case of firm-to-firm of-counsel relationships, both firms must be composed of at least one Iowa lawyer so that the close, regular and continuous relationship requirement can be met.

Description, Designation and Marketing

We recognize that a law firm's need for a particular field of expertise may be a motivating factor for entering into an of-counsel relationship. However, that need will not be met unless the law firm can describe the parameters of the relationship to its clients and to the public. ABA Formal Opinion 351 (1990) opines that:

> As to the meaning of the title, it is appropriate to note preliminarily that, although "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 term "special counsel," "tax [or other specialty] counsel," and "senior counsel." It is the Committee's view that, whatever the 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," and so should all be understood to be covered by the present opinion.

The rationale of the ABA opinion is sound. Consequently we believe that Iowa lawyers and law firms that meet the qualifications of this opinion and the Iowa Rules of Professional Conduct regarding description of practice, may describe their relationship

[1] Iowa lawyers who have elected retired or exempt status under Iowa Court Rules 39.7 and 41.7 could not meet this requirement and would have to reactivate their practice status with the Iowa Supreme Court Commission.

by any variant of the term “of-counsel” with or without the use of the preposition “of”[2].

For the Committee,

NICK CRITELLI, Chair
Iowa State Bar Association
Ethics and Practice Guidelines Committee

[2] To avoid the potential to mislead, we caution against the use of the term “senior counsel” which carries special connotation, similar to Queens Counsel in the international legal profession. Senior Counsel (SC) is the term is given to a senior barrister or advocate in some countries such as Hong Kong, the Republic of Ireland, South Africa, Kenya, Malawi, Singapore, Guyana and Trinidad and Tobago.