ETHICS ADVISORY OPINION

10-06

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A lawyer who is a partner in firm A is considering becoming either a partner in firm B or "Of Counsel" for firm B while maintaining his partnership in firm A.

Question Presented:

May a lawyer who is a partner in a law firm continue to practice in that partnership if he becomes either a partner or "Of Counsel" in another firm?

Summary:

Yes, with certain caveats. A lawyer who is a partner in a law firm in South Carolina is not prohibited from practicing as a lawyer in another firm in South Carolina or being "of counsel" to that other firm.

Opinion:

There is no impropriety in a partner in one firm practicing as a partner in another firm or as "of counsel" to that other firm. There are ethical issues to keep in mind in such an arrangement. The Rules of Professional Conduct do not prohibit a lawyer from being a partner in two firms or from being a partner in one firm and affiliated with another firm through an "of counsel"

arrangement. Such an arrangement invokes several of the Rules, particularly Rules 1.7, 1.8, 1.9, and 1.10, along with Rules 7.1 and 7.5.

Ethics opinions of the American Bar Association (ABA) and the South Carolina Ethics Advisory Committee agree that it is not improper for a lawyer to work for two law firms. See South Carolina Bar Ethics Advisory Committee Opinion No. 95-15 (1995), ABA Formal Opinion 357 (1990), and ABA Informal Opinion No. 1315 (1975).

The two firms effectively become a single firm for purposes of conflict-of-interest and imputed disqualification rules. Clients and former clients of each of the two firms must be considered clients and former clients, respectively, of the other firm for purposes of evaluating conflicts of interest under Rules 1.7, 1.8, 1.9, and 1.10.

Several state bar ethics advisory agencies have also held that pursuant to Rule 1.6 each firm must obtain the permission of every client to disclose enough information to the other firm to allow it to perform appropriate conflict checks. *See* Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion No. 99-7 (1999); Missouri Bar Informal Advisory Opinion No. 980143; Philadelphia Bar Association Ethics Opinion No. 2001-5.

The procedure for checking conflicts (or the Of Counsel agreement itself) may require disclosure of client information to the firm with which the lawyer intends to enter such a relationship. Thus, consent to this disclosure must be obtained from each client. Assuming that best practices would involve conflict checking with both firms, representation letters should inform clients and seek permission to disclose names and other necessary information to each firm for such conflict checking purposes.

The issue of conflicts raises the question of present client versus former clients. Obviously, possible conflicts with present clients must be analyzed through the conflict checking process, inasmuch as the affiliated firms are considered one firm. The question of possible conflicts with prior clients must be evaluated on two levels: substantial relationship and adverse interest. There is no hard and fast rule, but a lawyer entering into an "of counsel" relationship or other affiliation with another firm must carefully examine the relationship with former clients. *See* The Of Counsel Agreement, Wren and Glascock, Third Edition, 2005, published by the American Bar Association.

Avoiding misleading communication in accordance with Rule 7.1 is another concern in a situation where one lawyer is working in two firms (or two firms being affiliated). ("A lawyer shall not make false, misleading, deceptive, or unfair communications about the lawyer or the lawyer's services.") Rule 7.1 will require the affiliated lawyer to truthfully acknowledge his relationship with each firm when asked and whenever necessary, for example, to comply with Rule 1.6.

> Rule 7.5 speaks to Firm Names and Letterheads:
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> (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
>
> . . . *and* . . .
>
> (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

This Committee has previously opined that affiliated firms and "Of Counsel" arrangements may list each other, along with other indications, so long as the letterhead is not misleading. For other letterhead discussions in this vein, *see* Ethics Advisory Opinions 07-05, 98-31, 96-28, and 92-08, *inter alia*.

A valuable resource in devising and managing "Of Counsel" arrangements is the ABA publication The Of Counsel Agreement. This publication and others can be found in the Lending Library at the South Carolina Bar.