speaking of ethics

By Hope C. Todd

Considering 'Of Counsel'

Mick Wiggins

Sam Solo had not been this optimistic in quite some time. Last month, he had received an offer from Fast & Loose, LLP to become "of counsel" to the firm. Sam would keep his own law firm, of course, but Fast & Loose was looking for someone to occasionally handle plaintiff employment matters. Sam maintained a fairly substantial practice representing large office building owners in disputes with wayward tenants, but in recent years, he had taken on a number of individual employee lawsuits against private employers.

Sam, who was thrilled to have a new source of referrals and advertising, also thought that prospective clients would be impressed that he was part of a "larger operation." He ordered new business cards and letterhead and gave his approval to Fast & Loose to promote him in its law firm communications. Moreover, in his effort to get the word out about his new affiliation, he added a link to the Fast & Loose Web site on his own firm's home Web page. However, when he clicked on the "Our Professionals" portion of the Fast & Loose site, he was surprised to see no fewer than 15 other lawyers listed as of counsel, several of whom had been opposing counsel in cases he recently tried, including Laura Litigation, who Fast & Loose listed as a "specialist in Trust and Estates."

In fact, Sam represents two building owners in matters in which Laura represents the opposing party tenants. For a brief moment, he wondered whether he should tell Fast & Loose about those matters, but he determined there was really no need to do so because his of counsel relationship focused solely on employment law, and Laura's practice apparently focused on trusts and estates.

As early as 1985, the D.C. Bar Legal Ethics Committee, noting the "evolving concept" of the term *of counsel*, pointed out that lawyers use the expression to describe a number of relationships.[1] In Opinion 151, the question presented was whether a firm needed to comply with the fee sharing provisions of the then-effective D.C. Code of Professional Responsibility when the firm split a legal fee with an *of counsel* lawyer.[2] The committee concluded that in some instances, of counsel relationships were akin to partner and associate relationships, and in those circumstances, the rule governing fee division between lawyers not in the same firm should not apply. However, without much guidance in the plain language of the D.C. Code, the committee was left to conclude generally that "the ethical ramifications of the 'of counsel' relationship flowed from the actual nature of the arrangements established." Thus, to determine which ethical mandates apply to any particular of counsel relationship, one must look at how the relationship actually operates. In the ensuing years, several D.C. Legal Ethics Opinions, as well as Formal Opinions of the American Bar Association (ABA), have arguably turned that general conclusion on its head.[3]

Today, the use of the term *of counsel* or similar designation carries significant ethical implications. The of counsel designation is commonly used to describe different types of employment relationships, including, for example, the senior partner who remains at the firm, working significantly reduced hours instead of retiring, or a career lawyer at the firm who is too skilled and experienced to serve as an associate but, to optimize work–life balance or by firm preference, has not become partner. In each of these examples, the lawyers are employees of a firm and, from a client perspective (as well as ethical perspective), not readily differentiable from firm partners or associates. However, the of counsel designation can also be applied properly to a lawyer who is not an employee of the firm, who may be a sole proprietor or even a partner in another law firm, or who may serve as of counsel to more than one firm. As such, the use of the of counsel designation necessitates two significant ethical directives.[4]

1. The use of an of counsel designation requires a close and ongoing relationship between the lawyer and the firm.

Pursuant to D.C. Rule 7.5(a), "a lawyer shall not use . . . a professional designation that violates Rule 7.1." In turn, D.C. Rule 7.1(a) provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Although neither the D.C. Rules nor the ABA Model Rules specifically defines the of counsel designation, the ABA opined, as early as 1990, that the term of counsel holds out to the public that the lawyer has a "close, regular, and personal relationship" with the firm that is "general and continuing."[5]

The D.C. Bar Legal Ethics Committee agreed with this interpretation of the designation in Legal Ethics Opinions 247 (1994) and 255 (1995) and, most recently, in Opinion 338 (2007). In Opinion 338, the committee permitted a lawyer to serve as both of counsel to Firm A and a partner in Firm B if the of counsel association with Firm A was "regular and continuing" and if "the lawyer was generally available personally to render legal services to that firm's clients."

2. An of counsel *designation deems lawyers to be "associated" in a firm under D.C. Rule 1.10, such that all the conflicts of the of counsel lawyer and of the law firm are imputed to each other.*

D.C. Rule 1.10(a) states in pertinent part that, "[w]hile lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9...." (emphasis added).

> Comment [1] to Rule 1.10 clarifies that
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> [t]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.

In Opinion 247, the committee consid-

ered whether lawyers who held themselves out to the public as of counsel could avoid imputed disqualification and determined they could not. The lawyer argued that although he shared office space with the associated firm as of counsel, he actually did little more than "render occasional service to the associated firm on matters outside his real estate practice." Relying primarily on the language on Comment [1] to D.C. Rule 1.10 and ABA Formal Op. 90-357, the committee concluded that "an of counsel designation gives the public impression of a sufficiently close relationship among lawyers that they should be treated as if they were in the same firm for imputed disqualification analysis under [D.C.] Rule 1.10."

In Opinion 338, the committee confirmed that an of counsel lawyer to Firm A who was a partner in Firm B would be deemed to be "associated" with Firm A, and that "any disqualification of a lawyer in either firm would be imputed to all lawyers of both firms."[6]

Alternatives to the 'Of Counsel' Designation

There are, of course, many situations in which unaffiliated lawyers and law firms can benefit clients by working together on specific matters. The legal ethics opinions discussed herein are by no means meant to discourage such beneficial alliances. However, for the lawyer who only occasionally works for clients of another firm on specific types of issues (such as Sam Solo's proposed arrangement in the opening hypothetical), the ethics rules provide a straightforward approach to what is essentially a joint representation. Sam Solo could serve as an independent contract lawyer for Fast & Loose's occasional employment cases, but only if the contractual relationship is clearly explained to the client at the inception of the representation, and if Sam and the firm comply with the fee sharing requirements of D.C. Rule 1.5(e).[7] However, if, in fact, a lawyer's relationship is regular, close, and continuing, then the mere absence of an of counsel or similar designation may not necessarily avoid imputed disqualification under D.C. Rule 1.10(a).[8]

For a solo practitioner, the appeal of the greater resources of a larger law firm and the marketing and referral potential of an of counsel designation may be quite tempting; for a firm, the ability to expand into different practice areas or jurisdictions without costs of adding employees is also attractive, and in some cases, the designation makes sense. It is doubtful, however, that Fast & Loose has either a close, continuing, or regular relationship with its 15 named of counsel lawyers, and it is clear that, at the very least, potential conflicts abound.

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Notes

1 *See* D.C. LEO 151 (1985).

2 Unless certain conditions were met, DR 2-107(A) provided that "[a] lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office…." Rule 1.5(e), the successor to DR 2-107(A), which became effective in the District of Columbia in 1991, specifically provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
> (2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;
> (3) The client gives informed consent to the arrangement; and
> (4) The total fee is reasonable.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. *See* Comment [9] to D.C. Rule 1.5.

3 The American Bar Association Standing Committee on Ethics and Professional Responsibility issues formal advisory opinions interpreting the ABA Model Rules of Professional Conduct. Neither the ABA Model Rules nor the ABA's Formal Opinions specifically govern the conduct of District of Columbia Bar members. However, to the extent the language of the D.C. Rules of Professional Conduct is the same as or similar to an ABA Model Rule counterpart, an ABA Formal Opinion interpreting the language may inform the analysis and conclusions of the D.C. Bar Legal Ethics Committee in issuing formal ethics opinions interpreting the D.C. Rules, and vice versa.

4 This article does not address instances where a lawyer identifies him- or herself as "of counsel" on court filings in a single case. In the absence of any other general "holding out to the public" of such a relationship, such conventional designation does not typically implicate the broader misrepresentation or imputed disqualification issues discussed herein. *See also* ABA Formal Op. 90-357 (1990).

5 ABA Formal Op. 90-357 (1990) notes that its analysis would also more broadly apply to other terms such as "special counsel," "counsel," "tax counsel," or other designations that give the impression of a "close, regular, and personal relationship" between a lawyer and a firm.

6 *See* D.C. LEO 338 (2007). Importantly, the opinion reminds lawyers that pursuant to D.C. Rule 1.6, the of counsel lawyer or associated firm may need to obtain a client's or potential client's informed consent to disclose, with respect to any new matter, sufficient information to the other firm to facilitate both firms' ability to check for potential conflicts. Although a client's name and type of representation ordinarily do not constitute client "confidences or secrets" under D.C. 1.6(b), this information may require protection in certain circumstances. *See e.g.*, D.C. LEO 312 (2002) (Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm).

7 *See also* D.C. Rule 1.4(b). Indeed, Opinion 255 outlines an ethical roadmap in a similar relationship to facilitate avoidance of both a misleading impression of a regular and continuing relationship and conflicts imputation under D.C. Rule 1.10(a).

8 In D.C. LEO 352, the committee, addressing ethical issues that commonly arise for "temporary contract lawyers," found that "[t]he imputation of a temporary contract lawyer's individual conflicts to a hiring firm under D.C. Rule 1.10 depends on the nature and extent of the lawyer's relationship with the firm and the extent of the temporary lawyer's access to the firm's confidential client information." The opinion notes, however, that if the relationship between a lawyer and a firm is expected to last indefinitely, the lawyer is not a "temporary lawyer," and the conclusions by the committee may not apply.

Disciplinary Actions Taken by the Board on Professional Responsibility Hearing Committees on Negotiated Discipline

IN RE ROBERT W. MANCE III. Bar No. 285379. October 26, 2011. The Board on Professional Responsibility's Ad Hoc Hearing Committee recommends that the D.C. Court of Appeals accept Mance's petition for negotiated discipline for four consolidated matters and suspend Mance for six months with fitness for violations of Rules 1.1(a), 1.1(b), 1.3(a), 1.5(b), 1.7(b), 1.8, and 1.16(d).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE RICHARD D. LIEBERMAN. Bar No. 419303. October 7, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals accept Lieberman's consent to disbarment.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE DENNIS P. CLARKE. Bar No. 54353. October 13, 2011. The D.C. Court of Appeals approved Clarke's petition for negotiated discipline and suspended him for 90 days, with all but 30 days of the suspension stayed, followed by two years of probation during which Clarke must not be found to have violated any Rules of Professional Conduct. If, however, a new investigation of alleged ethical misconduct is undertaken against Clarke from the beginning of the suspension period until the conclusion of the two-year probationary period, and any such investigation results in a finding that Clarke violated the Rules of Professional Conduct, Clarke will be required to serve

the remaining 60 days of the suspension consecutively to whatever sanction may be imposed against him in the new matter or matters. Clarke inflated billable rates for associate attorneys and paralegals who provided legal services to an individual client, in violation of Rule 8.4(c).

IN RE MICHAEL JOSEPH MASON. Bar No. 358684. October 20, 2011. The D.C. Court of Appeals reinstated Mason with conditions. The conditions agreed to by Mason include: (1) successful completion within one year of reinstatement of the mandatory Continuing Legal Education class required of all new admittees; (2) successful completion within one year of reinstatement of 12 hours of Continuing Legal Education in the subject areas of criminal law, criminal procedure, and evidence; and (3) consultation with the D.C. Bar Practice Management Advisory Service prior to reentry into private practice and the execution of a waiver of confidentiality to permit Bar Counsel to obtain information on compliance. In addition, pursuant to the court's authority, *see* D.C. Bar R. XI § 16(f), the court imposed a condition that Mason remain in compliance with his post-release supervision imposed by the state of Virginia and execute the necessary waivers of confidentiality required for Bar Counsel to obtain information on Mason's compliance.

IN RE DAVID H. SAFAVIAN. Bar No. 448540. October 13, 2011. The D.C. Court of Appeals disbarred Safavian, *nunc pro tunc* to November 13, 2006, excluding the period of August 13, 2008, to February 18, 2009, representing the time when the interim suspension was lifted. Safavian was convicted in the U.S. District Court for the District of Columbia of obstruction of justice, in violation of 18 U.S.C. § 1505, and of making false statements, in violation of 18 U.S.C. § 1001, crimes involving moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

IN RE SHERYL L. ROBINSON WOOD. Bar No. 438953. October 13, 2011. The D.C. Court of Appeals approved Wood's petition for negotiated discipline and publicly censured her. The U.S. District Court, Eastern District of Michigan, Southern Division, appointed Wood as a monitor to evaluate compliance with two consent judgments involving the city of Detroit. Although Wood's position required her to remain neutral and independent from the parties, she had "undisclosed and personal communications with then Detroit Mayor Kwame Kilpatrick" from late 2003 through 2004, and intimate contact with the former mayor in early 2004. After the Michigan court confronted her with these facts, Wood voluntarily resigned as monitor on July 22, 2009. Rule 8.4(d).

Reciprocal Matters

IN RE MICHAEL A. KAPLAN. Bar No. 947499. October 6, 2011. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Kaplan for one year, all stayed in favor of a one-year probationary period subject to the conditions imposed in New Jersey.

IN RE MARK A. KEY. Bar No. 458725. October 6, 2011. In a reciprocal matter from North Carolina, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and suspended Key for 90 days with fitness.

IN RE GABRIEL I. MARTIN. Bar No. 465046. October 6, 2011. In a reciprocal matter from Florida, the D.C. Court of Appeals suspended Martin for three years with fitness, *nunc pro tunc* to August 29, 2011.

IN RE RITU SINGH. Bar No. 493198. October 20, 2011. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Singh, *nunc pro tunc* to August 24, 2011. Singh was permanently disbarred by consent in New Jersey based upon her admission that she had knowingly misappropriated client trust account funds.

IN RE ROBERT TEIR. Bar No. 413171. October 6, 2011. In a reciprocal matter from Texas, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Teir for 18 months, all stayed in favor of an 18-month probationary period subject to the conditions imposed by the state of Texas that he not engage in professional misconduct or violate any state or federal criminal statutes.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE JACK B. JOHNSON. Bar No. 344291. October 17, 2011. Johnson was suspended on an interim basis based upon his conviction of a serious crime in the U.S. District Court for the District of Maryland.

IN RE JEFFREY A. NEMEROFSKY. Bar No. 476841. October 11, 2011. Nemerofsky was suspended on an interim basis based upon discipline imposed in California.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE HARRY TUN. Bar No. 416262. October 3, 2011. Bar Counsel issued Tun an informal admonition for disclosing a client's confidences and secrets without the client's knowledge or permission while representing the client in a criminal matter. Rule 1.6.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*