

"Of Counsel" Liability

Lawyers associate with each other to provide legal services in a variety of ways. Lawyers with increasing frequency use of the term "of counsel" to denote relationships between attorneys and law firms. Although traditionally, the term was used to designate semi-retired lawyers who desired to maintain a regular association with a law firm for which they were previously a full-time attorney, now it is often used to designate other kinds of relationships between lawyers and law firm, or between two law firms:

- permanent full-time practitioners who are not on the traditional career path towards partnership in the firm;
- part-time affiliates of a firm who have other personal or professional commitments;
- potential partners brought into a firm for a probationary period;
- someone between a partner and associate; and
- Retired partners.

Definition

ABA Formal Advisory Opinion 90-357, defined "of counsel" as a "close, regular, personal relationship." It is a relationship "which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term 'associate', which is to say a junior non-partner lawyer, regularly employed by the firm."

Like most jurisdictions that have considered the question, the Supreme Court of California adopted the ABA definition of "close, regular, personal, and continuous." In discussing this aspect of the "of counsel" relationship, the court noted that "the essence of the relationship between a firm and an attorney 'of counsel' to the firm is the closeness of the 'counsel' they share on client matters." *People ex rel. Department of Corrections v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 980 P.2d 371, 86 Cal.Rptr.2d 816 (Cal. 1999).

Vicarious Disqualification

According to the ABA Lawyers Manual on Professional Conduct (Bur. Nat. Affairs 1990), the prevailing view is that "for purposes of disqualification, the of counsel attorney is considered to be affiliated with a firm so that the disqualification of one from representation must be imputed to the other."

The State Bar of Georgia, in its Formal Advisory Opinion No. 98-4, similarly concluded that, because an attorney who is "of counsel" should have a close, regular, personal relationship with the affiliated firm, when an "of counsel" attorney would be required to decline or withdraw from multiple representations, no partner, associate or other "of counsel" attorney of the principal firm may accept or continue such employment.

The Supreme Court of California came to the same conclusion in *Speedy Oil*, stating that, for purposes conflicts of interest and disqualification, an "of counsel" attorney and the principal firm must be considered "a single, de facto firm" so that if one of them is precluded from a representation because of a conflict of interest, the other is presumptively precluded from the representation as well.

Although the court in *Speedy Oil* noted that the "of counsel" attorney rented space in the firm's offices, talked frequently with its attorneys and discussed legal issues pertaining to cases the firm was handling, it did not rely on those factors for its decision. Instead, it reasoned that,

because an "of counsel" relationship is close, personal, continuous and regular, such a relationship justifies "a presumption that client confidences will be disclosed and exchanged in informal consultations. Hence, the conflict of interest of one will be imputed to the other, with the consequence that disqualification must follow." The court further explained that, from the perspective of clients and members of the public, "the 'of counsel' attorney can hardly be distinguished from other attorneys who may be more closely tied to a firm financially."

Other jurisdictions have taken a more fact-based approach under which an "of counsel" lawyer and the principal law firm may not necessarily be considered one firm for purposes of conflicts of interest. In *Gray v. Memorial Medical Center, Inc.*, 855 F.Supp. 377 (S.D.Ga. 1994), the court distinguished between "of counsel" who had a close, personal, continuous and regular relationship with the principal firm, and "a de minimus of counsel, an independent contractor working part time for the firm." The court in *Gray* stated that it "cannot envision a more peripheral relationship between an attorney and a law firm than that presented by these unique circumstances." The "of counsel" attorney was located in another town, his involvement with firm cases was limited to sporadic consultation, the firm had absolutely no involvement with the attorney's cases or those of his firm.

Material Limitation

Rhode Island Supreme Court Ethics Advisory Panel, Opinion No. 99-09 concluded that when the "of counsel" attorney and the law firm have separate offices, separate practices and no access to each other's files, they should not be considered one firm for purposes of conflicts of interest. It cautioned, however, that the attorneys also had to consider whether their affiliation would be a "material limitation" on the representation within the meaning of Rule 1.7(b), which prohibits a lawyer from representing a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. If the representation would be materially limited by the affiliation, the representation may be undertaken only if the lawyer reasonably believes the representation will not be affected and obtains the client's consent after consultation.

Vicarious Liability

Because the "of counsel" relationship is considered to be close, personal, regular and continuous, it also creates a risk of vicarious liability for legal malpractice.

In *Hart v. Comerica Bank*, 957 F.Supp. 958 (E.D.Mich. 1997), an attorney who was "of counsel" to a law firm was sued for legal malpractice under the theory of *respondeat superior*, for the negligent acts of attorneys in that firm. The attorney argued that, as "of counsel," he was not a member of the firm. The court did not decide this issue as a matter of law, but looked to the facts on both sides of the question. Among the factors considered by the court were:

- the manner in which the attorney held himself out and rendered services to the public;
- the entity to whom the clients paid their bills;
- the name on invoices and letterhead;
- whether the lawyer shared office space with the firm;
- the control the firm had over the attorney in client selection and case handling; and
- whether the lawyer was covered under the firm's health and malpractice insurance policies.

Because there was a genuine issue of material fact as to this issue, summary judgment was reversed, but the court left open the possibility that, under the right circumstances, the "of counsel" attorney could be liable for the firm's malpractice.

In another case, the converse was considered: whether a law firm could be vicariously liable

for the malpractice of an attorney associated with it in an "of counsel" capacity. In *Staron v. Weinstein*, 305 N.J.Super. 236, 701 A.2d 1325 (1997), an attorney failed to file a case within the applicable statute of limitations. At the time the plaintiff retained him, the attorney was "of counsel" to a firm. While the case was pending, the firm informed him that it was terminating the "of counsel" relationship. The firm notified all clients of which it had knowledge of the termination of that relationship. The firm was not aware, however, of one client - the one whose case was not filed within the statute of limitations. Consequently, that client was never informed that the lawyer was no longer "of counsel" to the firm. The "of counsel" attorney's malpractice occurred a year after the relationship had terminated.

In the legal malpractice brought against both the "of counsel" attorney and the firm, the firm contended that, because it was no longer associated with the "of counsel" attorney when the malpractice occurred, it could not be liable for that malpractice. The court found that genuine issues of fact existed and reversed summary judgment entered in favor of the firm on that issue.

The court rejected the theory that the firm was not liable as a matter of law for any malpractice committed by the "of counsel" attorney, holding that plaintiffs made a sufficient showing that the firm became counsel for plaintiffs by virtue of both the retainer agreement and the fact that the "of counsel" attorney had at least apparent authority to enter into such agreements on behalf of the firm. Having become counsel for plaintiffs, it was the responsibility of the firm to either terminate the representation or give notice that it was terminated by virtue of the "of counsel" attorney's departure.

In another case, however, the court found that the law firm was not liable for the acts of the attorney affiliated with it as "of counsel" based on the client's lack of reliance on any representation that the attorney was affiliated with the firm, the personal nature of the legal services to have been rendered by the attorney and the lack of remuneration to be paid to the firm. *Homa v. Friendly Mobile Manor, Inc.*, 93 Md.App. 337, 612 A.2d 322 (1992), *cert. granted*, 329 Md. 168, 617 A.2d 1085, and *cert. dismissed*, 30 Md. 318, 624 A.2d 490 (1993).

Risk Management

Whether courts in your jurisdiction take the prophylactic approach of the California Supreme Court in *Speedee Oil*, or conduct a factual inquiry into the nature and extent of the "of counsel" relationship, lawyers should be aware of their exposure to vicarious claims of legal malpractice arising out of an "of counsel" relationship.

Because one of the factors considered by the courts may be the knowledge of and reliance by the client on the "of counsel" attorney's affiliation with the law firm, in all communications with the public or with individual clients, the precise nature of the relationship between the "of counsel" and the law firm should be described fully and accurately. Clients of the firm should be informed of any participation the "of counsel" may have in handling the legal matter. Conversely, clients of the "of counsel" should be informed of any participation of the law firm.

The conflicts data bases of the law firm and its "of counsel" should both be examined for conflicts at least when an engagement of both the firm and its "of counsel" is made. Because some courts treat the law firm and its "of counsel" as one firm for conflicts purposes, the conflicts data bases of both should be checked before every engagement.

Finally, if the affiliation between the law firm and "of counsel" is close, both should consider obtaining insurance coverage from the same carrier to insure that all lawyers are covered.