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# Overcoming Ethical Challenges for Multi-Firm Lawyers and Their Firms: Fiduciary Duty, Conflict, Fee-Splitting and More

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Today's faculty features:

William T. Burke, Partner, **Williams & Connolly**, Washington, D.C.

Craig D. Singer, Partner, **Williams & Connolly**, Washington, D.C.

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# Overcoming Ethical Challenges for Multi-Firm Lawyers and Their Firms

*William T. Burke*

*wburke@wc.com*

*Craig D. Singer*

*csinger@wc.com*

*Williams & Connolly LLP*

# Multi-Firm Relationships – In General

- Lawyer as partner or employee of more than one firm
- More commonly:  Lawyer as "Of Counsel" at more than one firm
- Law firm may be "of counsel" to another law firm

# "Of Counsel" Relationships

- "Of Counsel" may mean any number of things:
  - Retired partner
  - Part-time employee
  - Full-time employee between partner and associate
  - Co-counsel to the firm for a particular matter
- We will use the term to mean: A lawyer who is neither a partner nor associate, but who maintains a close, regular, and personal relationship with the law firm.

# Of Counsel at Multiple Firms: History

- When is it appropriate for a lawyer to be "of counsel" at more than one firm?
- Old rules discouraged it.
  - ABA Informal Opinion 1173 (1971): "it is not proper . . . for any lawyer or law firm to be designated 'Of Counsel' to more than one lawyer or law firm."

# Of Counsel at Multiple Firms: History

- ABA Formal Opinion 330 (1973):
  - "Upon reconsideration, we recognize that while it would be highly unusual for a lawyer to be able to maintain simultaneously with two law firms the close, personal relationship indicated by the term 'Of Counsel', it may not be impossible for such a situation to exist. It is obviously impossible, however, for one to maintain such a relationship with more than two law firms."
- Most States followed this rule until . . .

# Of Counsel at Multiple Firms: History

- ABA Formal Opinion 90-357 (1990).
  - "On further consideration, the Committee finds the conclusion it reached on this subject in Formal Opinion 330 to be a doubtful one."
  - "The proposition that it is not possible for a lawyer to have a 'close, regular, personal, relationship' with more than two lawyers or law firms is not a self-evident one."
  - "There is to be sure some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two, but **the controlling criterion is 'close and regular' relationships, not a particular number.**"

# Most States Today Follow ABA Formal Opinion 90-357 and Allow Of Counsel at Multiple Firms

- Georgia Formal Advisory Opinion 97-2
- State Bar of California Standing Committee on Prof'l Responsibility and Conduct Formal Op. 1993-129
- State Bar of Michigan Ethics Op. RI-102 (1991)
- Maryland Ethics Docket 88-45 (1988)
- Massachusetts Bar Association Ethics Opinion No. 01-1
- Florida State Bar Ass'n, Committee on Prof'l Ethics, Op. 93-6 (1994)
- NY State Bar Ass'n Committee on Prof'l Ethics, Op. 944 (2012)
- Philadelphia Bar Ass'n Prof'l Guidance Committee, Op. 2001-5 (2001)
- South Carolina Bar, Ethics Advisory Committee, Op. 95-15 (1995)
- D.C. Bar Op. 338 (2006)
- Ohio Op. 2008-1 (2008)
- Oregon Formal Opinion No. 2005-155 (2014)
- Maine Prof'l Ethics Commission Op. 175

# A Few States Still Have 2-Firm Limit Or Have Not Decided

- Texas Comm. on Prof'l Ethics, Op. 402 (1982) (following traditional rule that of counsel may practice in no more than 2 firms)
- Nebraska Ethics Advisory Opinion for Lawyers No. 10-04 (recognizing the traditional rule that lawyers may practice in no more than two firms and the ABA position that there is no numerical limit – without stating which one applies in Nebraska).

# Other Multi-Firm Relationships Aside from Multiple "Of Counsel"

- Many jurisdictions permit a lawyer to be a partner in more than one firm
  - D.C. Bar Op. 338 ("the prevailing view among the various jurisdictions that have considered these issues is that a lawyer is not prohibited from being a partner in more than one firm if the firms are treated as one for imputation of conflicts").
  - The Ass'n of the Bar of the City of New York Formal Op. 1995-9 (1995)
  - Maryland Ethics Docket 88-45 (1988)
  - New Jersey Advisory Committee on Prof'l Ethics Op. 637
  - Ohio Op. 2013-1 (2013)
  - Georgia Formal Advisory Opinion 97-2
  - Florida State Bar Ass'n, Committee on Prof'l Ethics, Op. 93-6 (1994)
  - NY State Bar Ass'n Committee on Prof'l Ethics, Op. 944 (2012)
  - Philadelphia Bar Ass'n Prof'l Guidance Committee, Op. 2001-5 (2001)
  - South Carolina Bar, Ethics Advisory Committee, Op. 95-15 (1995)

# Other Multi-Firm Relationships Aside from Multiple "Of Counsel"

- Examples of lawyer serving as partner in one firm and of counsel in another:
  - Florida Bar Op. 94-7:
    - Law firm refers personal injury cases to a lawyers who is "of counsel" to the firm and who sometimes works in the law firm's offices, but who also has an independent practice in which he is a partner.
  - Ass'n of the Bar of the City of New York, Comm. on Prof'l and Judicial Ethics, Formal Ops. 1995-9:
    - A law firm named "A B & C" is a NY partnership consisting of partners A, B, and C. Motivated by tax concerns, C retires and becomes "of counsel" to the New York law firm A B & C. C becomes partner in a Washington, D.C. law firm that has the same name, "A B & C", and consists of the same partners A, B, and C.

# Other Multi-Firm Relationships Aside from Multiple "Of Counsel"

- Some jurisdictions permit a *law firm* to be a member of, or of counsel to, another law firm.
  - ABA Formal Op. 90-357
  - Ass'n of the Bar of the City of New York, Comm. on Prof'l and Judicial Ethics, Formal Ops. 1995-8
    - Example: Law Firm F subleases office space to two independent attorneys L and M. Firm F, L and M engage in joint consultations with clients and joint investigatory and litigation efforts. They have separate telephone numbers and practice under different names. *Firm F may become "of counsel" to attorneys L or M* and attorneys and L or M may become "of counsel" to Firm F, so long as the parties maintain the requisite ties to support the "of counsel" relationship.
  - Maryland Ethics Docket 88-45 (1988)
    - Example: A Maryland law partnership is composed of 4 partners: attorney A, attorney B, *Maryland professional association C, and Maryland law partnership D*. The second tier Maryland law partnership D is composed of individuals who may or may not be partners in the first tier partnership.

# Virtually All States Recognize Some Multi-Firm Relationships

- Today, we are not aware of any state that does not permit a lawyer to be of counsel to more than one firm.
  - Until last year, Iowa was a hold-out, adhering to Opinion No. 87-09, which did not permit lawyers to practice at more than one firm.
  - Iowa withdrew Opinion No. 87-09 in 2013 and issued Ethics Opinion 13-01, allowing lawyers or law firms to have "multiple of counsel relationships with different firms" provided that there is a "close, regular, and continuous relationship" between the lawyer and each firm with which he or she is affiliated.

# Conflicts of Interest: Imputation

- Conflicts are Imputed to All Firms
  - In jurisdictions that permit a lawyer to be affiliated with more than one firm, the law firms must be treated as a single firm for conflicts purposes.
  - Conflicts are imputed to all lawyers in both firms.
    - ABA Formal Op. 90-357 ("the effect of two or more firms sharing an of counsel lawyers is to make them all effectively a single firm for conflict of interest purposes"

# Conflicts of Interest: Ethical Screens

- An ethical screen is ***not*** sufficient to avoid imputation of conflicts of interest.
  - New York State Bar Ass'n Committee on Prof'l Ethics Op. 876 (2011) ("[L]awyers associated as partners, associates, or of counsel cannot avoid the imputation of conflicts by creating a screen or by limiting the practice of one of the firms.").

# Conflicts of Interest: Client Confidentiality

- Client Must Consent to Disclosure of Confidential Information
- Implications for Conflict Checking
  - Philadelphia Ethics Op. 2001-5 ("the dictates of client confidentiality under Rule 1.6 require that each firm obtain a client's or potential client's permission to circulate enough information outside the firm to the other firms involved in order to do the required conflict check").
- Best Practice: Get Client Consent to Disclose Conflicts Check Information to all Firms

# Fiduciary Duties

- A lawyer owes fiduciary duties to each firm with which he or she is of counsel.
- The lawyer and the law firms must agree how the lawyer will fulfill those duties to each firm.
- Which of the lawyer's cases will be handled by each law firm?
  - Depending on terms, agreement may require amendment to law firm's partnership agreement.
- In some circumstances, a lawyer's fiduciary duties to one firm may prevent association with other firms.
  - *See* Ohio Op. 2013-1 (2013);
  - *See* Phila. Bar Ass'n Prof'l Guidance Committee Op. 2001-5 (2001).

# Fee-Splitting

- Model Rule 1.5(e) provides that a fee may be divided "between lawyers who are not in the same firm" only if three conditions are satisfied:
  - The division is in proportion to the services performed by each lawyer **OR** each lawyer assumes joint responsibility for the representation;
  - The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; **AND**
  - The total fee is reasonable.

# Fee-Splitting

- The states differ on the issue of whether an of counsel who practices with more than one firm must adhere to the fee-division restrictions of Rule 1.5(e) before he or she can split a fee with a law firm to which he or she is of counsel.
- Some states take the position that the of counsel and the law firm with which he or she is splitting the fee must comply with the fee-division restrictions of Rule 1.5(e).
  - DC Opinions 151 and 197
  - Florida Bar Opinion 94-7 (1995)
  - South Dakota Ethics Op. 90-9 (1990)

# Fee-Splitting

- Other states hold that Rule 1.5(e) does not apply because a fee-division between a firm and a lawyer who is of counsel to the firm is not a division "between lawyers who are not in the same firm."
  - Iowa Ethics Op. 13-01 ("We do not believe the [fee-splitting] 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 its of-counsel members, is not a matter of client concern.")
  - Ohio Op. 2008-1 ("An 'of counsel' lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated 'of counsel.'").
  - Texas Comm. on Prof'l Ethics Op. 450.
  - Maine Prof'l Ethics Commission Op. 175.

# Disclosure of Lawyer's Affiliations: To the Client

- Model Rules 1.2(a) and 1.4(a)(2) require a lawyer to consult with the client regarding the means by which the objectives of the representation will be achieved.
  - Rule 1.2(a): "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."
  - Rule 1.4(a)(2): "A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."

# Disclosure of Lawyer's Affiliations: To the Client

- The lawyer may need to disclose to the client which law firm will be undertaking the representation and how that will affect the handling of the client's matter.
  - Georgia Formal Advisory Opinion No 97-2 ("An attorney may practice simultaneously in more than one firm so long as . . . the public and individual clients are clearly informed . . .").
  - Ohio Op. 2013-1 (2013) ("Due to the complex conflict concerns for lawyers who practice simultaneously in multiple firms, such lawyers must notify all of the applicable firms of the lawyer's other firm associations. . . . [pursuant to Rules 1.4 and 7.1] a lawyer must inform his or her clients of all multiple practice associations. Both clients and prospective clients may require this information to make informed decisions about the representation.")
  - Maine Prof'l Ethics Commission Op. 175 ("[I]n order to avoid misleading clients, and thereby possibly violating Bar Rule 3.2(f)(3), Lawyer B must clearly define the terms of the engagement with the client making it clear whether the engagement is with Lawyer B alone or with Law Firm A.").

# Disclosure of Lawyer's Affiliations: To Other Clients

- In some states, ***all*** clients of all lawyers in the law firms must be told about the affiliation between the firms as a result of a lawyer who is of counsel to multiple firms.
  - Massachusetts Bar Association Ethics Opinion no. 01-1:
    - "[C]lients who consult the 'of counsel' lawyer at Firm A must be told that the lawyer has an 'of counsel' relationship with Firm B that results in the two firms being treated as one for a variety of purposes."
    - "Clients who come to Firm A will ordinarily have no expectation that they are involved with Firm B at all and may not wish to have any relationship at all with Firm B."
    - "Moreover, the same situation may exist with all clients of any lawyer at either Firm A and Firm B. They, too, need to be informed of the affiliation and the consequences thereof."

# Disclosure of Lawyer's Affiliations: To the Public

- Advertising and Related Rules: Model Rules Section 7
- The lawyer and the law firms must be careful not to advertise their relationships in ways that might be misleading to the public.
- Firm letterhead
  - Must disclose on the letterhead that a lawyer is 'of counsel'
    - State Bar of Michigan Ethics Opinion RI-102
  - Use different letterhead for matters handled by each firm.
  - In dealing with a client matter that has been assigned to Firm A with which the lawyer is affiliated, the lawyer should be careful not to use the letterhead of Firm B with which the lawyer is also affiliated.

# Disclosure of Lawyer's Affiliations: To the Public

- Websites
- Social media
- Email address
  - A lawyer affiliated with more than one firm should have a separate email address for each firm.
    - Prevents client confusion as to which firm is representing the client. Be careful not to email a client using an email address associated with a firm that is not representing the client
    - Prevents confidential information in emails from being stored in the electronic records of the wrong law firm.
- Electronic filings with the court
  - Are separate ECF accounts necessary for the lawyer (one for each firm) so that the electronic filing system will associate the correct law firm with the lawyer's filing?

# Duty to Supervise

- Model Rule 5.1(a): Partners and other managerial lawyers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules …"
  - A lawyer who is affiliated with the firm as "of counsel" may be considered a "lawyer in the firm" for purposes of the Rule. *See, e.g.*, Iowa Ethics Op. 13-01 ("we consider all parties to the of-counsel relationship to be in the same firm for all ethical purposes).
  - Best practices:
    - Careful due diligence on lawyers who the firm is considering designating "of counsel"
    - Regular, in-person meetings with of counsel

# Duty to Supervise

- Model Rule 5.1(b): "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyers conforms to the Rules …"
  - An "of counsel" lawyer has a duty to supervise any subordinate lawyers – including law firm associates – who are working for him or her.

# Loss Prevention

- A law firm risks liability if an of counsel attorney represents a client in a matter being handled by a different firm, but …
  - it is not clear to the client which firm is handling the case or,
  - the client believes the law firm is handling the matter when it is not.
- Risk that a client with a malpractice claim may sue the wrong firm, or all firms with which the of counsel is affiliated.
  - Example: Attorney has solo litigation practice and is also "of counsel" to Firm B. Attorney's solo practice website describes him as "of counsel" to Firm B. Attorney represents Client in solo practice. Client alleges malpractice and sues both Attorney and Firm B. Firm B denies liability – no attorney-client relationship. Discovery reveals engagement letter on Attorney's solo-practice letterhead but it is silent as to Firm B, thus there is no written acknowledgment from Client that Firm B is not involved. Attorney usually sent emails to Client from his own email account, but occasionally from his Firm B email account. Client once met with Attorney in Firm B's offices. Client's current attorney thinks Firm B's reputational concerns will provide leverage for a quick settlement.
- Insurance coverage considerations

# Conclusions

- Multi-Firm Practice is Often Ethically Appropriate and Feasible
- Attorneys Engaged in Multi-Firm Practice Should Turn Square Corners
- Be Sensitive to All Ethics Requirements, which Present Many Potential Pitfalls
- Careful Conflict Checking Across All Affiliated Firms
- Good Communication Among the Affiliated Firms
- Good Communication with, and Consent From, the Client Is Paramount