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# A GOLDEN OPPORTUNITY

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*Working as an Of Counsel member for a law firm allows a lawyer to be formally affiliated with a practice, but it is important to be aware of rules, concerns, and potential conflicts of interest when assuming this role. Signing on as an independent contractor may be a better option. Weighing the tax benefits of an Of Counsel role vs. an independent contractor role may help to make the decision easy.*

# A Golden Opportunity

by Harold G. Wren

The American Bar Association's Formal Ethics Opinion 90-357 describes the core characteristic of Of Counsel as a "close, regular, personal relationship . . . which is neither that of a partner . . . nor . . . the status ordinarily conveyed by the term associate." The problem with this definition is that it is purely negative. It tells you what Of Counsel is not, but not what Of Counsel is. Formal Opinion 90-357 goes on to list four kinds of relationships that are properly termed Of Counsel and four that are not. Between these two extremes is anything that the mind can dream up under the law of contract. That is the status of Of Counsel today—it is a golden opportunity for creative drafting, and that should be kept in mind when drafting an Of Counsel contract.

Multiple Of Counsel relationships are permitted under Formal Opinion 90-357, but you should exercise caution not to have too many Of Counsel relationships because of the conflict of interest rules and the imputed disqualification rules.

Law firms as well as lawyers can be Of Counsel where, for example, a law firm retains another law firm in another city as Of Counsel. That has not been all that popular a provision. Today, regional law firms are developing, which likely will become more common as the practice of law moves into regional practicing.

In legal malpractice, there are three theories of liability—tort, contract, and breach of fiduciary responsibility. Each presents certain problems. In tort, for example, the biggest question is whether an employment relationship is shown, because of the doctrine of respondeat superior. If that is shown, then there is no question the principal will be liable for the torts of the servant. Making the lawyer an independent contractor does not avoid that liability because the plaintiff may prove negligence in the selection or control of Of Counsel. An important consideration is the necessity of privity. Only Of Counsel and the law firm are involved in a typical malpractice suit, but this is changing some-

what. It goes back to *Ultramarine v. Touche*, the famous Cardozo opinion that dealt with the accounting profession. 255 N.Y. 170 (1931). According to Cardozo, if you perform legal work and your work product has a third party in mind, you can be held liable to the third party.

The key to all Of Counsel relationships may be the specific contractual arrangement between the parties. The firm may be liable if it has close Of Counsel with actual or apparent authority. These are the fundamental rules of agency with which all lawyers are familiar. Factual patterns may negate the normal independent contractor status. For example, the relationship may be a joint venture, a partnership by estoppel, or, at the other end of the scale, that of an employer-employee.

The most important development in malpractice liability may be the growth of the breach of fiduciary responsibility, which may continue. The cause of concern is whether Of Counsel might be in a fiduciary responsibility situation if certain aspects of the situation were to change. In a Massachusetts case, a law partner could not state a claim for legal malpractice without an attorney-client relationship because of the privity, but he could take the same allegations and plead breach of fiduciary duty as a cause of action. This is certainly a growing trend.

Vicarious liability is the principal concern for most Of Counsels because the law firm often has more liability at stake than does the lawyer, although both can be held liable. The typical fact patterns involve associated counsel where you have a fiduciary relationship, partnership and joint venture, and partnership by estoppel. All of these are fiduciary relationships and all require full disclosure and acting as a fiduciary. In *Meinhard v. Salmon*, Cardozo said that the law of contract was not appropriate in dealing with relationships among partners. There must be full disclosure as between partners or any other fiduciaries. 1928 N.Y. LEXIS 830 (N.Y. 1928).

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Another concern is conflicts of interest. The interest must be directly adverse before there is an issue. However, a lawyer may cause the waiver of the directly adverse relationship if he reasonably believes that the representation will not be adversely affected, and there is full disclosure, and the client consents. Familiar factual patterns in the directly adverse situation include the husband and wife in a divorce action. The lawyer cannot represent both parties. The same thing is true in family litigation or in relationships in trusts and estates, where the lawyer cannot represent the beneficiaries, the estate, and the trustee without the necessary consent of all parties.

In successive relationships, as distinct from simultaneous ones, the lawyer must answer two questions. First, are the former and present representations adverse in any material way? That's fairly easy. Second, are the matters substantially related? (Those are the key words, *substantially related*.) Often, the answer is no, and the lawyer can continue to represent them. However, sometimes a lawyer will send out correspondence such as tax or estate planning letters or bring the estate up to date, and will have completely forgotten about the fact that she earlier represented a client whose relationship with another of the letter's recipients could cause the lawyer to be disqualified. In fact, most case law involving Of Counsel results from conflicts of interest and the very closely related imputed disqualification. To avoid this problem, the lawyer can advance inconsistent positions in two different cases—not in the same case—unless there would be an adverse situation affected by the representation. In any event, by avoiding multiple relationships, the lawyer will not have too many Of Counsel situations that can mean greater imputed disqualification. The Of Counsel lawyer who has a conflict must also consider that this affects the entire firm. Of Counsel must distinguish present affiliates—people whom the lawyer is presently representing—because, with them, there is an irrebuttable presumption that confidences were shared. This is what causes the disqualification. With former affiliates, there is a rebuttable presumption that the disqualified lawyer has shared confidences. However, this partic-

ular burden of proof lies with Of Counsel, who must show by clear and convincing evidence that the confidential information was not and is not likely to be disclosed—a very tough burden to prove.

A few special situations should be remembered about Of Counsel in the imputed disqualification system. Some of the firms have said the way to protect against imputed disqualification if a lawyer moves from firm A to firm B is to erect a Chinese wall to keep those matters from coming into play where there would be a conflict as far as the relocating lawyer is concerned. That there are holes in that wall is always a very good bet, however, and the Of Counsel should be very careful before attempting to construct such a situation. But it is a possibility.

Another special situation concerns government employees and former judges. Here, the ethics rules apply only where Of Counsel is actually associated or has, as the rules put it, “substantial responsibility.” If before coming into practice, counsel in question was a judge and had a case in which he had substantial responsibility affecting a client, he would during practice have to withdraw from that client's matter.

Lawyer advertising is governed by commercial free speech, and there are four tests for showing what constitutes commercial free speech. In *Zauderer*, the U.S. Supreme Court held that the state cannot prohibit lawyer advertising targeted at a particular clientele. In that case, there was an advertisement featuring drawings of intrauterine devices with the question, “Did you use this IUD?” Clearly, that advertisement was designed to target a particular clientele, and the Court held that it was protected commercial free speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Of Counsel should distinguish advertising from personal solicitation. The U.S. Supreme Court has said that the state may regulate misconduct in the form of personal solicitation, but only in the egregious case. The case that the Court considered concerned an attorney who induced a minor injured in an automobile accident to sign an employment contract for the lawyer's services while the minor was in the hospital. By contrast, *In re Primus* involved a lawyer who mailed material offering the ACLU's free services. The Court held that

the mail officer was protected, not as commercial free speech but as political free speech. 436 U.S. 412 (1978). In a Kentucky case, *Shapiro v. The Kentucky Bar Association*, a proposed direct mail letter was sent to the state's Attorney Advertising Commission for approval. The court held that the letter was completely protected as commercial free speech, and this holding continues to be the law in the state. The ethics rules, incidentally, prohibit all targeted direct mail solicitation by lawyers for, as they put it, pecuniary gain. I can't think of any other reason why lawyers would solicit by direct mail, but according to the ethics rules, they can't do it.

With respect to advertising, any jurisdictional limitations must be displayed on letterhead. If the lawyer is admitted in more than one jurisdiction, the lawyer should make sure that the letterhead indicates each jurisdiction in which he is admitted. If the lawyer is not admitted in the particular jurisdiction where he is practicing, this fact must be indicated on the letterhead. A retired partner's name can be put in the firm name even though he is Of Counsel; obviously, the firm would find this important to do if the attorney had a long history with the firm, for the sake of goodwill if nothing else.

The lawyer must include "Of Counsel" on business cards, shingles, flyers, and any other forms of promotion or advertising. Remember that all forms must state all jurisdictional limitations. Also, including any special terms such as tax counsel or special counsel is permitted and desirable.

When you begin drafting the agreement, keep in mind that its most important provision concerns compensation. Compensation can be defined in a variety of ways, including as a percentage of gross or net and as an hourly rate. Avoid using an hourly rate if you're seeking an independent contractor position because that gives the appearance of an employee-employer relationship. To enjoy the typical benefits of an employee of the firm, such as malpractice insurance, health insurance, group term insurance, and travel expenses, the agreement should provide that for those purposes *only*, Of Counsel shall be treated as an employee. You may want to do some investigation about your sta-

tus—the independent contractor situation may be the better deal, for tax and general practice reasons. Generally, the firm will be liable for the Of Counsel's pecadillos, but not the reverse.

As mentioned, Of Counsel can have many different provisions regarding compensation. The most common is a percentage of gross fees produced by the Of Counsel lawyer. Such percentage of gross might range from 40 to 60 percent, depending upon variables such as whether the firm pays all or a portion of malpractice insurance. Generally, the Of Counsel lawyer does not share in any office overhead or parking expense. Further, most Of Counsel agreements cover the independent contractor status, and, unless expressly included in the agreement, the lawyer is not eligible for health insurance or retirement benefits.

There are some tax benefits in adopting independent contractor rather than employee status. For starters the "contractor" legal relationship calls for filing a Schedule C for income tax purposes and deducting from such gross income all the allocable business expense related to it. This reference is to IRS Code Section 162, permitting deductions of ordinary, necessary, and reasonable expense in conducting a trade or business. Such deductions reduce the gross income dollar for dollar—and, correspondingly, the net income subject to self-employment is based on this reduced figure. (Additionally, one-half of such self-employment tax is deductible from gross income on Form 1040, to determine adjusted gross income.) Another advantage of filing Schedule C is that you can claim a 100 percent deduction of payments for health insurance for yourself, your spouse, and your dependents (also on Form 1040).

A further major deduction on Form 1040 can be made if you have adopted a self-employed 401(k) plan. The maximum deduction for 2006 for a taxpayer over 65 is \$49,000, which is based on the annual "salary" deferral amount and a percentage of net earned income. (See your CPA for your actual calculations and to set up the plan before the end of this tax year.) This is a great income deferral mechanism and should be considered by all who are eligible.

For more information, see Marvin W. Maydew, *Self-Employed 401(k) for Senior*

*Lawyers and Other Self-Employed Individuals*, SENIOR LAWYER NEWSLETTER [now VOICE OF EXPERIENCE] Vol. 18, No. 4 (Winter 2007).

By contrast to the above independent contractor status, an employee in an Of Counsel relationship may take business deductions only on Schedule A (as miscellaneous deductions, together with other regular itemized deductions) and is limited to the amount by which the business deductions exceed 2 percent of the adjusted gross income. Not good. Independent contractor status is best for taxes (at least as of June

2007; as always, present tax rules are subject to change, by statute or case law).

I believe Of Counsel relationships have a golden future, and I think that we can do wonderful things by going this route. When I first went into law practice in 1948, I was hired by the New York firm of Wilkey Farr and Gallagher. We had a so-called Of Counsel on our letterhead, a former governor of New York. I never saw him. I don't even know whether he existed; it may all have been a myth. Today's Of Counsels have no such luxury. ■

## **A Golden Opportunity**

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