THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

Formal Opinion 2013-3:

"OF COUNSEL" DESIGNATION FOR NEW YORK ATTORNEY PRACTICING LAW IN A FOREIGN COUNTRY

TOPIC: "Of Counsel" Designation

DIGEST: A New York law firm may designate as "of counsel" a lawyer who is licensed to practice law in New York but resides and practices law mainly in a foreign country, provided that: (a) the of counsel lawyer has a "continuing relationship" with the law firm; (b) the use of the of counsel title is not false or misleading in other respects; and (c) the of counsel lawyer's practice does not constitute the unauthorized practice of law in the foreign country.

RULES: 7.5, 5.5

QUESTION: Is a New York law firm permitted to designate as "of counsel" a lawyer who is licensed to practice law in New York but resides and practices law mainly in a foreign country?

OPINION

A New York law firm would like to designate as "of counsel" a lawyer who is licensed to practice law in New York but resides and practices law mainly in a foreign country. Subject to the limitations and conditions below, a New York law firm may designate as "of counsel" a lawyer who is licensed in New York but resides and practices mainly in a foreign country.[1] *See, e.g.*, N.Y. State Bar Ass'n Ethics Opinion ("NYSBA Ethics Op.") 955 (2013) (law firm may designate out-of-state attorney as "of counsel"). First, the of counsel lawyer must have a "continuing relationship" with the law firm as required by Rule 7.5(a)(4) of the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. City Bar Ass'n Formal Ethics Opinion ("NYCBA Formal Op.") 1996-8 (1996) (an of counsel attorney must have a "close, continuing, regular and personal" relationship with the law firm); NYCBA Formal Op. 1995-8 (1995) (a "'continuing relationship' has been characterized . . . as a 'close, regular, personal relationship' other than that of partner or associate."). Second, the of counsel title must not be false or misleading in other respects. *See* R. 7.5, Cmt. [1] ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."). Third, if the of counsel lawyer's practice in the foreign country constitutes the unauthorized practice of law in that jurisdiction, then the law firm must not designate the lawyer as of counsel. *See* R. 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law").[2]

---

[1] The New York lawyer "is subject to the disciplinary authority of this state" even if his conduct occurs overseas. R. 8.5(a). But the question of which jurisdiction's disciplinary rules would govern the "of counsel" lawyer's conduct is beyond the scope of this Opinion because the inquiry does not provide sufficient facts to make that determination. *See* R. 8.5(b).

[2] Whether a lawyer's conduct constitutes the unauthorized practice of law is a question of substantive law, which falls outside the jurisdiction of this Committee.

Determining whether a "continuing relationship" exists within the meaning of Rule 7.5(a)(4) involves a multi-factor analysis that depends on the facts and circumstances of each situation. *See* NYSBA Op. 955 ("Whether the relationship meets the 'continuing relationship' test is fact-specific."). Essential to this determination is whether the of counsel lawyer is available to the law firm "for consultation and advice on a regular and continuing basis." NYSBA Ethics Op. 936 (2012); *see also* NYSBA Ethics Op. 853 (2011) (full time in-house counsel with corporation who "minimizes" relationship with law firm may not be designated of counsel).

Ethics opinions that analyze the "continuing relationship" identify a variety of factors that may be examined to determine whether an of counsel designation is appropriate. A distillation of those ethics opinions suggests that the following factors, which are not intended to be exclusive or exhaustive, may be relevant to that determination:

- whether the lawyer shares office space with the law firm;
- whether the lawyer is actively involved in the firm's day-to-day affairs;
- whether the lawyer is actively involved in the firm's cases;
- the frequency and nature of the lawyer's communications with the firm;
- whether and to what extent the firm's clients use the lawyer's services;
- whether the lawyer's relationship with the firm is extremely limited, such a relationship that involves only the referral of business or occasional consulting.

Because of counsel relationships vary significantly from firm to firm, the fact that some of these elements are not present in a particular relationship (or that other elements not listed above are present) does not necessarily make the of counsel designation inappropriate. *See* NYSBA Ethics Op. 936 (no "fixed set of a few factors will answer the question whether a relationship is sufficiently close, regular and personal as to justify any form of 'counsel' designation"). Conversely, the existence of a particular factor or combination of factors does not conclusively determine that an of counsel relationship is appropriate. *See* NYCBA Formal Op. 1995-8 ("sharing of space and availability for consultation on a regular basis are strongly indicative of the requisite closeness of relationship, but not conclusive absent closeness, regularity and a personal dimension in the relationship").

Another important consideration is the policy underlying the ethics opinions and rules concerning of counsel attorneys – namely to protect the public from being misled about the relationship between the law firm and the of counsel attorney. *See* NYSBA Ethics Op. 955 ("Ethics committees have set forth criteria for use of particular designations such as 'of counsel' so as to avoid the risk of misleading the public."). By using the of counsel designation, both the law firm and the lawyer are conveying to the public that the lawyer's continuing relationship with the firm is close, regular, and personal.[3] *See* NYSBA Ethics Op. 793 (2006). Where these

[3] To avoid unexpected conflict problems, the law firm should review the Rules, ethics opinions, and case law relating to the imputation of conflicts of interest between law firms and of counsel lawyers. *See, e.g.*, NYCBA Formal Op. 1995-8 ("If the 'of counsel' designation is employed, the attorneys will need to keep in mind that for purposes

characteristics are absent, the public – including potential clients – may be misled or harmed.

CONCLUSION

A New York law firm may designate as "of counsel" a lawyer who is licensed to practice law in New York but resides and practices law mainly in a foreign country, provided that: (a) the of counsel lawyer has a "continuing relationship" with the law firm; (b) the use of the of counsel title is not false or misleading in other respects; and (c) the of counsel lawyer's practice does not constitute the unauthorized practice of law in the foreign country.

---

of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). The law firm should also be cognizant of their disciplinary responsibility and liability for the conduct of an of counsel attorney. *See* R. 5.1.