

Los Angeles County Bar Association  
Professional Responsibility And Ethics Committee

REVISED Opinion No. 516

Revised July 21, 2014

ETHICAL CONSIDERATIONS RELATING TO AN ATTORNEY  
WHO CONCURRENTLY SERVES IN AN OF COUNSEL RELATIONSHIP  
WITH A LAW FIRM AND MAINTAINS A SEPARATE SOLO PRACTICE

SUMMARY

An attorney is not precluded by ethics rules from concurrently being affiliated in an of counsel capacity with another attorney or law firm and maintaining her own solo practice. In communicating with a former, present or prospective client concerning the availability of professional employment, prior to or at the commencement of an engagement, the attorney should disclose her dual capacities and take reasonable steps to ensure that the actual or potential client understands whether the attorney will handle the client's matter in her solo practice or in her of counsel capacity. In subsequent communications with the client and the public, the attorney should take reasonable steps to avoid confusion concerning the capacity in which she represents the client. Notwithstanding rule 1-400(E), standard (9) of the California Rules of Professional Conduct, the attorney may use separate business cards and stationery to indicate when she is acting on behalf of the firm with which she is affiliated or through her solo practice. The attorney must ensure that her communications to the public are not false, deceptive, misleading or confusing as to the capacity in which she is acting. The attorney must also comply with all other applicable ethics rules, including rules 3-310 (conflicts of interest) and 2-200 (fee splitting).

## AUTHORITIES CITED

### **Cases**

*Chambers v. Kay* (2002) 29 Cal.4<sup>th</sup> 142

*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4<sup>th</sup> 17

*Goldberg v. Warner Chappell Music Inc.* (2005) 125 Cal.App.4<sup>th</sup> 752

*Hempstead Video, Inc. v. Incorporated Village of Valley Stream* (2d Cir. 2005) 409 F.3d 127

*The People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135

*Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber* (2d Cir. 2005) 407 F.3d 34

*Streit v. Covington & Crowe* (2000) 82 Cal.App.4<sup>th</sup> 441

### **Statutes**

Cal. Bus. & Prof. Code, §6068(e)(1)

Cal. Bus. & Prof. Code, §§ 6160-6172

Cal. Evid. Code § 605

Cal. Evid. Code § 606

### **Other**

ABA Form. Op. 90-357 (May 10, 1990)

ABA Form. Op. 84-351 (1984)

Cal. Rule of Professional Conduct 1-100(B)(4)

Cal. Rule of Professional Conduct 1-400(A)

Cal. Rule of Professional Conduct 1-400(D)

Cal. Rule of Professional Conduct 1-400(D), std. (6), (7), (8) & (9)

Cal. Rule of Professional Conduct 2-200

Cal. Rule of Professional Conduct 3-310

Cal. Bar Ass'n Form. Op. 2004-167 (2004)

Cal. Bar Ass'n Form. Op. 1993-129 (1993)

Cal. Bar Ass'n Form. Op. 1986-88 (1986)

L.A. Co. Bar Ass'n Form. Op. 470 (1993)

L.A. Co. Bar Assn'n Form. Op 386 (1980)

S.D. Co. Bar Ass'n Form. Op. 1996-1 (1996)

S.F. Co. Bar. Ass'n Form. Op. 1985-1 (1985)

H.G. Wren & B.J. Glascock, *The Of Counsel Agreement*, ABA Senior Lawyers Division (2d ed. 1998)

*Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation*, Cal. State Bar Office of Prof. Standards (Dec. 1987)

## FACTS AND ISSUES PRESENTED

An attorney maintains a general practice as a solo practitioner. As such, she routinely distributes to past, current and potential clients business cards and stationery identifying her practice. Recently the attorney has been offered the opportunity to affiliate with a law firm in an of counsel capacity. If she accepts the offer, when working on the law firm's business, she would like to use a set of business cards and stationery that identifies her affiliation with the law firm. She also wishes to continue to maintain her solo practice. For matters handled through her solo practice, she would like to continue to use the business cards and stationery identifying her solo practice.

The law firm has asked the following questions:

1. Does rule 1-400 of the California Rules of Professional Conduct preclude an attorney from concurrently serving in an of counsel capacity with the law firm and maintaining a solo practice? In particular, is such an arrangement prohibited by standard (9) of rule 1-400(E), which states that a member's "'communication' in the form of a firm name, trade name, fictitious name, or other professional designation . . . which differs materially from any other such designation used by such member or law firm at the same time in the same community" is presumed to contain an untrue, deceptive, confusing or misleading statement in violation of rule 1-400(D)?
2. Is the law firm vicariously liable for any legal malpractice committed by the of counsel attorney in matters handled by the of counsel attorney in her solo practice?
3. Is the of counsel attorney vicariously liable for any legal malpractice committed by the law firm in its matters in which the of counsel attorney has no involvement?

## DISCUSSION

As an initial matter, questions 2 and 3 do not constitute ethical issues, but legal issues, albeit of obvious and current interest to the bar. *See, e.g., Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V.* (2d Cir. 2005) 407 F.3d 34 (legal malpractice claim by shareholder group against its lawyer and law firm

with which its lawyer had “of counsel” relationship). In keeping with its longstanding policy, the Committee declines to opine on legal issues.

The first question, however, poses an ethical issue involving the interpretation of California Rules of Professional Conduct 1-400(D) and (E) and standard (9) in the context of the contemplated of counsel relationship. As explained below, an attorney is not ethically precluded from concurrently maintaining a solo practice and serving in an of counsel relationship with a law firm or another attorney. Assuming that “of counsel” is an appropriate designation for the relationship with the law firm, the Committee does not believe that the concurrent use of two sets of business cards and stationery – one set identifying the of counsel’s solo practice, the other indicating she is affiliated with the law firm – would constitute a violation of rules 1-400(D) or (E) or standard (9). The attorney should disclose to her actual and potential clients the nature of her dual capacity and take reasonable steps to ensure that a client understands the capacity in which she is working – as a solo practitioner or as part of the law firm – on the client’s specific matter. The of counsel attorney also should take reasonable steps to ensure that the recipients of her professional communications understand when she is acting on behalf of the law firm with which she is affiliated and when she is acting through her solo practice. The Committee believes that to avoid confusion, it may be appropriate for the of counsel attorney to use two sets of business cards and stationery, one for client matters handled in her solo practice and the other for client matters handled in her of counsel role with the law firm. The Committee also briefly addresses two additional ethical issues, although not specifically raised by the inquiry, that the of counsel attorney and law firm should be aware of – conflicts of interest and fee splitting.

#### The of Counsel Designation

Over the years, of counsel and similar designations<sup>1</sup> have been used in private practice to characterize a wide range of relationships between individual attorneys and law firms. *See* H.G. Wren & B.J. Glascock, *The Of Counsel Agreement*, ABA Senior Lawyers Division (2d ed. 1998)

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<sup>1</sup> The Committee views the designations “counsel,” “senior counsel,” “special counsel,” and “tax [appellate, or other specialty] counsel” to be comparable to “of counsel” for purposes of rule 1-400 of the California Rules of Professional Conduct. *See* ABA Form. Op. 90-357 (May 10, 1999); *see also* Cal. Bar Ass’n Form. Op. 1993-129 (1993) at 2. The designation “co-counsel,” however, is different and not covered by this Opinion. Likewise, this Opinion does not cover the use of the designation “specially appearing counsel.” *See Streit v. Covington & Crowe* (2000) 82 Cal.App.4<sup>th</sup> 441.

at 1; *see also* *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135, 1152-53 (providing examples of of counsel relationships); Cal. Bar Ass'n Form. Op. 1993-129 (1993) at 2; ABA Form. Op. 90-357 (May 10, 1990). In addition, two individual lawyers may maintain an of counsel relationship. *See* Cal. Bar Ass'n Form. Op. 1993-129 (1993). The of counsel designation may also be used to describe one law firm's relationship with another law firm. *Id.* (“[W]e conclude the current standard for ‘of counsel’ relationship may still be satisfied where a law firm, rather than an individual member, serves in the ‘of counsel’ role.”); *see also* ABA Form. Op. 90-357 (1990); ABA Form. Op. 84-351 (1984).

Under California ethics standards, the use of an of counsel designation in communications with former, current or potential clients is presumed to be false, misleading, confusing or deceptive unless two requirements are met. First, the of counsel attorney or law firm must have a relationship with the other attorney or law firm “which is close, personal, continuous, and regular.” Cal. Rules of Professional Conduct 1-400(E), std. (8); *see also* *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1153; Cal. Bar Ass'n Form. Op. 1993-129; Cal. Bar Ass'n Form. Op. 1986-88 (1986) (defining permissible use of of counsel designation prior to adoption of rule 1-400(E) standard (8)). Second, the of counsel attorney must have a relationship with the other attorney or law firm “other than as a partner or associate” or, if the law firm is a professional corporation under Business of Professions Code sections 6160 to 6172, as an “officer” or “shareholder.” Cal. Rule of Professional Conduct 1-400(E), std. (8).

By characterizing an attorney as of counsel to another lawyer or law firm, the other lawyer and law firm are representing to the public and their clients that the services of the of counsel attorney are reasonably available to the other lawyer/law firm. *See SpeeDee Oil, supra*, 20 Cal. 4<sup>th</sup> 1153; S.D. Co. Bar. Ass'n Form. Op. 1996-1 (1996) (two sole practitioners who do not share office space, but regularly discuss cases and clients on an anonymous basis are not acting in an of counsel relationship). The contact between the of counsel and other lawyer or law firm need not be daily to meet the “close, personal, continuous, and regular” standard. *See* ABA Form. Op. 90-357 (May 10, 1990) at 3. But the relationship must involve more than merely collaborating upon an individual or occasional matter, forwarding or receiving legal business or infrequent independent consulting. *See* Cal. Bar Ass'n Form. Op. 1993-129 (1993) at 3.

An attorney may concurrently have more than one “of counsel” designation provided each relationship is “close, personal, continuous, and regular.” Cal. Bar Ass’n Form. Op. 1993-129 (1993) (“[W]e believe that the number of ‘of counsel’ relationships in which a member or law firm may serve is limited not by any strict numerical standard. Instead, the number of such relationship [sic] is limited by the strict observance of the qualitative criteria of rule 1-400.”); *see also* ABA Form. Op. 90-357 (May 10, 1990). For the same reason, an attorney is not ethically precluded from concurrently maintaining solo practice and an of counsel relationship with a law firm or another lawyer.

For purposes of this opinion, the Committee assumes that the relationship between the attorney and law firm in this inquiry can properly be designated “of counsel.”

#### Communications with the Public

In the inquiry, the of counsel attorney contemplates using two sets of business cards and stationery – one when providing services for the law firm, the other when providing services for the of counsel attorney’s solo practice. The law firm asks whether such a practice would violate California Rule of Professional Conduct 1-400(E), standard (9).

Rule 1-400 regulates certain communications by members of the bar to the public. Rules 1-400(A) and 1-400(A)(3) define “communication” as “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to . . . stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers.”

Rule 1-400(D) prohibits members of the bar from distributing false, deceptive, misleading or confusing communications to the public. It provides:

“A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format that is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not misleading the public; . . .”

Rule 1-400(E) provides that “[t]he Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate . . . rule 1-400.” There are currently fifteen such standards. Standard (9) describes one type of communication that is presumed to be in violation of rule 1-400:

“A ‘communication’ in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.” Cal. Rule of Professional Conduct 1-400(E), std. (9).

Initially, the Committee notes that communications described in standard (9) (and the other standards) do not *per se* violate rule 1-400, but may presumptively do so. *See* Cal. Rule of Professional Conduct 1-400(E) (“The standards shall only be used as presumptions affecting burden of proof in disciplinary proceedings involving alleged violations of these rules. ‘Presumption affecting the burden of proof’ means that presumption defined in Evidence Code sections 605 and 606.”).

Revisions to the standards, including the addition of standard (9), became effective on May 27, 1989 after adoption by the California State Bar Board of Governors. In explaining the goal of the revised standards, the Board of Governors noted that standards (6), (7) and (8) “were included to clarify areas of concern which are frequently raised with respect to firm or trade



names, and the use of the term ‘of counsel.’”<sup>2</sup> *Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation*, Cal. State Bar Office of Prof. Standards (Dec. 1987), at p. 22; *see also* Cal. Bar Ass’n Form. Op. 2004-167 (on use of trade name and former government positions in client communications).

The Board of Governors did not, however, explicitly make reference to of counsel designations in their explanation of standard (9):

“Standard (9) is new and was added because multiple trade names may be misleading because each trade name used may imply to the public the existence of a separate and distinct entity.” *Id.*

Although the Board of Governors apparently intended standard (9) to apply primarily to the use of trade names (for example, the “Immigration Law Group”), the title “of counsel” is a “professional designation” and, thus, standard (9) is relevant to the law firm’s inquiry. The Committee also believes that the two business cards and separate letterhead that the of counsel attorney intends to use at the same time in the same community “differ materially” within the meaning of standard (9). That is, for example, one business card will indicate that the attorney maintains a solo practice. The other will indicate that she has an of counsel affiliation or is working as an attorney at the law firm.

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<sup>2</sup> Standards (6), (7) and (8) provide:

“(6) A ‘communication’ in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.”

“(7) A ‘communication’ in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.”

“(8) A ‘communication’ which states or implies that a member or law firm is ‘of counsel’ to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.”

The purpose of rule 1-400 is to ensure that an attorney's communications directed to any former, present or prospective client concerning the availability of professional employment are truthful and not misleading or confusing. That an attorney maintains both a solo practice and an affiliation with a law firm is potentially significant to a former, present or prospective client. For example, a client's decision to retain an attorney – even as a solo practitioner – may be influenced positively or negatively by the fact that the attorney concurrently maintains an of counsel relationship with another attorney or law firm. Also, as explained below, because of her of counsel relationship, the attorney must check whether a prospective engagement – even in her solo capacity – conflicts with the engagements of the law firm. To perform this conflicts check, the attorney must give the law firm the prospective client's name, as well as other pertinent information about the proposed engagement. Because of the need to give the prospective client's name to the law firm, at some time prior to or at the inception of a client relationship, the attorney should tell her potential client (a) that the attorney works in both capacities and (b) the capacity in which the attorney will handle the client's matter. The attorney should take reasonable steps at that time to ensure that the client understands whether the attorney will handle the matter in her solo practice or with the law firm.

Thereafter, consistent with rule 1-400(D)(2), the attorney should take reasonable steps to avoid communications with the client and the public that might create confusion and, of course, at no time may the attorney disseminate communications that are false, deceptive or misleading. In that regard, for subsequent communications it may be appropriate to use separate sets of business cards and letterheads. When the attorney communicates with clients, opposing counsel or others about matters handled through her solo practice, it may be appropriate for her to use her solo practice business cards and letterhead. When the attorney communicates about matters relating to the law firm's client matters or business, it may be appropriate for her to use business cards and letterhead identifying her affiliation with the law firm. If there is a reasonable possibility of confusion, the of counsel attorney and law firm may need to take affirmative steps, such as further direct communications confirming or disclaiming the of counsel's affiliation with the law firm, to ensure that particular recipients of their communications understand when the attorney is acting on behalf of the law firm and when she is acting through her solo practice.

## Conflicts of Interest

Because protecting communications between an attorney and his or her client, as well as the duty of loyalty and trust to the client are fundamental (L.A. Co. Bar Ass'n Form. Op. 386 *SpeedDee Oil, supra*, 20 Cal. 4<sup>th</sup> at 1146), the Committee addresses the issue of conflicts of interest raised by this inquiry.

A basic obligation of every attorney is “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Cal. Bus. & Prof. Code, § 6068(e)(1). California Rule of Professional Conduct 3-310(C) prohibits an attorney from accepting, without the client’s “informed written consent,” representation of more than one client in a matter in which the interests of the clients potentially or actually conflict.<sup>3</sup> The same rule also requires the client’s, informed written consent before the attorney accepts employment adverse to a client or former client where by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment. Cal. Rules of Professional Conduct 3-310(E).

In the case of an of counsel relationship, the California Supreme Court has disqualified a law firm where an of counsel attorney represented an interest adverse to a client of the law firm and additionally had obtained material confidential information which was adverse to the law firm’s client. *SpeedDee Oil, supra*, at 1156-1157.<sup>4</sup> S.F. Co. Bar Ass’n Form. Op. 1985-1 (1985)

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<sup>3</sup> “‘Informed written consent’ means the client’s or former client’s written agreement to the representation following written disclosure.” Cal. Rule of Professional Conduct 3-310(a)(2). “‘Disclosure’ means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of the client or former client.” Cal. Rule of Professional Conduct 3-310(a)(1).

<sup>4</sup> *Goldberg v. Warner Chappell Music Inc.* (2005) 125 Cal.App.4<sup>th</sup> 752 at 762-763 provides a succinct description of *SpeedDee Oil*:

In *SpeedDee Oil*, the court expanded the rule of vicarious disqualification to include attorneys acting “of counsel” to a law firm. In that case, a number of SpeedDee Oil franchises brought suit against the franchisee, Mobil. The Shapiro firm was associated in as counsel for one of the franchisees. At around the same time the Shapiro firm became involved, Mobil consulted with Attorney Eliot Disner, who was of counsel to that firm. Neither Mobil nor Disner was aware of the firm’s representation of the franchisee at the time of the consultation. Thereafter, Mobil objected to the Shapiro firm’s continued involvement in the case because Mobil believed it had imparted confidential information about the litigation to Disner. [¶] Disner was of counsel to the firm at the time of the disqualification motion and had no plans to leave his position, so the

at 2 (of counsel attorney must be treated as member of law firm for conflicts purposes). Therefore, it is crucial that the of counsel attorney and the law firm run conflicts checks for the of counsel's clients, and *vice versa*. Where a potential or actual conflict exists within the meaning of rule 3-310(C), or where confidential information material to the representation has been obtained which is adverse to an existing or former client of the of counsel or of the firm within the meaning of rule 3-310(E), the attorney(s) must also comply with the requirements of rule 3-310 by obtaining the client's or former client's informed written consent.<sup>5</sup>

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primary issue was whether the relationship between the tainted attorney and the firm was sufficiently close to justify disqualification of the entire firm. The record showed “without contradiction that Disner received material confidential information concerning [the] claims against Mobil.” (*SpeeDee Oil, supra*, 20 Cal. 4<sup>th</sup> at p. 1152.) Although Disner sought to assure the court that “he did not discuss ‘the merits’ of the case with attorneys or employees of the Shapiro firm,” there were no “effective screening procedures” set up by the firm to secure confidences from disclosure, and “[t]he potential for a breach of the duty of confidentiality, whether inadvertent or otherwise” was apparent. (*Ibid.*) The court concluded that “[t]he close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it as of counsel contains many of the same elements that justify the rule of vicarious disqualification applied to partners, associates, and members.” (*Id.* at p. 1154.)

<sup>5</sup> The Committee believes that in appropriate circumstances, an effective ethical screen would preclude the disclosure of confidential information and, thus, should protect the lawyer and law firm from disqualification for failure to comply fully with rule 3-310. See *SpeeDee Oil, supra*, at 1152, n. 5 in which the Court points out that “none of the Shapiro firm’s declarations suggested that it instituted any formal ethical screen to prevent even inadvertent disclosures after the problem became known.”). The Committee notes, however, that to date no reported California appellate decision has specifically approved of the use of screening where a lawyer in private practice transfers to another law firm in private practice. See *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4<sup>th</sup> 17, 24-25 (denial of motion to disqualify City Attorney’s Office which hired and screened attorney, previously in private practice, from matter against attorney’s former client). The Court in *City of Santa Barbara* denied disqualification of the City Attorney’s Office and limited its holding to ethical screens erected in public law offices, as opposed to private law firms. But see *Hempstead Video, Inc. v. Incorporated Village of Valley Stream* (2d Cir. 2005) 409 F.3d 127 (in which the Second Circuit rejected a *per se* imputation rule for of counsel attorneys in favor of a functional approach that examines the substance of the relationship under review and the procedures in place). Like the Second Circuit, the Committee “see[s] no reason why, in appropriate cases and on convincing facts, isolation – whether it results from the intentional construction of [an ethical screen], or from *de facto* separation that effectively protects against any sharing of confidential information – cannot adequately protect against taint” that would constitute a bases for disqualification. 409 F.3d at 138.

## Fee Splitting

Rule 2-200(A) provides:

“A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

- (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
- (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable . . . .”

Cal. Rule of Professional Conduct 2-200(A); *see also Chambers v. Kay* (2002) 29 Cal.4<sup>th</sup> 142 (agreement between former co-counsel to split fees on client matter made with client’s knowledge, but not with client’s written consent, was unenforceable). Likewise, rule 2-200(B) prohibits the gift of “anything of value” in return for a referral of business, except between partners, associates or shareholders of a firm.

As noted above, rule 1-400(E), standard (8) provides that an “of counsel” designation should not be used to describe “a partner or associate, or officer or shareholder [of a professional law corporation].” Cal. Rule of Professional Conduct 1-400(E), std. (8). Because, according to standard (8), an “of counsel” attorney by definition cannot be a partner, associate or shareholder, this Committee has previously concluded that an attorney (or law firm) cannot split client fees with an of counsel attorney unless the requirements of rule 2-200, including written client consent, are met. *See* L.A. Co. Bar Ass’n Form. Op. 470 (1993) (opining that client consent under rule 2-200 is required for a law firm to pay a year-end bonus to an of counsel attorney).

Some law firms and attorneys, however, treat their of counsel attorneys as employees, for example, by issuing W-2 forms for tax purposes; others do not. Rule 1-400(B)(4) defines “associate” for purposes of the Rules of Professional Conduct, including the rules on fee splitting, as “an employee or fellow employee who is employed as a lawyer.” Cal. Rule of

Professional Conduct 1-400(B)(4). Therefore, the language of standard (8) notwithstanding,<sup>6</sup> in certain situations, an of counsel attorney may be characterized as an “employee” of a law firm within the meaning of 2-200. If so, the Committee does not believe that the law firm must obtain client consent under rule 2-200 before splitting fees (for example, in the form of a year-end bonus) with the of counsel attorney. Unless the of counsel can be properly characterized as an employee of the law firm, the of counsel and law firm must comply with the requirements of rule 2-200 before splitting fees. Whether an of counsel is properly characterized as the law firm’s “employee” depends on the facts and circumstances of the of counsel attorney’s relationship with the law firm.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

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<sup>6</sup> The Committee suggests that that Board of Governors correct this apparent inconsistency between standard (8) and rule 1-100(B)(4).