



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1206 (11/02/2020)

Topic: Litigation Financing

Digest: A law firm may not refer its clients to a company providing litigation financing where the sole owner of the company is married to a lawyer who is “of counsel” to the law firm.

Rules: 1.8(e); 1.8(i); 1.10 (a); 7.5(a).

FACTS

1. The Committee has received an inquiry from a lawyer at a firm with two partners and a former partner with no equity interest in the firm who is listed as both "retired" and “of counsel” on the firm's materials. The law firm's website includes a profile of the former partner under the heading "Our Attorneys," and details the former partner’s current legal practice, including the statement that he "maintains a role with the firm in an 'of counsel' capacity." The firm would like to refer clients who need financial assistance to the former partner's wife, who is the sole owner of a company providing litigation financing. The former partner will not be involved in providing the financing and will not have any ownership in the company. The law firm will not participate in financing the litigation or have any ownership in the litigation financing company.

QUESTION

2. May a law firm may refer its clients to a company providing litigation financing when the sole owner of the company is married to a lawyer who is listed as "retired" and “of counsel” on the law firm's materials and who is represented on the law firm’s website as maintaining a role with the firm in an “of counsel” capacity?

OPINION

3. As we concluded in N.Y. State 855 (2011):

A lawyer may not refer a client for whom the lawyer is conducting litigation to a litigation financing company owned by the lawyer's spouse in order to advance financial assistance to the client based on the prospective recovery in that litigation if the lawyer personally would be barred from providing that financial assistance.

4. As we further noted in N.Y. State 855: "If the inquiring attorney had asked this Committee whether a lawyer could *personally* form a litigation financing company to advance funds to clients, the Committee would have concluded that such an act violates Rule 1.8(e). Under Rule 1.8(e), the inquirer personally could not advance funds to clients in the form of loans." *See also* N.Y. State 1196 (2020); N.Y. State 1145 (2018).

5. Here, because the former partner and current of counsel lawyer would be personally barred from providing litigation financing to his clients, he may not refer his clients to a litigation financing company owned by his wife. Under Rule 1.10(a), a lawyer's conflicts arising under Rule 1.8 are imputed to all other lawyers "associated in" the firm. Because the former partner maintains an ongoing relationship with the law firm (*i.e.*, he remains "associated" with it), Rule 1.10(a) imputes his conflict of interest arising from referring clients to his wife to the other lawyers in the firm. Thus, the law firm may not refer its clients to the litigation loan company.

6. Arguably, the question posed here raises a slightly different issue from the issues posed in N.Y. State 855, because there the inquiring lawyer was an active lawyer in the firm whereas here the inquiring lawyer is a former partner who is listed as "retired" and "of counsel" on the firm's materials, and has no equity interest in the firm. This factual distinction, however, does not result in a different result. Under Rule 7.5(a)(4), "[a] lawyer or law firm may be designated 'Of Counsel'

on a letterhead if there is a *continuing relationship with a lawyer or law firm*, other than as a partner or associate." (Emphasis added.) Indeed, as we noted in N.Y. State 793 (2006): "We have interpreted an of counsel relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" Moreover, the law firm's website lists a profile of the former partner under the heading "Our Attorneys" and says that he "*maintains a role with the firm* in an 'of counsel' capacity." (Emphasis added).

7. Therefore, we conclude that the former partner who is listed "of counsel" on the law firm's materials maintains an ongoing relationship with the firm that imputes his Rule 1.8 conflicts to the other lawyers in the firm and precludes the firm from referring its clients to a company providing litigation financing where the sole owner of that company is the former partner's spouse.

CONCLUSION

8. A law firm may not refer its clients to a company providing litigation financing where the sole owner of the company is married to a lawyer who is "of counsel" to the law firm.

(23-20)