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New Days, New Ways: Exploring the 'Of Counsel' Option

The new legal landscape will have novel features, including the proliferation of "of counsel" relationships. If such an arrangement will be in your future, go boldly forward, but know the few rules that pertain.

By **Marc Garfinkle** | July 31, 2020

The COVID-19 pandemic continues its relentless reshaping of our world. Individual activities and almost every imaginable sort of human interaction have already been rethought and reformed, and we are only beginning to see the ramifications in our daily lives. In the business of law, changes are affecting every aspect of practice. Law firms are being challenged on every front. Even the most fundamental elements of a firm's character—its size, location, public image, use of human, technological and real estate resources, legal specialties, business model, payroll, and strategic alliances—are being reviewed and reconsidered. From my desk, another change is clear.

Since early in the pandemic, lawyers and law firms have been on the move or planning changes, voluntarily and otherwise. Everywhere are symptoms of downsizing, cost-cutting, fence-jumping, wing-spreading and risk-taking. Across the state, lawyers have been going solo or joining forces or otherwise reorganizing. They

call with questions about the RPCs and Rules of Court and the bookkeeping requirements of setting up shop. They want to know about giving notice to their firm and to the firm's clients, about malpractice insurance tails, confidentiality, fee sharing, installing spyware, accessing client lists, and soliciting staff. Managing attorneys have questions about recently departed (or soon-to-be departed) associates, partners or staff. Departing attorneys want to know the rules of disengagement and the boundaries.

With surprising frequency, lawyers from large and small firms alike have questions about the employment relationships we call "of counsel"—an arrangement that will apparently be increasingly common in the new world. To *have* an "of counsel" may make a firm seem sophisticated, informed and expert. To *be* "of counsel" makes the solo or small firm seem bigger or better-connected. Moreover, lawyers seem to love this title, perhaps because it sounds so British and so important.

But beware! Despite some residual vagueness in the meaning of the term, there are legal parameters that describe the relationship, and there are guidelines for its use. Being of counsel comes with a price—or at least, with limits.

In 1963, the ABA's Standing Committee on Professional Ethics, Informal Decision 678 said that "of counsel" is "customarily used to indicate a former partner who is on a retirement or semi-retirement basis, or one who has retired from another partnership or the general private practice or from some public position, who remains or becomes available to the firm for consultation and advice, either generally or in a particular field." The latter element, about counsel being "available to advise the firm," opened the door for many sorts of non-traditional strategic relationship—even the most casual of relationships—to be described on letterheads and business cards as "of counsel."

The Restatement of the Law Governing Lawyers tried to offer clarity. "A lawyer is of counsel if designated as having that relationship with a firm or when the relationship is regular and continuing although the lawyer is neither a partner in the firm nor employed by it on a full-time basis." The New Jersey Advisory Committee on Professional Ethics has opined that attorneys who have a relationship with a law firm that is "close, ongoing, and involves frequent contact for the purpose of providing consultation and advice" may be described as counsel to the firm, and may be so represented in advertising and law firm stationery. The Advisory Committee has also held that an attorney may serve as "of counsel" to more than one firm.

As the meaning of the term remained vague, Advisory Committee Opinion 21 provided the much-cited language which helps refine our understanding. It held that "of counsel" arrangements included, but were not limited to:

1. "Special counsel," who has developed an expertise in a particular field of law, such as complex toxic tort or employment discrimination law, and will provide advice to, or handle such cases for, a law firm on a recurring basis.
2. A prospective partner, more often than not an attorney who will be a lateral hire, who will handle matters for and work with a law firm during an "engagement" period.
3. A retired judge or partner in a law firm who will be providing advice and guidance to members of the firm on more than an occasional or as needed basis.
4. An attorney who, due to personal or non-law related business interests, will be practicing law part-time.
5. A permanent senior associate who is not on a partnership track.

Attorneys who merely refer business to other firms who, in turn, refer business to them, may not use the designation. Although the parameters of the relationship are not perfectly clear, it would almost certainly be a violation of the Rules to describe as "of counsel" this purely pecuniary relationship. Where the "of counsel" lawyer provides neither advice nor assistance nor guidance to the law firm, both parties should try to create an arrangement that would be more accurately described some other way.

Another issue is that the title “of counsel” may give the lawyer the apparent authority to bind the firm to an attorney-client relationship. As a result, the law firm may have liability exposure for negligent or intentional acts of the “of counsel” attorney. Accordingly, it may behoove the firm to include the attorney in its malpractice coverage, or, at least, to confirm that the “of counsel” attorney has adequate coverage that would protect the firm in the event of a claim.

Upon the “of counsel” attorney’s departure, the firm should notify any clients who “follow” that lawyer that their relationship with that attorney has been terminated. Upon terminating the relationship, the “of counsel” attorney will probably be subject to the same standard for notifying clients as any other departing partner, shareholder or associate would be. In practice, the “of counsel” relationship tends to be long-lived.

The new legal landscape will have novel features, including the proliferation of “of counsel” relationships. If such an arrangement will be in your future, dear reader, go boldly forward, but know the few rules that pertain. In any event, stay safe; we can shake hands once a cure is found.

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