

Texas City Attorneys Association

Serving As “Of Counsel”

Ethical Concerns and Best Practices

A group of five business professionals (three women and two men) in a meeting, shaking hands. They are all dressed in professional business attire (suits and blouses). The background is plain white.

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Presentation Outline

1. The “Of Counsel” Relationship
 2. Ethical Considerations
 3. Malpractice Risks
 4. Common Provisions in “Of Counsel”
Agreements
- **INCLUDED:** Summary of Ethical Opinions

What is an “Of Counsel” relationship?

“Of Counsel” relationships can include the following:

- part-time practitioners, practicing in association with a firm, differently than the mainstream lawyers of a firm;
- a retired partner of the firm who remains associated with the firm and available for occasional consultation;
- a lawyer, in effect, that may be a probationary partner to be;
- a permanent status in between those of partner and associate lacking an expectation of likely promotion to full partner status;

What is an “Of Counsel” relationship?

The “Of Counsel” designation can apply to a lawyer to:

- meet temporary staffing needs,
- provide special expertise not available in the firm or to the “Of Counsel” lawyer;
- or because the law firm and the “Of Counsel” lawyer jointly represent clients on a recurring basis.

The Use of the Title “Of Counsel”

The use of the title “Of Counsel” or variants of that title, in identifying the relationship of a lawyer or law firm is permissible with another lawyer or firm as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading.



The Use of the Title “Of Counsel”

- Tex. Comm. On Professional Ethics, Op. 402 (1982) states that “Of Counsel” should denote a regular, continuing and substantial relationship between a law firm and an attorney and provides that "A lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm other than as a partner or associate." DR 2-102(A)(4).
- A cardinal principle of Legal Ethics is that information on a lawyer's letterhead must not be misleading.



The Use of the Title “Of Counsel” - ABA Opinions

- ABA Informal Opinion 770 requires that an attorney designated as "Of Counsel" have a close, regular, personal relationship with the law firm that lists him on its letterhead.
- ABA Informal Opinion 1134 approved the use of the designation provided the attorney regularly and actively practiced law and that he actually rendered legal services to firm clients.
- ABA Formal Opinion 330 states that it is not possible for an attorney to truly have "Of Counsel" status with more than two different law firms.

The Use of the Title “Of Counsel”

- In Op. 402 the Texas Professional Ethics Committee opined that "Of Counsel" should denote a regular, continuing and substantial relationship between a law firm and an attorney.
 - An attorney's mere availability for consultation with firm members, or prior, sporadic association is not sufficient to fulfill this requirement.
 - An attorney may not be "Of Counsel" to more than two firms.

The Use of the Title “Of Counsel”

According to the *ABA* and the *Texas Committee on Professional Ethics*, the lawyer and law firm must have...

- a close, regular, personal relationship
- no conflicts of interest
- use of the title is not otherwise false or misleading
- if lawyer is not licensed in Texas, any pertinent limitations must be indicated.

* Tex. Comm. On Professional Ethics, Op. 402, V. 45 Tex. B.J. 77 (1982)

* ABA Formal Opinion 90-357

Ethical Considerations

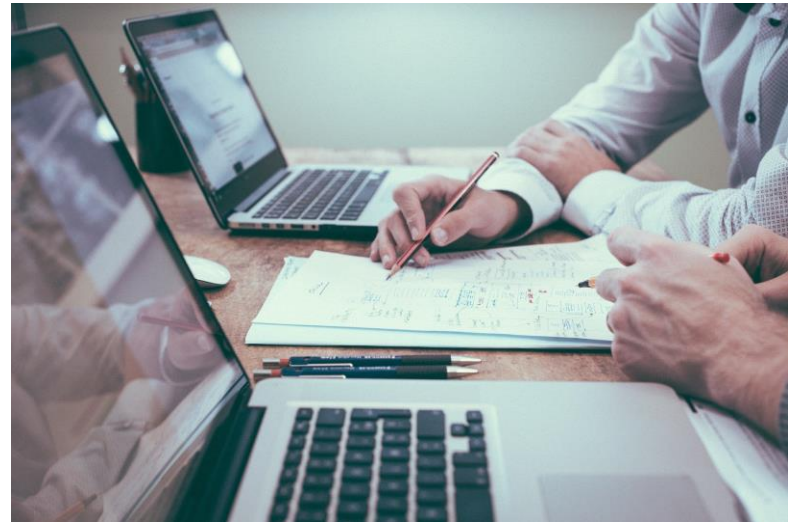
- Conflicts of Interest

- You should check the *Texas Disciplinary Rules of Professional Conduct* prior to the formation of the “of counsel” relationship and continuously during the relationship.

NOTE: In Texas, except in limited circumstances, a conflict involving one member of a firm is imputed to all members of the firm. Tex. Disciplinary R. Prof. Conduct, Rule 5.01. The same rule would likely apply to the “Of Counsel” lawyer and the law firm.

Malpractice Risks

- Check the explicit language of the malpractice policy.
- Specifically examine the definition of “named insured” and “professional services.”
- Do not assume coverage.



Malpractice Risks

- Conflicts of Interest
 - The general rule is the “Of Counsel” lawyer is responsible for his own malpractice but is not vicariously liable for the firm’s malpractice.
 - **HOWEVER**, the firm is liable for its malpractice and partners are vicariously liable for the malpractice of an “Of Counsel” lawyer acting within the actual or apparent scope of the firm’s practice and for the firm.

Reducing Malpractice Risks

A firm considering forming an “Of Counsel” relationship with another lawyer should:

- screen potential candidates
- monitor the relationship continuously

NOTE: If the “of counsel” lawyer uses the firm’s letterhead in his or her own practice and on matters not related to the law firm, vicarious liability could be imposed on the law firm for the malpractice of the “of counsel” lawyer even if the legal matter did not involve the work of the law firm.

“Of Counsel” Agreements

- Use a written “of counsel” agreement.
- Create two versions of letterhead.
- Update your malpractice insurance.
- Discuss with your malpractice insurer if “Tail Coverage” is necessary.



Ethics Opinions

- Tex. Comm. on Professional Ethics, Op. 450, V. 51 Tex. B.J. 165 (1988)
 - a law firm's sharing legal fees with a lawyer designated as "of counsel" to the firm is allowed. A lawyer who is "of counsel" is treated as a member of a firm.



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Ethics Opinions

- Tex. Comm. On Professional Ethics, Op. 656 (2016)
 - A lawyer and a law firm may not enter into an agreement for the lawyer to serve as a member of the law firm if the agreement provides that the lawyer is restricted or prohibited from providing legal services to clients of the law firm after the lawyer's work with the law firm ends.



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Ethics Opinions

- Tex. Comm. On Professional Ethics, Op. 402, V. 45 Tex. B.J. 77 (1982).
 - The requirements of DR 2-107(A) of the Texas Code of Professional Responsibility do not apply with respect to a law firm's sharing legal fees with a lawyer designated as "of counsel" to the firm and having a regular, continuing and substantial relationship with the law firm.



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Resources - State Bar of Texas Website

- For Texas attorneys with a specific ethics question that is not answered by the resources below, see **Ethics Helpline** at **(800) 532-3947**.
- Texas attorneys must abide by the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.
- Aspirational guidance for lawyers is found in the Texas Lawyer's Creed.
- The American Bar Association maintains Model Rules of Professional Conduct.
- Texas Center for Legal Ethics.
- University of Houston Law Center - Texas Ethics Reporter.



Questions?
