

Texas City Attorneys Association

Serving As “Of Counsel”

Ethical Concerns and Best Practices

By: Dorothy G. Palumbo

Of Counsel



I. Introduction

This paper discusses examples of the “Of Counsel” Relationship; the ethical requirements; the ethical considerations in the “Of Counsel” Relationship; malpractice risks; and common provisions in “Of Counsel” agreements. A summary of ethical opinions discussing the “Of Counsel” Relationship is provided.

II. The “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 the 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.

In addition, the “Of Counsel” designation can apply to a lawyer either 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.

III. Use of the Title of “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.

Tex. Comm. On Professional Ethics, Op. 402 (1981) 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. This is due to a lawyer's special responsibilities to the legal system and actual and prospective clients' right to know the identity of the attorneys with whom they are dealing. The relevant Disciplinary Rule implies that there must be a special relationship between a law firm and a lawyer it designates as "Of Counsel."

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. This relationship may be by virtue of prior partnership of a retired firm member or a regular and frequent association such that the attorney who is "Of Counsel" has a significant and continuing relationship with the law firm. Also, 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.

Accordingly, in Op. 402 the 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. Further, an attorney may not be "Of Counsel" to more than two firms.

In addition, ABA Formal Opinion 90-357, provides that the ethical requirements for an "Of Counsel" relationship are:

- there must be a close, regular and personal relationship between the "Of Counsel" lawyer and the firm;
- the relationship must not involve conflicts of interest;
- the title must not be otherwise false or misleading;
- if the "Of Counsel" lawyer is not licensed in Texas any pertinent jurisdictional limitations on the lawyer's entitlement to practice must be indicated.

IV. Ethical Considerations in the "Of Counsel" Relationship

Conflicts of Interest may arise in an "Of Counsel" lawyer's relationship with a law firm. A conflicts check should be done prior to entering into the relationship to make sure there are no conflicts of interest that prevent the formation of the "Of Counsel" relationship prior to entering into an agreement.

Because conflicts of interest may arise during the relationship, conflicts must be continuously checked and dealt with, just as if the "Of Counsel" lawyer was a member of the law firm. 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.

V. Malpractice Risks in the "Of Counsel" Relationship

This is a circumstance where you would need to check the explicit language of the malpractice policy. Specifically examine the definition of "named insured" and the definition of "professional services." Do not assume coverage.

Moreover, conflicts of interest present a real malpractice risk. The general rule is the "Of Counsel" lawyer is responsible for his own malpractice but is not vicariously liable for the firm's malpractice. 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.

A firm considering forming an "Of Counsel" relationship with another lawyer should carefully screen potential candidates and also monitor the relationship continuously. 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.

VI. The “Of Counsel” Agreement

Use a written “Of Counsel” agreement. The “Of Counsel” agreement may provide the status in the firm, duties, limitations on authority to act for and in the name of the firm, malpractice liability insurance, compensation, office use, benefits and termination.

Consider creating two versions of firm letterhead. One version will list the “Of Counsel” lawyer and the other will not. Use the letterhead showing the “Of Counsel” lawyer’s name only when that attorney is working on a firm matter. Make sure the “Of Counsel” attorney abides by the same rule. Put this requirement in your written “Of Counsel” Agreement. This may head off liability issues.

Update your malpractice insurance. Both the law firm and the “Of Counsel” lawyer should contact their malpractice insurance carriers before entering into the relationship. Usually, the “Of Counsel” lawyer will be added to the law firm’s malpractice policy. The “Of Counsel” lawyer may be required to maintain his or her own malpractice policy, preferably with the same insurer.

If a retiring lawyer is assuming the title “Of Counsel,” the lawyer should discuss with his malpractice carrier whether “tail coverage” is necessary to protect himself from claims made after his policy expired but which arose from acts or omissions committed during the policy period.

VII. Ethics opinions discussing use of the designation “Of Counsel.”

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.

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.

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.

VIII. Resources

Below is a list of ethics resources from the State Bar of Texas website, www.texasbar.com. See Resources, Texas Ethics Resources.

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. The ABA's Commission on Ethics 20/20 is currently reviewing the model rules, and posts frequent updates.

Texas Center for Legal Ethics. This independent non-profit offers ethics reference materials (including attorney ethics opinions), courses, and public education on ethics and professionalism for the legal industry and judiciary.

University of Houston Law Center - Texas Ethics Reporter This website serves as a clearinghouse of current and past Texas professional conduct rules, attorney and judicial ethics opinions, and other resources.