

“Of Counsel” Defined

Introduction

This chapter explains the current status of the law with respect to “Of Counsel” relationships and considers some of this earlier background to lay a foundation for understanding the current status of the law. Subsequent chapters will explore the primary issues to be considered in connection with the “Of Counsel” designation, including choosing between employee and independent contractor status, legal malpractice and insurance, conflicts of interest and imputed disqualification, advertising and solicitation, firm names, and avoiding the appearance of partnership. Final chapters will explore appropriate terms for the “Of Counsel” agreement and provide checklists, term sheets, and sample agreements for drafting the same.

The term “Of Counsel” has been used in connection with a wide variety of arrangements between attorneys and law firms and has meant different things to different people over the years. In the past, the “Of Counsel” designation was commonly used to show that a law firm had powerful friends in high places.¹ The listing of a senator, congressional representative, or former judge as “Of Counsel” to a firm was perhaps the most common use of the phrase and was largely a marketing tool for the firms with those types of connections.² However, this use of the designation is not appropriate unless the relationship between the firm and the “Of Counsel” attorney is a “close, regular, personal relationship.”³

Aside from elevating a firm’s prestige with elder statesmen, historically the phrase “Of Counsel” has been most commonly used for those partially

1. HAROLD G. WREN & BEVERLY J. GLASCOCK, *OF COUNSEL* 1 (3d ed. 2005).

2. *Id.*

3. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 90-357 (1990) [hereinafter ABA Formal Op. 90-357], set forth in its entirety later in the chapter.

or fully retired from the practice of law. A retired partner would use the designation to describe an honorary status with the firm whether or not the retired partner actually maintained a professional working relationship with it. Use of the “Of Counsel” designation for a retired partner is still appropriate, but care must be taken to ensure that the designation is not misleading under the circumstances, such as the attorney’s availability for consultation, status with the bar, and so on.

The “Of Counsel” designation is now used in so many different contexts that one cannot assign a single meaning to it. Contracting parties use it in several different ways depending upon what they wish to accomplish. For example, the term might be used to describe a relationship between a law firm and a lawyer who works part time for the firm and devotes the balance to an otherwise solo law practice, teaching law, or a totally unrelated business endeavor. Or, it might be used to describe the relationship between a law firm and an expert in an area of law in which the firm does not think of itself as being particularly well qualified. In short, the precise meaning of “Of Counsel,” a vague term that for years was never formally defined, has in some ways become even more ambiguous. This book seeks to add a measure of definition and precision to it, as well as provide forms and advice for those wishing to enter into such an arrangement.

The American Bar Association’s (ABA’s) Formal Opinion 90-357, issued in May 1990, is now the primary authority on the appropriate use of the term “Of Counsel,” and provides in part:

The use of the title “of counsel,” or variants of that title, in identifying the relationship of a lawyer or law firm with another lawyer or firm is permissible 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.

Formal Opinion 90-357 governs the designation “Of Counsel” and all variant titles that use the word “counsel,” such as “special counsel,” “tax [or other specialty] counsel,” and “senior counsel.” The opinion does not cover terms that do not employ the word “counsel,” such as “consultant,” “consulting attorney,” or “corresponding attorney.”⁴ Even though there are slight differences between the variant titles that employ the word “counsel,” the committee⁵ viewed these as sharing similar characteristics so that they should all be governed by the opinion.

Formal Opinion 90-357 identifies four principal patterns of relationships that typically fit into this definition and are properly referred to by the title

4. *Id.* at 3.

5. References to the “committee” mean the ABA’s Standing Committee on Ethics and Professional Responsibility. The ABA created a Standing Committee on Professional Ethics in 1913. The name of the committee was changed to the Committee on Professional Ethics and Grievances in 1919, and it was separated into two committees in 1958, with the Committee on Professional Ethics retaining responsibility for opinions concerning proper professional conduct. The name of that committee was changed to the Committee on Ethics and Professional Responsibility in 1971.

"Of Counsel," as well as a number of types of relationships that do not and are, therefore, not ethically permissible.

The following table illustrates permissible and non-permissible relationships designated as "Of Counsel" under Formal Opinion 90-357.

<i>Type of Relationship</i>	<i>Permissible "Of Counsel"?</i>
Part-time lawyer practicing with a firm, but not an associate or partner	Yes
Retired partner of the firm who remains available for consultation	Yes
Lawyer associated with a firm on a probationary basis with the expectation of becoming a partner	Yes
Lawyer with regular firm status between partner and associate	Yes
Lawyer with "Of Counsel" relationship with more than one firm	Yes
Firm serving as "Of Counsel" to another firm	Yes
Lawyer assisting a firm with an individual case	No
Lawyer or firm with relationship that forwards or receives legal business	No
Lawyer or firm with relationship involving occasional collaboration	No
An outside consultant	No

Permissible "Of Counsel" Relationships

Formal Opinion 90-357 explains the permissible patterns of relationships as follows.

The Part-Time Practitioner

A part-time practitioner is one who practices law in association with a firm or other lawyer, but out of the mainstream of the other lawyers of the firm. This person's part-time practice might originate from a change from full-time practice to part-time practice, or a change from a salaried position, such as a government official, law professor, retired judge, or corporate lawyer, to the practice of law.

The Retired Partner

The retired partner is one who is not actively practicing law but remains associated with the firm and is available for occasional consultation.