What Lawyers Should Be Thinking About Before Entering into an Of Counsel Relationship

The term “of counsel” has multiple meanings. It has been used as an honorary designation for retired partners, a special designation for firm attorneys who are neither a partner nor an associate, and to describe part-time attorneys who have created an association with a firm. Some even try to use the term solely for advertising purposes. After all, the public presentation of close ties with another firm might prove to be an effective marketing tool that could help drive additional business to a firm, right? Setting ethics aside for a moment, maybe, but there are risks that come into play with use of the term and these risks should not be taken lightly.

What is an of counsel attorney?

The “of counsel” designation, as envisioned by the authors of various ethics opinions around the country, refers to something altogether different from a traditional attorney within a firm. These opinions generally define the term “of counsel” as an attorney who is not a partner, associate, shareholder, or member of a firm, and further state that an attorney may only be designated “of counsel” to a firm if the attorney will have a close and continuing relationship with that firm. Thus, any attorney who works at a firm and has a significant degree of shared liability with that firm or has any managerial responsibilities to that firm and/or its staff should never be designated as “of counsel”. And be aware that related terms such as “special counsel”, “tax counsel”, “senior counsel,” and the like are understood to have the same meaning as “of counsel” and thus the requirement of a close and continuing relationship will apply here as well.

Okay, so what constitutes a close and continuing relationship?

The requirement of a close and continuing relationship has been defined as providing for close, ongoing, regular, and frequent contact for the purpose of consultation and advice. Further, the of counsel attorney must be more than an advisor on only one case or just a forwarder or receiver of legal business. Now you know why attorneys sometimes find themselves in ethical hot water after designating an attorney, whose sole role is to act as a referral source, as “of counsel”

to a firm. Use of the term in this manner is considered to be a misleading client communication.

Who can properly be designated "of counsel?"

Evaluating the appropriateness of the designation in the light of what a disciplinary committee could perceive as misleading can help one avoid some of the common "of counsel" designation pitfalls. In short, any attorney contemplating being listed on another firm's letterhead as of counsel, should only do so if he or she is truly able to be available and committed to providing counsel to that firm.

Examples of acceptable relationships for the "of counsel" designation have included but are not limited to 1) retired lawyers, 2) withdrawing partners or associates, 3) part-time practitioners, 4) permanent non-partner/non-associates, 5) partners on leave, and 6) probationary partners-to-be. Examples of unacceptable relationships for the "of counsel" designation have included but are not limited to 1) outside consultants, 2) suspended lawyers, 3) when the affiliation involves only a single case, 4) those who merely share office space and nothing more, and 5) public officials who are not engaged in active practice with their former firm.

Can a law firm be of counsel to another firm? Can an attorney be of counsel to more than one firm? Can an attorney be of counsel to an out-of-state firm?

While the answers to questions such as these can be yes, the reality is that the answers to these questions and a number of others will differ depending upon the jurisdiction in which you practice. Given the numerous and varying state specific rules regarding this designation, best practices would dictate that prior to establishing any of counsel relationship you review any relevant ethics opinions and/or contact bar counsel in your jurisdiction.

What are the risks?

There are a few issues of concern with of counsel affiliations. In particular, imputed disqualification, vicarious liability, insurance coverage disputes, and disputes over the terms of the relationship warrant special attention.

Imputed Disqualification - For conflict purposes the of counsel affiliation means that the affiliated firm and the of counsel attorney will often be treated as one entity. This does mean that the conflicts the of counsel attorney brings to the table may prevent the affiliated firm from continuing to represent current or future clients. Likewise, the of counsel attorney must be concerned about apparent or

actual conflicts between his own clients and those of the affiliated firm. The imputed disqualification rule is a two-way street and there is little that can be done to correct the problem once it has arisen. Conflict checks can be burdensome and the potential cost in lost business if a conflict is ever missed can be substantial. Always address the conflict issue prior to establishing of counsel relationships so that everyone understands what the additional burden will be and can agree that the benefits outweigh the costs.

Vicarious Liability - While the affiliated firm is not going to be liable for the independent acts, errors, and omissions of the of counsel attorney that were outside of the apparent scope of the of counsel attorney's involvement with the affiliated firm, this doesn't prevent claims from arising. Problems can and will arise based upon any given client's perspective of the affiliation. Unrestrictive use of letterhead listing the of counsel attorney by the affiliated firm or the of counsel attorney sends the message that all participants are involved on any and all matters of the firm and/or the of counsel attorney even if this isn't the case. To help avoid becoming a named co-defendant in each other's suits, create two versions of letterhead. One will list the of counsel attorney and the other will not. Then only use letterhead showing the of counsel attorney's name when that attorney is actually working on a firm matter. Likewise, make sure that the of counsel attorney abides by the same rule.

Insurance Coverage Disputes - In the unfortunate event of a claim, coverage problems can arise when an affiliated firm has done work on a matter that the of counsel attorney had no involvement in or awareness of but was unfortunately listed as "of counsel" on the letterhead that was in use. Should this of counsel attorney not have coverage under the affiliated firm's malpractice policy there may be a significant problem because the of counsel attorney's own policy will often not afford coverage either. Why is this? The of counsel attorney's own policy will only cover work done on behalf of clients of the named insured which is the of counsel attorney's own firm. In this situation the of counsel attorney would be facing a claim that arose out of work done for a client of the affiliated firm thus the coverage gap. These sorts of "who is the client," "who is the attorney of record," and "who is the named insured" are common challenges that underscore the necessity of investigating and addressing the insurance coverage issues early on. Appropriate coverage for the exposures of both the affiliated firm and the of counsel attorney can usually be obtained if the issue is addressed at the outset.

Disputes Over the Terms of the Relationship – The best way to mitigate this risk is to have a written and signed of counsel agreement because reasonable minds can disagree, and memories can be short. Always have a written agreement that at

least covers the essentials, which would include setting forth the purpose of the relationship, the duties of the of counsel attorney, any limitation of authority, the compensation plan, how overhead and any fringe benefits will be handled, and the termination and dispute resolution procedures.

Closing Thoughts

Beyond the above, the best risk management advice I can give regarding of counsel relationships is to encourage every attorney considering entering into an of counsel relationship to always keep in mind joint accountability. Of counsel relationships can be quite valuable, but clients will rightly respond to these affiliations as if they represent a single entity. Mutual accountability will be in play, particularly when a client is directly involved with both parties to the of counsel affiliation. Here's the bottom line. Of counsel relationships can be quite beneficial as long as they are created with client interests in mind as opposed to being the latest new marketing strategy. In light of all the above, that's simply never going to be a good idea.

Mark Bassingthwaighte, Esq.

mbass@alpsinsurance.com