

What Lawyers Should Know Before Entering an Of Counsel Relationship

Disclaimer: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions regarding the laws and ethical opinions of your jurisdiction. In no event will ALPS be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Meet Mark:

Mark Bassingthwaighte, Esq., serves as Risk Manager at [ALPS](#), a leading provider of insurance and risk management solutions for law firms. Since joining ALPS in 1998, Mark has worked with more than 1200 law firms nationwide, helping attorneys identify vulnerabilities, strengthen firm operations, and reduce professional liability risks.

He has presented over 700 continuing legal education (CLE) seminars across the United States and written extensively on the topics of risk management, legal ethics, and cyber security.

A trusted voice in the legal community, Mark is a member of the State Bar of Montana and the American Bar Association and holds a J.D. from Drake University Law School. His mission is to help attorneys build safer, more resilient practices in a rapidly evolving legal environment.



Contact Information:

Mark Bassingthwaighte, Esq.
ALPS Insurance Agency
111 N. Higgins Ave, Suite 600
Missoula, MT 59802

(T) 800.367.2577 | (D) 406.523.3859

mbass@alpsinsurance.com

www.alpsinsurance.com



The term “of counsel” gets used in a variety of ways. Some firms apply it as an honorary title for retired partners; others use it for attorneys who are neither partners nor associates, and still others use it to describe part-time lawyers with a formal affiliation. Some even try to use the designation purely as a marketing tool, hoping the appearance of a close connection with another firm will attract business. Setting ethics aside, that might sound appealing, but the risks associated with misusing the term are significant and should not be taken lightly.

What Is an Of Counsel Attorney? Ethics-Based Definitions:

Various ethics opinions across the country define “of counsel” as something distinct from a traditional firm attorney. An of counsel lawyer is not a partner, associate, shareholder, or member of the firm. Instead, the designation is appropriate only when the attorney has a close and continuing relationship with the firm. Any attorney who shares significant liability with the firm or has managerial responsibilities should not be designated as of counsel.

Similar titles such as “special counsel,” “tax counsel,” “senior counsel,” and the like are treated the same way and carry the same requirement of a close and continuing relationship.

What Counts as a Close and Continuing of Counsel Relationship:

A close and continuing relationship requires ongoing, regular, and frequent contact for the purpose of consultation and advice. The of counsel attorney must be more than a one-case advisor or a referral source. This is why lawyers sometimes find themselves in ethical trouble after designating someone as of counsel when that person’s only role is to send business to the firm. Ethics authorities view this as misleading communication to clients.

Who Can Properly Be Designated as Of Counsel (and Who Cannot):

To avoid common pitfalls, evaluate the designation from the perspective of a disciplinary committee. An attorney should only be listed as of counsel if they are genuinely available and committed to providing counsel to the firm.

Examples of acceptable of counsel relationships include:

- Retired lawyers,
- Withdrawing partners or associates,
- Part-time practitioners,
- Permanent non-partner/non-associate attorneys,
- Partners on leave, and
- Probationary partners-to-be.

Examples of unacceptable relationships include:

- Outside consultants,
- Suspended lawyers,
- Single-case affiliations,
- Attorneys who merely share office space, and
- Public officials not actively practicing with the firm.

Can Firms or Multiple Attorneys Serve as Of Counsel? Jurisdiction-Specific Rules:

In some jurisdictions, a law firm may serve as of counsel to another firm; an attorney may be of counsel to more than one firm, or an attorney may be of counsel to an out-of-state firm. However, the rules vary widely. Before establishing any of counsel relationship, review relevant ethics opinions or consult bar counsel in your jurisdiction.

Key Risks Lawyers Face in Of Counsel Relationships:

Of counsel affiliations raise several risk-management concerns, particularly around:

- Imputed disqualification,
- Vicarious liability,
- Malpractice insurance coverage gaps, and
- Disputes over the terms of the relationship.

Each of these deserves careful attention before entering an of counsel arrangement.

Imputed Conflicts of Interest in Of Counsel Arrangements:

For conflict-of-interest purposes, the affiliated firm and the of counsel attorney are often treated as a single entity. This means conflicts the of counsel attorney brings may prevent the firm from representing certain clients, and vice versa. Because imputed disqualification runs both ways, conflict checks become more complex, and the cost of missing a conflict can be substantial. Address conflict procedures upfront so everyone understands the added burden and agrees the benefits outweigh the risks.

Vicarious Liability Risks Between Firms and Of Counsel Attorneys:

Although a firm is not liable for the independent acts or omissions of an of counsel attorney acting outside the scope of the affiliation, claims can still arise based on client perception. Overly broad use of letterhead listing the of counsel attorney can create the impression that all attorneys are involved in all matters.

To reduce this risk, create two versions of letterhead, one listing the of counsel attorney and one without, and use the version with the of counsel name only when that attorney is involved in the matter. The of counsel attorney should follow the same rule.

Malpractice Insurance Coverage Issues in Of Counsel Relationships:

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 was not involved 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.

The reason for this is 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 no coverage.

Questions such as "who is the client," "who is the attorney of record," and "who is the named insured" are common, and they 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.

Why You Need a Written Of Counsel Agreement to Avoid Disputes:

The best way to prevent misunderstandings is to have a written, signed of counsel agreement. At a minimum, it should address:

- The purpose of the relationship,
- The duties of the of counsel attorney,
- Any limitations on authority,
- Compensation,
- Overhead and benefits,
- Termination procedures, and
- Dispute-resolution processes.

Reasonable minds can differ, and memories fade. A written agreement protects everyone involved.

Final Risk Management Considerations for Of Counsel Relationships:

The most important principle to keep in mind is joint accountability. Clients will naturally view the affiliated parties as a single entity, especially when they interact with both. Of counsel relationships can be valuable, but only when created with client interests, not marketing optics, as the driving force. When used as a branding strategy rather than a genuine professional affiliation, the risks far outweigh the benefits.