

The Of Counsel Relationship

Lawyers have been using the “of counsel” designation in a variety of ways for many years. Originally, the term was used to identify firm partners or judges transitioning from full-time legal practice into retirement. The definition has broadened over time to cover other relationships between lawyer and law firm, from testing out a lateral hire before extending a partnership offer to an attorney with special expertise joining the firm as a resource. Because of the variety of arrangements and inherent potential for ambiguity, attorneys and law firms should keep in mind a few considerations as they enter into of counsel relationships.

Conflicts of Interest

Oregon Rule of Professional Conduct (ORPC) 7.5(e) states that “[a] lawyer may be designated ‘Of Counsel’ on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate.” ORPC 1.0(d) provides that a firm “denotes a lawyer or lawyers, including ‘Of Counsel’ lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law...” Together, these two rules inform us that an of counsel attorney is considered a part of a law firm for conflict purposes.

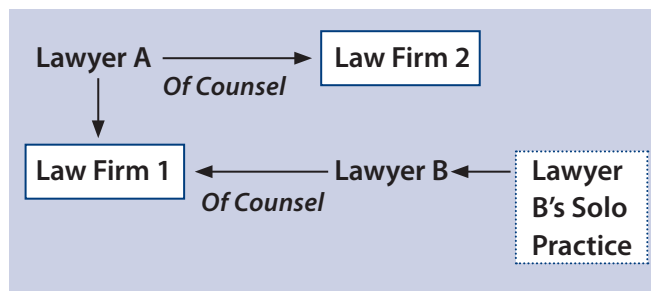
The Oregon State Bar addresses the particularities of the conflict-of-interest issues created by of counsel relationships in Oregon Formal Ethics Opinion 2005-155. The opinion proposes the following scenario:

Lawyer A operates Law Firm 1 as a sole practitioner. Lawyer A is also of counsel to Law Firm 2 and is listed as such on Law Firm 2’s letterhead. Lawyer B is a sole practitioner who wishes to be of counsel to Law Firm 1.

What conflict-of-interest issues are implicated by the proposed arrangement?

In the relationships depicted above, Lawyer A is considered a member of his or her own solo practice, Law Firm 1. Lawyer A is also considered a member of Law Firm 2 because of Lawyer A’s of counsel relationship. Similarly, Lawyer B would be a member of both Lawyer B’s solo practice and Law Firm 1. Though more attenuated, Law Firm 2 would also be considered a member of Lawyer B’s solo practice. The clients of Law Firm 1 are deemed to be clients of Law Firm 1, just as the clients of Lawyer B’s solo practice are deemed clients of both Law Firm 1 and Law Firm 2. Put simply, Lawyer A/Law Firm 1, Lawyer B, and Law Firm 2 will be treated as a single unit for conflict-of-interest purposes.

This brief example makes it very clear that of counsel relationships can create a tangled web of conflict-of-interest concerns very quickly. Before entering into an of counsel agreement, be sure to closely examine each person or entity you will be joining. Does the law firm have more than one of counsel attorney? How many lawyers



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and law firms will be entering into your conflict-of-interest evaluation? Questions like these are important to keep in mind as you contemplate an of counsel arrangement. For advice on the ethics rules applicable to of counsel relationships, call the OSB General Counsel's Office at 503-620-0222.

Liability for Lawyer and Law Firm

Professional liability is another concern for lawyers and law firms in of counsel relationships. Though the law on liability for of counsel attorneys is still developing, a few hallmark legal principles apply. Liability in contract will depend on the contractual agreement. In tort, the law firm will probably be responsible for the conduct of the of counsel attorney based on theories of respondeat superior or negligence (either negligent supervision or negligent selection). Though the law firm may seek to lessen its liability exposure for of counsel attorneys by using an independent contractor designation, the firm could still be held vicariously liable if actual or apparent authority existed. An Ohio appellate court found liability for an of counsel attorney based on an agency by estoppel theory.¹

Law firms should also be aware that of counsel attorneys are often considered part of a single practice unit along with the law firm on malpractice insurance plans and policies in excess of the \$300,000 mandatory PLF Plan. (The PLF Primary Plan differs because it provides coverage on an individual attorney basis, although multiple attorneys named on the same claim – including of counsel – could still share indemnity and expense limits.) For example, the PLF's Excess Program considers of counsel attorneys to be part of the firm unit due to potential vicarious liability risk and requires them to be included on the firm's application. Further, the Excess Program coverage assessment is charged on a per attorney basis – including of counsel members of the firm. Just as the ethics example pointed out, in terms of liability and cost, an of counsel attorney is considered a part of the firm.

Clarity in the Nature of the Relationship

Another consideration for law firms and attorneys is whether the use of the "of counsel" designation is false or misleading. Specifically, does its use accurately capture the relationship between the law firm and the of counsel attorney?

¹ *Trimble-Weber v. Weber*, 119 Ohio App 3d 402, 695 NE 2d 344, 347 (11th Dist 1997).

Oregon Formal Ethics Opinion No. 2005-12 addresses this issue in the following scenario. "Lawyers A, B, and C share office space. Beyond this, however, A, B, and C all maintain separate practices." The question is whether A, B, and C may "hold themselves out, whether through the use of a common letterhead or otherwise," as associates or of counsel with each other. The answer is no. To use an "of counsel" designation where none exists would be false or misleading and in violation of ORPC 7.5. In that situation, avoid representing the group as having an ongoing relationship if none exists. Instead, refer and associate on a case-by-case basis. The best practice would be to disclose any relationships you have with other attorneys and law firms.

What do the above considerations mean for Oregon lawyers and law firms? First, consider whether the of counsel relationship is the best option for your situation. If it is, choose carefully those lawyers and law firms with whom you associate in an of counsel relationship. Before entering into the relationship, consider the general history and reputation of the attorney or law firm, as well as any claims history and outside business relationships.

Second, identify whether the lawyer or law firm has any additional of counsel relationships. This is an extremely important step that will help you discover any conflict-of-interest issues early.

Finally, consider the professional liability implications of the of counsel relationship. This is particularly important for relationships with lawyers or law firms outside of Oregon. Your PLF coverage will not protect you from vicarious liability for your of counsel relationship with out-of-state lawyers or law firms.

Balance the purposes and benefits of the particular of counsel relationship you contemplate forming against the additional ethical and liability risks that you and your firm may assume.

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