ATTORNEYS RISK MANAGEMENT

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Of Counsel, Special Counsel, and Senior Counsel: Close, Regular, and Personal Relationship with the Firm

Lawyers often combine forces in order to achieve more efficient service for clients, more effective business generation, to prepare for a retirement or change in practice, or just because they enjoy working with certain attorneys. When considering such an arrangement, the lawyers involved must determine how to meaningfully describe the relationship and what ethical issues arise. Failure to consider applicable rules and law can lead to disciplinary complaints and even increase the chance of a legal malpractice claim.

There are quite a few ethics opinions that provide guidance on this topic:

ABA Formal Op. 90-357: "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."

Illinois State Bar. Op. 24-02: "A law firm may use the terms "senior counsel," "special counsel," or "counsel," as well as "of counsel," to designate lawyers with whom a firm has a close, regular, and personal relationship. Where a lawyer is "senior counsel," "special counsel," "counsel," or "of counsel" to more than one law firm, those law firms will generally be considered as a single firm for purposes of attribution of conflicts of interest and disqualification."

New York City Bar Formal Op. 1995-8: "Unaffiliated group of lawyers may not advertise themselves collectively as "The Law Offices at X Square." A law firm may be "of counsel" to another law firm or to individual lawyers. Lawyers or law firms may state in advertisements or on letterhead that they are "associated" or "affiliated" with each other, so long as their relationship is akin to an "of counsel" relationship and the precise nature of the relationship is fully disclosed in communications with specific prospective clients whenever such disclosure could be relevant to the clients."

California State Bar Formal Op. 1993-129: "1. In order to avoid false, deceptive or confusing communications, a principal member or law firm ("principal") may hold out another member or law firm as "of counsel" only where the relationship between them is "close, personal, continuous, and regular." So long as that standard is observed, there is no absolute limit to the number of "of counsel" relationships in which a member or firm may participate as "of counsel." 2. Due to the requirement to maintain a "close, personal, continuous, and regular" relationship within the principal and "of counsel" relationship, neither the principal nor "of counsel" members or law firm may represent adverse or potentially adverse interests except as authorized by rule 3-310 of the California Rules of Professional Conduct."

Colorado Bar Formal Op. 139: "The term "of counsel" refers to a lawyer who has a close, regular, personal relationship with a law firm. "Of counsel" describes a form of association between lawyers in a firm. Because a lawyer who is "of counsel" is considered to be in that firm for purposes of dividing fees, the firm need not comply with the requirements of Rule 1.5(d)(1)-(3). A lawyer may be "of counsel" (or otherwise associated) with more than one firm. However, the imputation of conflicts of interest among the firms with which the lawyer is associated present practical limitations on such arrangements."

As always, be sure to check the rules and opinions in your specific jurisdiction before taking action. While all states have adopted the ABA's Model Rules of Professional Conduct, most states have amended the language of one rule or another, as well as having differing interpretations of the Rules.

Should you need advice on this or any other risk management topic, consult with our senior risk management counsel by visiting the Attorneys Risk Management website: Attorneys Risk Management, and click on the "Request a Risk Management Consultation" button.