ALPS
Practice Management Pointers

Understanding the Risk in Of Counsel Relationships

Mark Bassingthwaighte, Esq.
mbass@alpsnet.com

"Of counsel" is one of those terms that does have multiple meanings. This term has been used as an honorary designation for retired partners, as a special designation for firm attorneys who are neither a partner nor an associate, and as a way to describe part-time attorneys who have created an association with a firm. In recent years however, more attorneys seem to want to use the term solely as a way to generate additional business. After all, the public presentation of close ties with another firm can be an effective marketing tool that will drive additional business to your firm, right? Well perhaps, but there are risks that come into play 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 refers to something altogether different from a traditional attorney within a firm. These opinions generally define an of counsel attorney as an attorney who is not a partner, associate, shareholder, or member of a firm, and they further state that an attorney may only be designated "of counsel" to the firm if the attorney will have a close and continuing relationship with the firm. This means that any attorney that works with your firm and has a significant degree of shared liability with your firm or managerial responsibilities to your firm and/or its staff should never be designated as "of counsel." 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.

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. Attorneys can get into serious disciplinary trouble by designating someone who is merely a referral attorney as "of counsel" because that is usually considered to be a misleading client communication in

violation of the ethical rules. This is why the idea of creating "of counsel" relationships solely for marketing purposes falls flat.

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. Remember the average person will take the term at face value so come at the decision from the perspective of the average person's expectations. If you are thinking about being listed on another firm's letterhead as "of counsel," only do so if you are able to be readily available and actually will provide counsel to that firm.

Examples of acceptable relationships for "of counsel" designation have included, but are not limited to: 1) retired lawyers, 2) withdrawing partner or associate, 3) part-time practitioner, 4) permanent non-partner/non-associate, 5) partner on leave, and 6) probationary partner-to-be. Examples of unacceptable relationships for "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 these questions 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 the "of counsel" designation, I would recommend 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 generally applicable issues that take on special significance in an "of counsel" affiliation. In particular, imputed disqualification, vicarious liability, and insurance coverage disputes 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 has to 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 and omissions of the of counsel attorney that were outside of the apparent scope of the of counsel'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'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.

Closing Thoughts

Beyond the above, the best risk management advice that I can give regarding of counsel relationships is to encourage you 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. I do believe that of counsel relationships are of significant value as long as these relationships are entered into with client interests in mind as opposed to being a marketing strategy. Overlook this, and problems may lie just around the corner.

Risk Management Questions?

Mark Bassingthwaighte, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or mbass@alpsnet.com.

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