Of Counsel

If It Looks Like A Parrot, Walks Like A Penguin, And Quacks Like A Duck It May Be An --

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KBA Bench & Bar, Vol. 63 No. 1, January 1999

Letter in the January 1996 ABA Journal

> Regarding "Of Counsel," October, page 70, an urbane and distinguished colleague of mine responded thus to inquiries about his of counsel designation: A local tomcat's nightly yowling so upset the neighbors that Tom's owner took him to get fixed . On the first night of his return from the hospital, Tom was again out in the yard yowling as loud as ever. When his owner asked why, Tom explained, "I am now of counsel to the other tomcats in the neighborhood."

A Modern Lawyer Fable

A law firm decided that a good way to leverage its practice was to establish an of counsel relationship with a lawyer named, Sheldon. While of counsel, Sheldon took a personal injury case without telling the firm. He used a retainer agreement that included the firm's name and used firm letterhead during the representation that showed his name as of counsel. A year or so later the firm terminated the of counsel relationship and notified Sheldon's known clients. Subsequent to termination Sheldon missed the two year statute of limitations for the personal injury case. The first time the firm ever heard of this matter was when they were served the summons and complaint for the malpractice claim. A summary judgment in favor of the firm was reversed on appeal. The appellate court found that when a firm forms an of counsel relationship it is vicariously liable if the of counsel malpractices when acting with the apparent authority of the firm[i].

The Moral of the Fable

Many lawyers lack a clear understanding of what an of counsel is and the risks of practicing as an of counsel or with one. In common parlance of counsel is used to mean anything from a phantom lawyer to a lawyer that is virtually a full fledged partner of the firm. What is clear is that before becoming an of counsel or bringing one into the firm you need to do three things:

1. Be sure you have a working definition of what an of counsel is.

2. Consider carefully the professional responsibility issues that an of counsel relationship raises.

3. Study the malpractice exposure of the of counsel relationship and risk manage it from the outset.

This article provides a structure for evaluating the illusive of counsel relationship by analyzing these considerations. There is little Kentucky authority to help, but a definitive ABA ethics opinion and other sources that include The Of Counsel Agreement – A Guide for Law Firm and Practitioner by Wren and Glascock offer guidance that is both helpful and reasonable.

The Of Counsel Relationship Defined

The start point for Kentucky lawyers in defining of counsel is Kentucky Rule of Professional Conduct 7.02 that contains the only guidance on of counsel in the rules. It provides: "A lawyer may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." This rule does a better job of indicating what is not an of counsel than illustrating what it is. It does, however, express the core characteristics of the concept:

- The relationship is continuing and not intermittent or for a single matter; and

- The of counsel does not have the status of a partner with managerial responsibilities and shared liability or of an associate lawyer regularly employed by the firm.

To flesh out this core concept the best available authority is ABA Formal Opinion 90-357 (1990). This opinion was issued in response to the confusion created by prior ABA and state ethics opinions, and to bring uniformity to a perplexing professional relationship. It describes valid and invalid of counsel designations:

> 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.
>
> ….
>
> There appear to be four principal patterns of such relationships, all of which in the Committee's view are properly referred to by the title "of counsel" (or one of its variants).

The four patterns are:

> Perhaps the most common of such relationships is that of a part-time practitioner who practices law in association with a firm, but on a basis different from that of the mainstream lawyers in the firm. Such part-time

> practitioners are sometimes lawyers who have decided to change from a full-time practice, either with that firm or with another, to a part-time one, or sometimes lawyers who have changed careers entirely, as for example former judges or government officials.
>
> A second common use of the term is to designate a retired partner of the firm who, although not actively practicing law, nonetheless remains associated with the firm and available for occasional consultation.
>
> A third use of the term is to designate a lawyer who is, in effect, a probationary partner-to-be: usually a lawyer brought into the firm laterally with the expectation of becoming partner after a relatively short period of time.
>
> A fourth, relatively recent, use of the term is to designate a permanent status in between those of partner and associate -- akin to the category just described, but having the quality of tenure, or something close to it, and lacking that of an expectation of likely promotion to full partner status.

The Committee then identified four professional relationships that may not ethically be called of counsel:

- A relationship involving only an individual case;
- A relationship of forwarder or receiver of legal business;
- A relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms; and
- The relationship of an outside consultant.

Special Considerations of the Relationship

May a lawyer be of counsel to more than one firm?

Answer: Yes. The traditional rule is that a lawyer may be of counsel to only one firm at a time. Only a few states currently adhere to that rule. I found no Kentucky authority on point and rely on ABA Formal Opinion 90-357 for guidance. It reversed limitations expressed in prior opinions:

> The Committee's previous opinions have expressed the view that a lawyer cannot properly be of counsel simultaneously with multiple firms, because the necessary "close, regular, personal relationship" cannot exist on a plural basis. … The proposition that it is not possible for a lawyer to have a "close, regular, personal relationship" with more than two lawyers or law firms is not a self-evident one. A lawyer can surely have a close, regular, personal relationship with more than two clients; and the Committee sees no reason why the same cannot be true with more than two law firms. There is, to be sure, some point at which the number of relationships

> would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two, but the controlling criterion is "close and regular" relationships, not a particular number.

May a firm be of counsel to other firms?

Answer: Yes. The traditional rule is that only an individual lawyer may be of counsel. ABA Formal Opinion 90-357 resolved the question in these terms:

> … the Committee does not now perceive any reason that a firm should not be of counsel to another firm. Moreover, the Committee held in Formal Opinion 84-351 (1984) that two law firms could ethically present themselves as "affiliated" or "associated" with each other, and in Informal Opinion 1315 (1975), the Committee gave its approval to arrangements whereby two firms effectively became "of counsel" to each other by each designating a partner of the other firm as "of counsel" to itself.

KBA E-311 (1986) adopted ABA Formal Opinion 84-351 for Kentucky lawyers. It appears safe to conclude that the guidance in ABA Formal Opinion 90-357 on of counsel arrangements among firms is valid for the Kentucky Bar[ii].

May a firm designate a lawyer of counsel who is not admitted to practice in Kentucky?

Answer: Yes. KBA E-198 (1979) provides: "The firm must indicate after the name of any member who is not licensed in this state the limitation of his authority by use of a heading "Of Counsel", or the phrase "Not Admitted to Practice in Kentucky" or the phrase "Admitted Only in (..)" or similar words to negate any implication of entitlement to practice in this state."

Is the of counsel relationship changed if the firm or the of counsel is a professional service corporation, registered limited liability partnership, or limited liability corporation?

Answer: No. There are no Kentucky opinions on point, but other state ethics opinions hold that a professional corporation form of practice by either the firm or the lawyer does not preclude of counsel relationships[iii]. If ABA Formal Opinion 90-357 were updated, it would likely provide that an of counsel cannot be a "partner, shareholder, or associate," making it clear that the firm's or the lawyer's form of practice does not alter the Committee's conclusions. (Since to date the Kentucky Supreme Court has not approved limited liability forms of practice for Kentucky lawyers, this question is mooted to a large extent.)

Of Counsel and Professional Responsibility

The Kentucky Rules of Professional Conduct apply to the of counsel relationship without exception. The following rules have special significance:

Firm Letterhead – Rule 7.02: The rules specifically allow of counsel to be listed on firm letterhead. The listing must clearly indicate when an of counsel is not admitted to practice in Kentucky[iv]. Variants of the term of counsel include "counsel," "special counsel," "senior attorney," and "principal attorney." Some states allow specialty designations such as "tax counsel." Given Kentucky's conservative policy on advertising, solicitation, and specialization use only the term "of counsel" without variation or embellishment. If you want to do more, call the KBA Ethics Hotline or contact the KBA Attorney's Advertising Commission.

Conflicts of Interest – Rules 1.7, 1.9, and 1.10: For purposes of the conflict of interest rules an of counsel is treated just like any other lawyer in a firm. This means that all interests of the of counsel are imputed to the firm[v]. An of counsel who has a private practice, who is a member of another firm, or who is of counsel to other firms geometrically increases the risk of a disqualifying conflict for the firms he is serving as of counsel[vi]. Some states allow screening to overcome of counsel conflict problems. The Kentucky rules allow conflict avoidance screening only in successive government and private employment situations[vii]. The KBA Ethics Committee takes the position that, since the Kentucky rules do not otherwise provide for screening, lawyers should not rely on screening for conflict resolution in any other situation[viii].

Lawyer as Witness – Rule 3.7: An of counsel is treated like any other lawyer in a firm for purposes of determining whether the of counsel or firm members must withdraw as an advocate at trial when either is a witness[ix].

Sharing Fees – Rule 1.5(e): This rule requires inter alia client notification if a lawyer shares fees with another lawyer not of the same firm. A majority of states require compliance with Rule 1.5(e) before a firm may share fees with an of counsel[x]. I can find no Kentucky authority on point. The Florida Bar Ethics Committee opined that as long as a lawyer practices exclusively as an of counsel with one firm the fee division rules do not apply. If the of counsel practices outside the firm, however, compliance with Rule 1.5(e) is required[xi]. The Florida approach is reasonable – whether it is acceptable in Kentucky is a matter of conjecture. Disclosing of counsel involvement in a client letter of engagement is a professionally responsible way of complying with Rule 1.5(e).

Of Counsel Client Trust Accounts – Rule 1.15: There is no Kentucky authority specifically dealing with an of counsel's responsibility for safekeeping client property. In Wisconsin of counsel are required to maintain separate client trust accounts for clients that are exclusively theirs. If the client is the firm's client, a separate of counsel client trust account is not required[xii]. This is a reasonable approach that should work in Kentucky.

Office Sharing Of Counsel – Rule 7.50: The ethics problem for lawyers sharing offices is they may give the misleading impression to clients that they are a law firm. If that

impression is given, a de facto partnership is created responsible for both ethics complaints and malpractice claims. A lawyer sharing an office with another lawyer may be of counsel to that lawyer provided the relationship is a continuing one. The risk in shared offices is the confusing title of counsel may be one more factor indicating to clients that the lawyers are a partnership. Some lawyers in shared offices list on their letterhead several other lawyers in the office as of counsel -sometimes this is done on a reciprocal basis. This practice has significant conflict of interest and malpractice liability implications, and contributes to the impression that the lawyers in the office are a partnership. Finally, there is a limit to how many continuing close, regular, personal relationships a lawyer can have. Numerous of counsel affiliations increase the risk that the lawyers involved will be found to have misled clients.

Of Counsel Malpractice Liability

The substantive law of legal malpractice applies in full force to the of counsel relationship. The basic rule is of counsel are responsible for their own malpractice, but are not vicariously liable for the firm's malpractice. The firm is liable for its malpractice and partners are vicariously liable for the malpractice of an of counsel "who acts within the actual or apparent scope of the firm's practice and for the firm." The apparent scope test is "pragmatic, viewed from the objective perspective of a client's reasonable expectations[xiii]."

While the general rule is that an of counsel is not vicariously liable for the firm's malpractice, of counsel who are retired partners risk vicarious liability. In some circumstances clients can reasonably think the retired partner retains his former status with the firm and thereby be misled about the representation. This is particularly true if the of counsel was a name partner and the firm did not change its name upon the partner's retirement. Office sharing of counsel risk creating a de facto partnership that carries vicarious liability for the malpractice of other lawyers determined to be in the partnership. Both of counsel relationships are proper, but must be carefully risk managed.

Risk Management

Establishing The Of Counsel Relationship: Always use a written of counsel agreement. It should cover title, status in the firm, duties, limitations on authority to act for and in the name of the firm, compensation, termination, benefits (if any), reciprocal conflict check systems, and malpractice liability insurance. The Of Counsel Agreement – A Guide for Law Firm and Practitioner has model of counsel agreements that cover most of these considerations in detail. The book conveniently comes with the model agreements on disk. Follow ABA Formal Opinion 90-357 in tailoring the agreement to your circumstances. Use approved of counsel definitions and categories. Remember that the policy on advertising, solicitation, and specialization for Kentucky lawyers is conservative. Do not press the envelope without coordinating with the KBA.

Disclosure Of The Of Counsel Relationship: The overarching ethics and malpractice consideration is the risk the of counsel relationship will mislead clients about the nature

of the representation, the resources available to the firm, and how fees will be shared. Full disclosure of firm resources and relationships to clients in a letter of engagement clarifies the of counsel's role and serves to explain how the of counsel shares fees. It, along with the of counsel agreement, is a firm's best defense should the issue of the of counsel's apparent authority to act for the firm be raised.

Reciprocal Conflict Of Interest Check Systems: Prior to a firm entering an of counsel relationship with a lawyer with an outside practice a thorough conflict analysis of the lawyer's past and current work must be made. A lawyer who cannot supply detailed conflict information should be avoided. Both the firm and an of counsel must maintain reciprocal conflict check systems and coordinate frequently as they accept new clients and matters. Remember that the of counsel for conflict analysis is treated as a firm lawyer. Of counsel conflicts are imputed to the firm and vice versa. Be especially careful of lawyers that are of counsel to more than one firm and firms that are of counsel.

Firm Supervisory Controls: The firm must manage an of counsel's work just like any other firm matter. This includes employing work and docket control systems, billing, reviewing of counsel work product, assuring that that the of counsel protects client confidentiality, and confirming that of counsel working outside the office have appropriate safeguards for protecting client files and property in their possession. All members of the firm should be given specific guidance on an of counsel's status in the firm.

Malpractice Liability Insurance: An of counsel practicing exclusively with a firm should be covered by the firm's malpractice insurance. Refer to the policy terms and declaration page to confirm coverage. The firm and the of counsel with an outside practice both should have malpractice insurance, preferably with the same insurer. They should compare coverages to determine which policy has priority, whether differing limits and deductibles cause gaps in coverage that could lead to disadvantageous cross-actions between them, and that both the firm and of counsel are entitled to legal defense. The safest course is to have the of counsel specifically listed as an insured on the declaration page of the firm's policy. Conversely, the firm should be named an insured on the of counsel's policy declaration page[xiv]. The major risk to the firm is vicarious liability for unauthorized acts by the of counsel. Do not allow a gap in insurance for this risk.

Conclusion

The of counsel relationship can serve as a career extender, an alternative way to practice, and a method to economically expand the capability and resources of a firm. It also carries professional responsibility and malpractice considerations that must be risk managed. Use this article and the cited authorities as a guide. When in doubt talk to your friend, the KBA.

Endnotes

[i]Staron v. Weinstein, 701 A.2d 1325 (1997)
[ii]See ABA Formal Opinion 94-388 (1994) for a comprehensive review of relationships among law firms.
[iii]§ 91:503, Of Counsel, ABA/BNA Lawyers' Manual on Professional Conduct
[iv]KBA E-198 (1979)
[v]"There can be no doubt that an of counsel lawyer (or firm) is "associated in" and has an "association with" the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules and the imputation of disqualifications resulting from former government service under Rules 1.11(a) and 1.12(c)….", ABA Formal Opinion 90-357 (1990)
[vi]See generally, Wren & Glascock, The Of Counsel Agreement - A Guide for Law Firm and Practitioner, Chpt. VII & VIII, 2ed. ABA (1998)
[vii]Rule 1.11
[viii]KBA E-354 (1993)
[ix]"…an of counsel lawyer…is a lawyer in the firm for the purposes of Rule 3.7(b), regarding the circumstances in which, when a lawyer is to be a witness in a proceeding, the lawyer's colleague may nonetheless represent the client in that proceeding." ABA Formal Opinion 90-357 (1990)
[x]§ 91:504, Of Counsel, ABA/BNA Lawyers' Manual on Professional Conduct
[xi]Florida Ethical Opinion 94-7 (4/30/95)
[xii]Wisconsin Ethics Opinion E-86-4 (1986)
[xiii]Mallen & Smith, Legal Malpractice, 4th ed., § 5.7 "Of Counsel"
[xiv]Mallen, Romero & Schute, Legal Malpractice: The Law Office Guide To Purchasing Legal Malpractice Insurance, Chpt. 11 "Of Counsel" And Affiliated Lawyers; West Group, 1998 ed.