

'OF COUNSEL' AND THEIR ROLE IN THE LAW FIRM



THE CORE ASSET: PERSONNEL

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Ask any young lawyer who has just been hired by a firm what his or her goals are, and chances are the answer will be ‘to start off as an associate and work my way up to partner.’ Law firms generally function under a partnership structure, and it is, therefore, natural for lawyers to aspire to become a partner after a period as an associate—both for professional as well as pecuniary reasons. Yet, there is a third position of affiliation with a law firm that is neither associate nor partner, and that is the status of ‘Of Counsel’. It is increasingly common for law firms to utilize this type of relationship, and there are certainly benefits to both the firm and lawyer arising from such an arrangement. We will examine what the role of ‘Of Counsel’ entails and what ethical as well as professional risk considerations need to be considered.

Not Just for Retiring Partners

At one time, the most common scenario under which an attorney would associate with a firm as ‘Of Counsel’ was when a senior partner was retiring from full-time service to the firm but still wished to practice in that familiar environment. Today, however, lawyers making lateral moves may enter into such a status for a variety of reasons. According to ABA Formal Opinion 90-357, which was adopted more than 30 years ago, the designation of ‘Of Counsel’ (or sometimes, simply ‘counsel’) describes a ‘close, personal, continuous, and regular relationship’ between the firm and the ‘Of Counsel’ lawyer. Firms may wish to bring on board a lawyer with significant experience in a particular niche area of practice which is outside of the firm’s normal core competencies but without providing that lawyer with the same workload as a partner or with operational or governance responsibilities. Notwithstanding the reference to ‘continuous’ in the ABA definition, a lawyer with a practice specialty may be brought in just to assist with a high-profile case or with a specific type of litigation.

ABA-specific Definitions

The above-referenced ABA Formal Opinion recites four categories of ‘Of Counsel’ status:

- › 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. This can include former judges, politicians, other government officials, or attorneys who are transitioning from a corporate in-house position to law firm practice.
- › A retired partner of a firm who, although not actively practicing, remains available for occasional consultation.
- › A probationary ‘partner-to-be’ who may be brought in laterally with the expectation of becoming a partner after a relatively short period of time.
- › A permanent status that lies somewhere between associate and partner and which grants tenure to the lawyer, but without any expectation of likely promotion to partner status.

Applicability to the Solo Practitioner

But it is not just sizeable law firms that make use of the ‘Of Counsel’ designation for those affiliated with a practice. Solo practitioners and small law firms may also find that a client has a legal matter that requires legal counsel outside of their core practice area. Rather than refer the matter (and the client) out altogether, by associating with an expert in

“TO THE EXTENT THAT LAWYERS AND LAW FIRMS IN “OF COUNSEL” RELATIONSHIPS ARE TREATED AS ONE FIRM FOR PURPOSES OF CONFLICTS AND FEE SHARING, SO TOO IS THE POTENTIAL FOR SHARED MALPRACTICE LIABILITY BETWEEN LAWYERS OR LAW FIRMS AFFILIATED IN “OF COUNSEL” ARRANGEMENTS. BEFORE FORMING AN “OF COUNSEL” RELATIONSHIP WITH ANOTHER LAWYER, A FIRM SHOULD CAREFULLY SCREEN POTENTIAL CANDIDATES AND MONITOR THE RELATIONSHIP CONTINUOUSLY.”

**— Mary F. Andreoni,
Illinois ARDC, Ethics
Education Senior
Counsel**

the field, the solo practitioner or small law firm can keep the client 'in-house', thereby reducing the risk that the client will leave for another practitioner.

An 'Of Counsel' arrangement can also help the small firm grow legal staff resources and maintain access to specialized practitioners, including those who can provide complementary practices, without hiring a full-time associate, which may be financially beyond the ability of the solo practitioner or small firm at the early stages of practice development. Importantly, 'Of Counsel' relationships are not mere consulting relationships such as a firm might engage in with a tax adviser, nor are they established merely by an office-sharing agreement.

Some Ethical Considerations

In the course of weighing whether to form an 'Of Counsel' relationship with another lawyer, firms must consider the possible ethical ramifications, and in particular those relating to conflicts of interest, confidentiality, and compensation. Conflicts of interest are governed by the ABA's Model Rules of Professional Responsibility 1.7 through 1.11. If either the firm's attorneys or the 'Of Counsel' attorney have clients who are independent of the other's client roster, legal matters undertaken could possibly lead to a conflict of interest. Furthermore, it is important to be aware that in the eyes of the court, the 'Of Counsel' and the law firm are frequently treated as one entity and will be regarded as such when it comes to such issues as disqualification, recusal, and other conflict issues.

Some jurisdictions allow for a screening process in order to determine upfront whether an actual conflict of interest exists before excluding either the firm's or the 'Of Counsel's' representation.

As to confidentiality issues, the 'Of Counsel' is generally considered to be formally associated with the law firm, thereby imposing a duty to keep information about client matters confidential. In terms of compensation, local rules vary as to sharing any profits with the 'Of Counsel', and likewise, distributed bonuses may also be governed by strict fee-splitting restrictions.

A Mutual Benefit

In sum, entering into the 'Of Counsel' relationship can be highly beneficial for both the lawyer and the firm if handled properly. For the seasoned or niche-expert lawyer, there is the opportunity for employment despite the absence of a partnership opportunity being available, and for the firm, there is the advantage of keeping everything in-house and providing for growth without the addition of another full partner. Knowing the professional responsibility boundaries of this arrangement can make it very rewarding for both parties.

Executive Summary

1. The Issue:

What is the role of the 'Of Counsel' lawyer in a law firm?

2. The Gravamen

'Of Counsel' arrangements fall somewhere between that of associate and partner and can be quite mutually advantageous to the firm and the 'Of Counsel' lawyer.

3. The Path Forward

Aside from the traditional filling of the role by retiring partners, today, the position is commonly filled by former judges, politicians, and attorneys with a specialty that the firm can use without referring the matter to another practice.

Action Items:

1 As a Growth Tool:

Determine what the growth needs are of your firm, and if you need to increase staff without the financial burden of adding on a partner, 'Of Counsel' may be just right for your firm.

2 Litigation Assistance:

If your firm is faced with litigation that requires an area of expertise beyond your firm's core competence, then serious consideration should be given to bringing on board an 'Of Counsel' specialist.

3 Marketing Aspect:

If the association with a former judge, politician, or government official can enhance the reputation of your firm, then bringing such a person on as 'Of Counsel' should be considered a valuable marketing tool.

4 The Ethics of 'Of Counsel':

In the 'Of Counsel' relationship, your first consideration must be to carefully screen for any possible conflict of interest issues that could arise, thereby jeopardizing both the standing of the firm and the 'Of Counsel' lawyer.

Further Readings

1. https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/march-2020/of-counsel-not-just-for-seniors-any-more
2. <https://lawschooli.com/what-does-of-counsel-mean/>
3. https://www.law.cornell.edu/wex/of_counsel
4. <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/building-your-law-firm-through-of-counsel-relationship>
5. <https://www.biglawinvestor.com/counsel-vs-partner/>





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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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