

## Ethics: What does "of counsel" mean?

by

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The term "of counsel" traditionally was used to describe a lawyer, often a former partner, who has cut back on his workload, perhaps no longer shared in the profits of a firm, but had some level of access to office space and/or other firm resources. More recently, the term has expanded to apply to lawyers who have a continuing non-full-time relationship with the firm, working in a capacity other than that of a traditional partner or associate.

According to ABA Formal Opinion 90-357 (1990), the core characteristic of an "of counsel" relationship is a close, regular, personal relationship with the firm. The ABA opinion identified four common variants of the relationship: (1) the "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"; (2) a retired partner of the firm who is available for consultation; (3) a lawyer (usually a lateral hire) brought into the firm with the expectation that the lawyer will shortly become a partner; and (4) a lawyer who occupies a permanent senior position in the firm with no expectation of becoming a partner. Thus, the "of counsel" label may be applied to several different types of relationships. What does that mean, in terms of the responsibilities of the of counsel lawyer under the Minnesota Rules of Professional Conduct?

The presence of a conflict of interest may preclude representation of a current client when that representation is contrary to the interests of a current or past client. Rules 1.7 and 1.9, Minnesota Rules of Professional Conduct (MRPC). Conflicts of interest on the part of one member of a firm are generally imputed to all of the lawyers who are "associated" in a firm. Rule 1.10(a), MRPC. The Minnesota Supreme Court has not directly addressed when conflicts may be imputed to or from an "of counsel" lawyer. Many "of counsel" relationships rise to the level of an "association," and, therefore, should result in the imputation of conflicts, both from the "of counsel" lawyer to the rest of the firm, and from the rest of the firm to the "of counsel" lawyer. The ABA generally shares the view that "of counsel" lawyers are "associated" for purposes of imputation of conflicts. ABA Formal Opinion 90-357 at p. 6. The Restatement of the Law Governing Lawyers § 123, Comment C, takes a fairly ambiguous stance, noting that courts are not always strict on applying imputation. The Iowa State Bar

Association, however, recently stated that of counsel lawyers and law firms will be considered as one firm for all ethical purposes. Iowa Ethics Op. 13-01 (2013).

Similarly, of counsel lawyers may have imputed duties regarding the confidentiality of information received by clients. A lawyer may not knowingly reveal information relating to the representation of a client. Rule 1.6, MRPC. However, a comment to the rule states that lawyers in the same firm may disclose information relating to a client of the firm, absent instructions from the client to the contrary. Rule 1.6, Comment 5, MRPC. Is an of counsel lawyer "in the same firm," for purposes of this rule? While it is difficult to generalize due to the many different types of relationships that fall under the "of counsel" designation, there does not appear to be any basis generally to distinguish an of counsel lawyer from any other lawyer in the firm for purposes of maintaining client confidentiality.

As to advertising, the bedrock rule for a lawyer's communication about her services is that such communication cannot be false or misleading. Rule 7.1, MRPC. That prohibition extends to firm names and letterheads, as well. Rule 7.5, MRPC. Although the words "of counsel" do not appear in the rule or comment, certain provisions are relevant to of counsel arrangements. For example, if a lawyer formed a new "of counsel" association with an existing firm, and that firm then changed its name to include that of the of counsel lawyer (unlike when a named partner partly retires but maintains a relationship with the firm), prospective clients could well be misled as to that lawyer's role in the firm.

While not strictly an ethics consideration, it also may be wise for an of counsel lawyer to confirm that he or she is named as an insured, or otherwise provide for their own coverage.

"Of counsel" may denote one of several different types of relationships between an attorney and the firm. In most common situations, the "of counsel" lawyer will be considered to have similar ethical duties as any other lawyer in the firm. However, attorneys should also consider the actual substance of their relationship with a firm, rather than simply the label "of counsel," to accurately determine their ethical responsibilities.