



## OF COUNSEL ARRANGEMENTS

Ellen Freedman, CLM  
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A few issues ago I published an article about the financial aspects of “Of Counsel” arrangements. [For a copy of “Of Counsel Arrangements: Dollars and Sense” send an email request to [lawpractice@pabar.org](mailto:lawpractice@pabar.org).] I promised to return to the topic with more specifics about these arrangements. In this article I’d like to focus on getting an agreement on paper.

It comes as little surprise that there are a great number of law firms which don’t have any written agreement between owners. So we should not be surprised that there are also a large number of other arrangements, such as Of Counsel (“OC”), which are not documented either. In my experience, this often leads to needless headache.

What should be included in an Of Counsel Agreement? Experience dictates the following are necessary elements:

1. **Statement of purpose.** Is this arrangement leading to anticipated retirement? Is it an on-going alternative to an associate or partner position?
2. **Term.** How long will the relationship run? How often will it be subject to review? What are the notification requirements for termination? For change to terms?
3. **Duties.** Will work be performed exclusively for the benefit of the firm and its clients? Will the attorney be able to hold public office, teach, represent private clients apart from the firm, or operate another business? Must work be exclusively referred back to the firm in all or specific practice areas?
4. **Work requirements.** Will the attorney be required to work a certain number of hours? Bill a certain number of hours? Collect a certain threshold of revenues? Must the work be performed at the office, from a remote location, or any combination?

5. **Compensation.** This is a key area in which language must be crystal clear. Including examples helps to clarify. The various parameters to consider and set forth include
- a. Percentage or hourly rate (“%/\$”) for work originated by and performed by of counsel
  - b. %/\$ for work originated by of counsel and performed by attorneys or paralegals of the firm
  - c. %/\$ for work originated by the firm and performed by of counsel
  - d. Payment terms applied based on hours worked, hours billed, or hours collected? Difference based on origination? How fast / timing of payments?
  - e. Payment for non-billable activity requested / performed (which should also be reflected in #3 Duties), such as mentoring, development of forms and workflows, management activity
  - f. Additional components to specifically include or exclude (saying what is not included is just as important as what is!)
    - i. Dues – which will the firm cover? State? County? Registration fee? Other fees?
    - ii. CLE – is there a dollar threshold? A credit threshold? A flat amount offered by the firm? No benefit?
    - iii. Malpractice insurance – an often overlooked “gotcha” with a possible nasty surprise. The firm must add Of Counsel to its policy. Will you require that OC maintain a separate policy, and if so is there a minimum coverage you will require? (Mark your calendar to get a fresh declaration page each year at renewal.)

Have you received/required a written indemnity for anything arising from prior acts? Have you made sure that your carrier has excluded prior acts? (Or included – done far less frequently -- but be sure to state which, and require disclosure of history prior to crafting your final deal.)



Note that some carriers discount premium for of counsel who consistently work less than 20 billable hours/week. If your arrangement will consistently call for part-time, check with your carrier for possible savings. Be sure to document any purposeful limitation of hours within the agreement.

- iv. Additional costs: marketing, such as continuation or redirection of former website; business cards; letterhead; equipment; announcements; modification to firm's website and so forth. (As an aside, if the OC will continue to maintain a separate private practice, be sure to spell out how and when firm letterhead and other resources may be appropriately used.)
  - v. If you have qualified retirement plans, health plans, and so forth, be sure to state whether OC is included or excluded from participation in each
  - vi. What form of tax reporting, withholding, and payment will the firm be responsible to provide?
6. **Firm requirements and procedures.** These should be spelled out as well. If for no other reason, to ensure you've thoroughly discussed all these items and have no incompatibilities which lead to a brush fire in short order.
- i. Conflict of Interest procedures – how must the OC handle intake under the arrangement?
  - ii. Firm records and retention – on what systems and how should the attorney record information about clients and matters, record time and bill, store communications documents and other records that are part of the file, close files, store and ultimately destroy files?
  - iii. What level of office space and support will the firm provide? Is use of all equipment included? Is electronic research included? Are any specialized tools or software required? If so, will the firm pick up the cost?



- iv. In what manner may the firm publish the OC's name and status? What rights does it have upon death, disability or retirement of OC?
  - v. Stating the requirement of client confidentiality and confidentiality of firm information beyond the term of the agreement is smart to include.
7. **Termination, Death, Disability, Dissolution, Retirement.** When firms do have written agreements, this is often an area which is omitted or poorly crafted. The key point to detail is what payments, if any, will be paid upon termination of the agreement due to any of these causes. In the case of retirement, we know this is the remainder of "sweat equity" the OC gets for leaving clients behind. If payments will be made, be sure to include any timing considerations.
8. **Dispute Resolution.** Spell out how you will resolve disagreements in the future.

The above is not meant to constitute legal advice. It is provided as general information based on my experience in assisting firms in this area. There are many lawyers who can assist with drawing up an agreement for your firm, if you don't already have someone at your firm to do it. Most malpractice insurance carriers provide assistance to their insureds with resources and sample agreements. PBA members (only) may contact me for my complete resource in this area by emailing [lawpractice@pabar.org](mailto:lawpractice@pabar.org).

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