



**PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY**

FORMAL OPINION 2026-100

USE OF THE DESIGNATION “OF COUNSEL”

I. INTRODUCTION

This Opinion addresses the ethical parameters governing the use of the designation “of counsel” by lawyers and law firms practicing in Pennsylvania. Specifically, it examines when the designation is permissible, what professional relationship it signifies, and the ethical obligations that flow from its use under the Pennsylvania Rules of Professional Conduct. The term “of counsel,” which is sometimes considered interchangeable with “special counsel,” is not defined in the Rules of Professional Conduct. This Committee, in its past guidance, along with the Philadelphia Bar Association and the American Bar Association, all emphasize that the propriety of the “of counsel” designation turns on the substance of the relationship, not the label alone.

II. APPLICABLE RULES OF PROFESSIONAL CONDUCT

Rule 1.0 Terminology

(g)¹ “Partner” denotes an equity owner in a law firm, whether in the capacity of a partner in a partnership, a shareholder in a professional corporation, a member in a limited liability company, a beneficiary of a business trust, a member of an association authorized to practice law, or otherwise.

Rule 7.1 Communications Concerning a Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

¹ The only title defined in the Rules is “Partner.” This opinion is intended to address the designation “of counsel” and is not intended to encompass the circumstances where a firm uses designations such as “associate” or “senior counsel” or “counsel,” often meant to denote partnership track or non-partnership track or length of time in the firm, even though the lawyer has a close, regular and personal relationship with the firm.

Comment:

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Rule 1.5 Fees

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Rule 1.9 Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10(b) or (c).

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously

represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

III. DISCUSSION

A central ethical mandate underlying the Rules is the prohibition against false or misleading communications about a lawyer's status or professional relationships. The leading national authority on the meaning of "of counsel" is ABA Formal Opinion 90-357 (1990), which remains the foundational analysis. The ABA concluded that use of the designation is permissible only when the lawyer and the firm share a "close, regular, personal relationship" and the designation is not otherwise false or misleading.

This committee has repeatedly emphasized that the designation "of counsel" must accurately reflect the lawyer's professional role and must not imply a partnership, common ownership, or shared responsibility where none exists. By definition, an "of counsel" relationship cannot be considered a partnership. Partner is defined in the Rules as an equity owner in a law firm or a shareholder in a professional corporation. Rule 1.0(g). Further, consultation or collaboration on an occasional basis is generally not sufficient, although daily contact is not required.

Philadelphia Ethics Opinion 88-32 confirmed that a lawyer may maintain a separate practice while serving as "of counsel" or "special counsel" to a firm, appear as co-counsel on pleadings, and share fees, provided Rule 1.5(e) safeguards are met.

In PBA Inquiry 97-81, the Committee recognized that while unconventional, a reciprocal "of counsel" relationship between a lawyer and a former firm could be permissible provided the lawyer remains available for consultation and continues to have meaningful professional integration with the firm.

The Restatement (Third) of the Law Governing Lawyers § 9 Law-Practice Organizations – In General (2000) provides in Comment [f]:

Traditionally, some lawyers have maintained "of counsel" relationships with a private-practice law firm. By customary usage, the term suggests that the lawyer is associated with the firm on a substantial, although part-time, basis because semi-retired or because of extensive duties in another organization not involved in the practice of law (such as a corporation or law school). The term "of counsel" may also refer to lawyers newly arrived at the firm, as on a trial basis. Other firms employ other terminology, such as "special counsel," to refer to one of the foregoing. Such relationships are significant primarily to reflect firm culture and practices, for purposes of advertising and to determine the imputation of conflicts

of interest. In some jurisdictions, holding oneself out as of counsel requires that the lawyer maintain a continuous and substantial relationship with the law firm (although likely with reduced duties). For purposes other than advertising, the legal significance of the relationship can vary depending on the purpose for which the question is posed.

The ABA identified several permissible models of an “of counsel” relationship, including:

- A retired or semi-retired partner who remains available for consultation;
- A part-time practitioner associated with a firm on an ongoing basis;
- A senior lawyer with a permanent status between partner and associate;
and
- A lateral lawyer with an expectation of future partnership.

(ABA Formal Op. 90-357). Pennsylvania ethics authorities have consistently adopted this framework. An affiliation that amounts to no more than a referral relationship, or that involves only one case, does not merit “of counsel” designation. On the other hand, a lawyer who provides the firm with advice in only one area of the law, but regularly, may properly be designated “of counsel” or similar designation such as tax (or other legal area) counsel. *See also* District of Columbia Ethics Opinion 255 (1995) (observing that the designation “special counsel” is frequently used interchangeably with “of counsel”); Georgia Ethics Opinion 05-13 (2007) (concluding that a lawyer or law firm may associate with another lawyer or firm to advise clients on specialized matters and may identify that lawyer or firm as “special counsel” for that area of law); and Restatement (Third) of the Law Governing Lawyers § 9 cmt. f (2000) (recognizing the use of alternative terminology, including “special counsel,” to describe such relationships). *See also* New York City Ethics Opinion 1996-8 (1996) (an attorney engaged on a non-exclusive, per diem basis cannot properly be referred to as an “associate” of the firm and instead if the attorney has a close, regular relationship may be referred to as of counsel).

The American Bar Association has rejected the imposition of a formal numerical limit on the number of “of counsel” relationships a lawyer may maintain. Although earlier ABA guidance suggested a cap of two such relationships, the ABA has concluded that no fixed limit is required. Instead, the propriety of multiple “of counsel” affiliations is constrained, as a practical matter, by the requirement that each relationship be close and continuing, as well as by the imputation of conflicts that extends among all lawyers and firms connected through “of counsel” relationships. ABA Formal Ethics Opinion 90-357 (1990).

Some jurisdictions historically adhered to a more restrictive view. For example, Iowa concluded that a lawyer may be “of counsel” to only one firm at a time. Iowa Ethics Opinions 82-19 (1982) and 87-9 (1987). Similarly, Texas limited “of counsel” affiliations to no more than two firms. Texas Ethics Opinion 402 (1982).

The majority of jurisdictions, however, now follow the ABA’s approach and decline to impose a numerical cap, focusing instead on the substantive nature of the relationships and their ethical consequences. *See, e.g.,* California Ethics Opinion 1993-129 (1993) (finding that a firm could be of counsel to three law firms so long as close, continuous and regular relationship exists);

Michigan Informal Ethics Opinion RI-102 (1991) (while there are no numerical limits, there are practical limitations to maintaining the required close, regular and personal contact with each affiliated lawyer or law firms. Disqualification and malpractice liability implications will operate to limit the number of "of counsel" affiliations); and New York State Ethics Opinion 793 (2006) (a lawyer and a firm may have of counsel affiliations with multiple lawyers and firms, but conflicts are imputed to all the lawyers associated with the firms).

Because the common understanding is that lawyers whose names appear on a firm's letterhead without any qualifying designation are partners, shareholders, associates, or employees of the firm, it would be misleading to include the name of an "of counsel" lawyer on firm letterhead without clearly identifying that lawyer's distinct status. Likewise, it would be misleading—and therefore impermissible—for a firm name to include the name of a lawyer who is designated as "of counsel" if that lawyer has never held the status of partner or shareholder of the firm. (ABA Formal Op. 90-357)

Although the "of counsel" designation may properly be used in communications concerning the firm's legal services, including on letterhead and a website, the nature of the relationship must be transparent to the client. Consistent with this principle, PBA Inquiry 2005-181 cautions that marketing materials, letterhead, and communications regarding legal services must unambiguously disclose the independent status of an "of counsel" lawyer and must avoid the use of logos, branding, or other indicia that could mislead the public into believing that the lawyer and the firm share common ownership or a partnership relationship.

Because the term "of counsel" indicates a licensed lawyer, of counsel is not appropriate to designate a lawyer who is retired or on inactive status, nor should a suspended or disbarred lawyer ever be referred to as of counsel. Likewise, an of counsel lawyer's name should not be included in a firm name, unless the of counsel is a former name partner who is reducing their practice with the firm prior to taking full retirement status. *See, e.g.,* Ohio Supreme Court Ethics Opinion 97-2 (1997).

A lawyer in one state may be of counsel to a lawyer or firm in another state, provided the requisite continuing, close relationship is maintained. *See, e.g.,* ABA Informal Ethics Op. 1315 (1975); Michigan Op. RI-102; and Arizona Ethics Opinion 00-08. If the affiliation is with a firm in another state, the jurisdictional limitations (if any) of the affiliated lawyers must be made clear on any public communications, such as letterhead, announcements, and communications regarding legal services so that it is clear to the clients where the of counsel lawyers may practice law. Likewise, two firms can be of counsel to each other, provided they meet the criteria of a close, regular relationship. *See, e.g.,* ABA Formal Opinion 90-357 and Ethics Opinion No. 180 of the Mississippi Bar, Dec. 1990.

Conflicts of Interest and Imputation

Law firms and lawyers engaged in an "of counsel" relationship must scrupulously comply with the Pennsylvania Rules of Professional Conduct governing confidentiality and conflicts of interest, particularly Rules 1.6, 1.7, 1.9, and 1.10.

For purposes of conflict analysis, an “of counsel” lawyer is considered “associated in a firm” within the meaning of Rule 1.10. As a result, the relationship generally carries the attributes of reciprocal imputation of conflicts between the firm and the “of counsel” lawyer. Conflicts of the firm are imputed to the “of counsel” lawyer, and conflicts of the “of counsel” lawyer are imputed to the firm.

This principle reflects the understanding that an “of counsel” relationship is substantially closer than that of an outside consultant, referral source, or occasional collaborator. The defining feature of the designation, a “close, regular, personal relationship,” supports the conclusion that the lawyers are functionally associated for purposes of imputation under Rule 1.10(a).

Under Rule 1.7, a lawyer may not represent a client if the representation involves a concurrent conflict of interest unless the requirements of Rule 1.7(b) are satisfied. Because Rule 1.10(a) provides that “while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so,” a concurrent conflict of one lawyer in an “of counsel” relationship is generally imputed to the entire firm.

Accordingly:

- If the firm has a concurrent conflict under Rule 1.7, that conflict is imputed to the “of counsel” lawyer.
- If the “of counsel” lawyer has a concurrent conflict under Rule 1.7, that conflict is imputed to the firm.

The only exception under Rule 1.10(a) applies where the disqualification is based solely on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation by the remaining lawyers in the firm.

Rule 1.9 governs successive conflicts involving former clients. An “of counsel” lawyer who formerly represented a client may not represent another person in the same or a substantially related matter materially adverse to the former client unless informed consent is obtained.

Under Rule 1.10(a), that former-client conflict is imputed to the firm if the “of counsel” lawyer is currently associated with the firm.

Similarly, if the firm has a former-client conflict under Rule 1.9, the “of counsel” lawyer is generally precluded from undertaking representation adverse to that former client in a substantially related matter.

The substantial relationship test triggers a presumption that confidential information material to the matter was obtained. Because lawyers associated in a firm are presumed to share confidences, imputation ordinarily follows.

When a lawyer becomes newly associated with a firm as “of counsel,” Rule 1.10(b) governs conflicts arising from the lawyer’s prior or present firm affiliation(s).

If the “of counsel” lawyer previously represented a client at another firm, the new firm may not represent a materially adverse client in the same or substantially related matter if:

1. The lawyer acquired protected information material to the matter; and
2. The interests are materially adverse.

However, Rule 1.10(b) permits screening to avoid imputation if:

- The disqualified lawyer is timely screened from participation;
- The lawyer receives no portion of the fee; and
- Prompt written notice is provided to the affected former client.

Thus, while an “of counsel” relationship generally results in imputation under Rule 1.10(a), screening may be available when the conflict arises from a prior firm association and the conditions of Rule 1.10(b) are satisfied.

Reciprocal Imputation Among Multiple “Of Counsel” Relationships

Where a lawyer maintains multiple “of counsel” affiliations, the scope of imputation expands accordingly. Each firm with which the lawyer maintains a qualifying “of counsel” relationship may be treated as associated for purposes of Rule 1.10. In practice, this can result in conflicts being imputed across multiple firms.

The ethical permissibility of multiple “of counsel” relationships does not eliminate the conflict-imputation consequences of such arrangements. Indeed, the realities of Rule 1.10 may significantly limit the number of “of counsel” affiliations that can be maintained without creating untenable conflict exposure.

The imputation analysis applies regardless of whether the “of counsel” lawyer works in the firm’s physical office or remotely, and regardless of the extent of the lawyer’s access to firm files. Imputation under Rule 1.10 turns on association in a firm, not physical proximity.

The factual realities of the relationship, however, including the lawyer’s access to client confidences, participation in firm matters, shared infrastructure, branding, and electronic systems, may inform whether the lawyers are “associated in a firm” for purposes of Rule 1.10.

Because Rule 1.6 prohibits disclosure of client information without informed consent, firms must implement appropriate safeguards to protect client confidences in the context of “of counsel” relationships.

Where screening is used pursuant to Rule 1.10(b), effective measures must be taken to prevent access to files, electronic information, and communications relating to the screened matter.

Firms entering into “of counsel” relationships should:

- Conduct comprehensive conflict checks covering the lawyer’s current and former representations.
- Evaluate whether screening may be necessary or available.
- Provide for “of counsel” to access only the files pertinent to the engagement.
- Assess the risk of cross-imputation among multiple affiliated firms.
- Ensure engagement letters accurately reflect the firm structure where relevant.
- Periodically reassess conflicts as new matters arise.

To summarize, an “of counsel” lawyer is associated with the firm for purposes of Rule 1.10. Accordingly:

- Concurrent conflicts under Rule 1.7 are imputed between the firm and the “of counsel” lawyer.
- Former-client conflicts under Rule 1.9 are imputed in the same manner.
- Screening may be available under Rule 1.10(b) when the conflict arises from a prior firm affiliation and the rule’s requirements are satisfied.
- Multiple “of counsel” affiliations expand the scope of potential imputation.

Firms and lawyers must therefore treat the “of counsel” relationship as carrying significant conflict-imputation consequences and structure such relationships with careful attention to Rules 1.6, 1.7, 1.9, and 1.10.

Fee-Sharing and Pay Arrangements

The method of compensation is not relevant to determining whether an affiliation may be designated as “of counsel.” ABA Formal Ethics Op. 90-357 (1990). When an of counsel lawyer is integrated into a firm, the lawyer may be treated as part of the firm for fee purposes. Therefore, an of counsel lawyer may be paid a salary, receive retirement benefits, or be paid on an hourly basis. Philadelphia Bar Association Ethics Opinion 93-17. *See also* Michigan Op. RI-102. However, when an “of counsel” lawyer is not treated as being in the same firm, Rule 1.5(e) applies. Under that Rule, the client must be advised of and not object to the participation of all lawyers involved and the fee must not be illegal or clearly excessive. Philadelphia Bar Association Ethics Opinion 93-17.

This Committee has cautioned against blanket or automatic percentage-based fee-splitting arrangements and emphasized that client consent controls on a matter-by-matter basis. *See* PBA Inquiry 2005-181.

Judges and Public Officials as “Of Counsel”

The PBA has addressed the “of counsel” designation in the context of judicial transitions in PBA Inquiry 2024-026. The Committee concluded that a sitting judge may not be announced or held out as “of counsel” to a firm prior to retirement. After retirement, a former judge may not use honorifics such as “Judge,” “Honorable,” or “Hon.” in connection with the practice of law, including in an “of counsel” role, because such usage may imply improper influence in violation of Rules 7.1 and 8.4(e). A firm may, however, factually describe prior judicial service in

biographies or announcements, provided no special influence is implied. Likewise, PBA Informal Ethics Opinion 98-17 provides that a Legislator may be designated as “of counsel” where there is a close, continuing relationship, but use of honorifics such as Honorable is misleading.

Termination of an “Of Counsel” Relationship

This Committee addressed the ethical obligations arising from the termination of an “of counsel” relationship in PBA Inquiry 90-20. When an “of counsel” lawyer departs, clients for whom the lawyer was providing non de minimis legal services must be notified of the change and afforded the choice of counsel. No notice is required if the matter is over. Joint notification letters are preferred where practicable. Files belonging to clients who were never clients of the firm may be transferred directly to the departing lawyer. These requirements reflect the lawyer’s continuing duties of loyalty, communication, and protection of client property.

IV. CONCLUSION

It is the opinion of this Committee that:

The designation “of counsel” is ethically permissible when it reflects a close, continuing, and personal professional relationship between the lawyer and the firm.

The designation may not be used to describe a referral relationship, case-specific collaboration, or occasional consulting arrangement.

An “of counsel” lawyer is associated with the firm for conflict-imputation purposes under Rule 1.10.

All communications, including letterhead and marketing materials, must accurately describe the relationship and must not be false or misleading under Rule 7.1.

Fee-sharing must comply with Rule 1.5(e) where applicable, and client consent is necessary.

Special care must be taken when the “of counsel” lawyer is a former judge or public official to avoid implying improper influence.

Upon termination of an “of counsel” relationship, current clients must be promptly notified and afforded freedom of choice.

As with all ethics guidance, the propriety of any “of counsel” arrangement ultimately depends on the specific facts and the realities of the professional relationship, not the title alone.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.