



ISBA Professional Conduct Advisory Opinion

Opinion 24 – 02

May 2024

SUBJECT: Law Firm Name and Letterhead; Of Counsel Designation

DIGEST: A law firm may use the terms “senior counsel,” “special counsel,” or “counsel,” as well as “of counsel,” to designate lawyers with whom a firm has a close, regular, and personal relationship. Where a lawyer is “senior counsel,” “special counsel,” “counsel,” or “of counsel” to more than one law firm, those law firms will generally be considered as a single firm for purposes of attribution of conflicts of interest and disqualification.

REFERENCES: Illinois Rules of Professional Conduct; Rules 7.1 and 7.5

ISBA Opinions No. 22-04 (October 2022); No. 20-04 (May 2020); and No. 16-04 (October 2016)

Restatement Third, The Law Governing Lawyers § 9, cmt. f; and § 123, cmt. c(ii) (2000)

American Bar Association Formal Opinion 90-357 (May 1990)

Annotated Model Rules of Professional Conduct (10th ed. 2023)

QUESTION

The inquiring lawyer asks whether, when a law firm partner or shareholder moves from partner to “of counsel” status within the firm, may the description or title “senior counsel” be used instead of “of counsel” for that lawyer.

OPINION

Rule 7.5(a) of the Illinois Rules of Professional Conduct provides that a lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. Illinois Rule 7.1, in turn, provides that a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services.

American Bar Association Formal Opinion 90-357 (May 1990), interpreting and applying ABA Model Rules substantially similar to Illinois Rules 7.1 and 7.5, notes that although the term "of counsel" appears to be the most frequently used among the various titles including the word "counsel" to indicate a relationship between a lawyer and a law firm, it was not the only typical use of the term "counsel." Other such common and permitted uses noted in the ABA opinion included the single word "counsel" as well as the terms "special counsel" and "senior counsel." ABA Formal Opinion 90-357 also concludes that the use of such terms should be limited to those lawyers with whom a firm has a close, regular, and personal relationship. The opinion offered four examples of relationships appropriate for an "of counsel" designation: (1) a part-time practitioner who practices in association with a firm, but on a basis different from that of the mainstream lawyers in the firm; (2) an inactive retired partner who may be available for consultation; (3) a probationary partner, often a lateral hire who joined the with the expectation of future partnership; and (4) a permanent firm lawyer with a status other than a partner or associate. The proposed relationship described by the inquiring lawyer appears to fit within the types of relationships described and approved in ABA Formal Opinion 90-357. See also Restatement Third, The Law Governing Lawyers § 9, cmt. f (2000) (by customary usage, the term "of counsel" suggests that the lawyer is associated with the firm on a substantial, although part-time basis).

Prior ISBA opinions are consistent with ABA Formal Opinion 90-357 and the Restatement comment. ISBA Opinion No. 22-04 (October 2022) concluded that an "of counsel" designation denotes a continuing and regular relationship between a lawyer and a law firm other than as a partner or associate. ISBA Opinion No. 20-04 (May 2020) held that an "of counsel" relationship between a lawyer and a law firm must be continuing and regular. ISBA Opinion No. 16-04 (October 2016) also concluded that a lawyer may be "of counsel" to a law firm if the relationship with the firm is close and continuing.

In summary, the consensus of the relevant ABA and ISBA opinions, as well as the Restatement of The Law Governing Lawyers, is that: (1) a lawyer with a close, regular, and continuing relationship with a law firm may be designated as "of counsel" to the firm; and (2) the terms "of counsel," "senior counsel," "special counsel," or simply "counsel" may also ordinarily be used to designate such a relationship. Thus, when a law firm partner or shareholder moves from partner or shareholder status to "of counsel" or similar status within the law firm, the firm may use the description or title "senior counsel," "special counsel," or "counsel" for that lawyer as long as the lawyer maintains a close, regular, and continuing relationship with the firm. Lawyers without such a relationship should not be described or identified using those terms.

The firm and the prospective “senior counsel” lawyer should also be aware of the potential consequences of the proposed relationship. As noted in ISBA Opinion No. 16-04 and ABA Formal Opinion 90-357, lawyers who are “of counsel” to a law firm are generally treated like partners or associates for conflicts purposes. See also Restatement Third, The Law Governing Lawyers § 123, cmt. c(ii) (2000). The result is that where a lawyer is “of counsel,” “counsel,” “special counsel,” or “senior counsel” to more than one law firm, those firms are generally considered as a single firm for purposes of attribution of conflicts of interest and disqualification. See Annotated Model Rules of Professional Conduct (10th ed. 2023) at 226.

CONCLUSION

An Illinois law firm may use the terms “senior counsel,” “special counsel,” or “counsel,” as well as “of counsel” to designate lawyers with whom the firm has a close, regular, and personal relationship. Where a lawyer or lawyers may have such relationships with more than one law firm, those law firms will generally be considered as a single firm for purposes of attribution of conflicts of interest and disqualification.

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