OF COUNSEL ARRANGEMENTS – DOLLARS AND SENSE

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I've had a consistent number of inquiries about of counsel arrangements over the past twenty years. Most recently, however, I have seen a spike in calls. It makes sense, with so many remaining attorneys of the boomer generation seeking to find a suitable situation from which they can transition to retirement, while leaving clients in capable hands. But there are lots of other reasons.

In the many decades I've managed and consulted in the legal industry, the role of "Of Counsel" has widened dramatically. In fact, many calls start with the question of what, exactly, is an Of Counsel arrangement? Good question.

When I first entered the legal industry, there was really only one meaning to of counsel. It was a designation ascribed to one who was transitioning from a full-time equity position to a full or part-time non-equity position. In other words, a transitional phase leading to retirement. Most people became of counsel at firms where they were long tenured. It was a natural transition.

Over the years this position has morphed into many different roles. Here are three examples of frequently found arrangements carrying an of counsel, or similar – such as special counsel – designation. All have in common an ongoing relationship between an attorney and a firm.

- **Lateral hires**. Many firms may have criteria for admission to ownership. These may be formal or informal. Two elements – tenure with the firm and/or book of business – may preclude bringing aboard some laterals as partners. Having the designation of associate is often a deal-breaker for a lateral.

  Firms have discovered that using an of counsel designation is an acceptable compromise. It is not negatively interpreted by clients. It also allows the firm time to determine whether a lateral is a good fit and sufficient producer before admission to partnership.

  Undoing an unsuccessful of counsel arrangement is much easier to

accomplish than undoing a partnership, and it rarely raises an eyebrow in the legal community.

- **Non-partner track attorneys**. I have written about this previously. ["When Alternative Staffing Makes Sense" The Pennsylvania Lawyer; May/June 2015. For a copy send an email request to lawpractice@pabar.org.] Attorneys who eschew the partnership role for any variety of reasons may find the title of associate, or senior associate, inappropriate and diminutive at some point in their career. Firms may come to the same conclusion, finding the associate title a barrier to setting an appropriate hourly rate for the attorney's experience and skill level.

  Most firms have abandoned the old "up or out" attitude. Good attorneys who will not be admitted to partnership are not forced out if there is sufficient work and they are willing to accept an of counsel designation.

  It is easier to monitor and maintain attorney profitability in an of counsel arrangement. If set-up properly, they become financially self-correcting.

- **Part-time attorneys**. These are frequently attorneys who simultaneously wear other hats. Perhaps they hold public office. Or own and run a business which takes only part of their time. There might be family obligations, or civic activities which occupy a significant portion of their time.

The next most frequent question I am asked is one your firm may have already wrestled with: what amount of fees earned should of counsel be paid? This is normally expressed as a percentage split. Many attorneys are familiar with the "Rule of 3's" but may not fully understand how or even whether it applies in today's marketplace. By the same token, attorneys have most frequently heard of 60/40 splits in of counsel relationships. Mostly they call to confirm that is correct. My answer is always, "It may be. But there's an equal chance it may not be, and you could literally lose money on every dollar the attorney produces for the firm. We need to examine the whole of the proposed arrangement, as well as your firm's gross margin."

Here's a simple example to clarify my statement. Let's assume that your firm is well managed financially. In today's market that may realistically mean that every dollar you bring into the firm costs you 50¢ to produce. That means you have 50¢ of profit to pay yourself. If your of counsel attorney gets 60¢ of every dollar of revenue she/he produces — e.g. a 60/40 split— you will actually *lose* 10¢ on every

dollar earned. The harder your of counsel works, the greater your loss will be!

Of course, various factors will influence profitability one way or another. If your firm has unused space which is not supporting revenue production, adequate staff already on board to support the of counsel, and incurs little additional cost, such as for CLE, dues, special marketing, insurance, etc, then you can justify that whatever revenues come in is "found money" which doesn't have to support a fair share of overhead. This is often a case with larger firms. In this case, the more revenue the of counsel produces, the more profit goes to the partners.

In smaller firms, the math becomes much more critical. I have worked with firms that have arrangements from 80/20 to 20/80, and everywhere in between. Some firms have more of counsel attorneys than owners or associates. For firms which have never done the math, the analysis comes as a great shock, and often not in a good way.

A phone call typically starts with a statement that the firm has significantly increased gross revenue, yet the owners are earning less, and don't understand why. Based on simple experience, my first step is to perform a profitability analysis of any of counsel arrangements.

Sometimes the analysis gets complex, like when an of counsel works on their own matters, plus matters for other attorneys at the firm. Of perhaps they are utilizing associates of the firm, and mentoring them so they can become successors for their practice. There are many different forms of value and expense to look at in order to be fair. Not everything is a simple mathematical computation.

Keep in mind, that there is a whole other article which could be written on other items of due diligence. This is just about math. What about synergy, cultural compatibility, malpractice history, reputation in the community, workstyle?

Individual facts and circumstances regarding your firm, and the of counsel attorney and his/her support needs, must be taken into consideration in setting terms which are fair and reasonable, and are not a windfall or loss for either party. There is no magic number to use as a guideline. PBA members who are considering becoming of counsel, or welcoming one into the firm, should call me to make sure your analysis is sufficient.

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