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Use of "Of Counsel" Title for Lawyers in Foreign Countries

A recent New York City Bar Professional Ethics Committee opinion offers important new guidance to New York law firms on use of the "of counsel" title for lawyers who work in foreign countries. The [opinion](#) states that a New York law firm can designate as "of counsel" a New York attorney who resides and practices law overseas, provided the firm complies with three criteria. First, the "of counsel" lawyer must have a "continuing relationship" with the law firm. Second, the use of the "of counsel" title must not be false or misleading in other respects. Third, an "of counsel" lawyer's practice must not constitute the unauthorized practice of law in the foreign country.

As the opinion explains, determining whether a "continuing relationship" exists involves "a multi-factor analysis that depends on the facts and circumstances of each situation." Ethics opinions that analyze this relationship identify a variety of factors that may be examined to determine whether an "of counsel" designation is appropriate. Factors include: whether the lawyer is actively involved in the firm's day-to-day affairs and/or cases; the frequency and nature of the lawyer's communications with the firm; and whether and to what extent the firm's clients use the lawyer's services. The opinion noted, however, that the presence or absence of any of these elements is not conclusive in determining whether the "of counsel" designation is appropriate.

As noted above, the opinion also specified that the "of counsel" designation may not be false or misleading in other respects. As Comment [1] to Rule 7.5 states, "a lawyer should be scrupulous in the representation of professional status." Protecting the public from being misled about the relationship between the law firm and the "of counsel" attorney is a key consideration. The opinion notes that "by using the of counsel designation, both the law firm and the lawyer are conveying to the public that the lawyer's continuing relationship with the firm is close, regular, and personal."

Finally, if the "of counsel" lawyer's practice in the foreign country constitutes the unauthorized practice of law in that jurisdiction, the law firm may not designate the lawyer as "of counsel." Doing so would likely violate Rule 5.5(b), which prohibits New York lawyers from aiding "the unauthorized practice of law."

[In the interests of full disclosure, I am the Chair of the NY City Bar Ethics Committee that issued this opinion]