

## "Of Counsel" Title Does Not Automatically Bar Claim for Attorney Fees

January 17, 2012 by [David J. McMahon](#)

In [Dzwonkowski v. Spinella](#), 2011 DJDAR 16427 (2011), the [California Court of Appeal for the Fourth Appellate District](#) decided an appeal relating to an award of attorney fees arising out of fee arbitration.

A client retained a law firm for representation in a probate matter. Another attorney who had the designation as “**of counsel**” at the law firm took over the matter when it proceeded into litigation.

The lawyer with the “**of counsel**” designation occasionally handled litigation matters on behalf of the firm. However, the “**of counsel**” did not maintain a regular presence at the office. A dispute over the payment of attorney fees arose between the client and the law firm. An arbitration panel found in favor of the law firm. The fee award amounted to more than \$33,000. The trial court confirmed the arbitration award. The law firm then filed a motion for \$16,344 in attorney fees incurred in the arbitration proceeding and in related proceeding at the trial court level.

In the client’s opposition to the fee motion, he argued that the firm had not “**incurred**” attorney fees in connection with the representation, in part because the fees were incurred by the attorney with the “**of counsel**” title. The trial court rejected that argument and granted the motion for fees in its entirety.

The court of appeal affirmed that decision. The court of appeal noted that [Civil Code Section 1717\(a\)](#) states that in an action on a contract, if a contract provides for attorney fees incurred in enforcing the contract, the prevailing party is entitled to reasonable attorney fees. The court stated that:

**Whether fees are incurred is evidenced by an obligation to pay attorney fees, the existence of an attorney-client relationship, and distinct interests between the attorney and client.**

The court of appeal noted that the record established that the firm was contractually obligated to pay the “**of counsel**” attorney fees incurred for his work on the case. The court of appeal also noted that the record established that the law firm actually retained the “**of counsel**” to provide services related to the fee dispute. Based in part on those conclusions, the court concluded the trial court’s award was proper.