

Nebraska Ethics Advisory Opinion for Lawyers
No. 92-3

A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION MAY PARTICIPATE IN A LAW FIRM INTENDING TO ENGAGE AN ATTORNEY AS "OF COUNSEL", AS LONG AS THE DESIGNATED "OF COUNSEL" ATTORNEY AND THE LAW FIRM MAINTAIN A CLOSE AND CONTINUING RELATIONSHIP. ALSO, THE RELATIONSHIP MAY NOT BE FORMED SOLELY FOR THE PURPOSE OF BEING A FORWARDER AND RECEIVER OF LEGAL BUSINESS AND MUST NOT BE ALLOWED TO EVOLVE INTO SUCH A RELATIONSHIP. FURTHER, THERE DO NOT APPEAR TO BE ANY PROVISIONS WHICH WOULD PROHIBIT A LAW FIRM FROM DESIGNATING A LAWYER, WHO IS A PROBATIONARY PARTNER-TO-BE AS "OF COUNSEL".

FACTS

A law firm maintains a branch office in Nebraska and is contemplating acquiring an additional Nebraska firm. Two partners from the firm to be acquired would become part of the new firm. One partner will limit his practice to part-time but will have an office, secretary and clients. The second attorney, whom you wish to designate as "of counsel," would in fact be on a probationary partner-to-be status.

QUESTION PRESENTED

Is it proper to designate a probationary partner-to-be and a part-time practitioner as "of counsel?"

CODE PROVISIONS

EC-13: In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or

associate if he only shares offices with another lawyer.

DR 2-101 (A): 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:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of Professional Conduct or other law; or

(3) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

DR 2-102 Firm Names and Letterheads.

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of DR 2-101.

(B) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(C) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communication on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(D) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

OPINIONS FROM OTHER JURISDICTIONS

"A lawyer who is partially retired from a law practice in Texas and who is licensed to practice in North Carolina may maintain an "of counsel" relationship with a North Carolina law firm where the lawyer would have an office at the firm, would be in the office for a few days each month, and would be in frequent contact with the firm's other lawyers and staff. So long as the lawyer is licensed in this state and will have a close, in-house association with the law firm that does not create conflicts of interest problems, the "of counsel" affiliation is permitted...." North Carolina Ethics Opinion 34 (10-21-87) as summarized in ABA/BNA Lawyers' Manual on Professional conduct at 901:6607.

A lawyer who is an associate or a partner in a law firm may not be designated as "of counsel" on the firm's letterhead. A retiring lawyer who merges his office with the law firm and becomes a salaried employee of the firm may be designated as "Senior Attorney" on the firm's letterhead. However, it is suggested that the firm separate the notation of the senior lawyer from the other associates and partners on the letterhead. Ohio Supreme Court Ethics Opinion 90-3 (4-20-90) as summarized in ABA/BNA Lawyers' Manual on Professional Conduct at 901:6865.

A lawyer may be designated as "of counsel" to a law firm where there is a close and ongoing relationship between the lawyer and the firm and the designation is not misleading. Pennsylvania Ethics Opinion 89-98 (undated) as cited in ABA/BNA Lawyers' Manual on Professional Conduct at 901:7319.

A lawyer who sells his law practice may not sell the goodwill of the practice because goodwill is personal and confidential and attached to the lawyer rather than the practice. However, "hard assets" such as furniture, equipment, books, accounts receivable, and other

tangible goods can be sold. The selling lawyer must notify his clients of their right to retain other counsel and to keep their case files. The purchasing lawyer is obligated to take reasonable steps to assure that the seller complies with this duty. If the selling lawyer remains "of counsel" to the purchasing firm, he may be compensated for services rendered, but the compensation agreement must not be a subterfuge for the sale of goodwill. Vermont Ethics Opinion 88-3 (undated) as cited in ABA/BNA Lawyers' Manual on Professional Conduct at 901:8606.

DISCUSSION

Generally, the "of counsel" relationship may be described as being close, ongoing, regular and involving frequent contact for the purpose of providing consultation and advice. "Of counsel" means:

That core characteristic properly denoted by the title "counsel" is, as stated in Formal Opinion 330, a "close, regular, personal relationship"; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with a shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term "associate, " which is to say a junior non-partner lawyer regularly employed by the firm.

ABA Formal Opinion 90-357.

Our Committee last addressed the issue of the "of counsel" designation in May of 1990. Thereafter, the ABA issued its Formal Opinion 90-357 regarding permissible uses of the "of counsel" designation. In that opinion, we stated:

An attorney who is a registered professional engineer and is employed by a corporation as such may be designated "of counsel" to a law firm provided the attorney and law firm

maintain a close and continuing relationship. The relationship may not be formed solely for the purpose of being a forwarder and receiver of legal business and must not be allowed to evolve into such a relationship. The lawyer must also be mindful of the ethical considerations involved when one seeks to engage simultaneously in the practice of law and a related business.

The American Bar Association's Committee states, in part, "insofar as Formal Opinion 330 may be read to conclude that either the probationary partner model or the permanent between-partner-and-associate model are not permissibly designated of counsel, that conclusion is disavowed.

CONCLUSION

A member of the Nebraska State Bar Association may participate in a law firm intending to engage an attorney as "of counsel" as long as the designated "of counsel" attorney and the law firm maintain a close and continuing relationship. Also, the relationship may not be formed solely for the purpose of being a forwarder and receiver of legal business and must not be allowed to evolve into such a relationship. Further, there do not appear to be any provisions which would prohibit a law firm from designating a lawyer, who is a probationary partner-to-be as "of counsel".