

**Nebraska Ethics Advisory Opinion for Lawyers
No. 10-04**

AN ATTORNEY MAY ONLY BE LISTED ON FIRM LETTERHEAD AND IN FIRM ADVERTISEMENTS AS “OF COUNSEL” WHERE THERE IS CLOSE, ONGOING, REGULAR, AND FREQUENT CONTACT WITH THE FIRM FOR THE PURPOSE OF PROVIDING CONSULTATION AND ADVICE.

A FIRM NAME MAY RETAIN THE NAME OF A RETIRED PARTNER, BUT NOT IF THE RETIRED PARTNER RESUMES THE PRACTICE OF LAW ELSEWHERE, EVEN IF HE MAINTAINS AN “OF COUNSEL” RELATIONSHIP TO THE FORMER FIRM.

QUESTIONS PRESENTED

1. Whether a lawyer who is practicing law as a sole proprietor can also be identified as “of counsel” for a separate law firm and be advertised as such.
2. Whether a firm name may retain the name of a retired partner when the partner comes out of retirement and resumes the practice of law as a sole proprietor apart from his former firm.

STATEMENT OF FACTS

An attorney retired from the practice of law approximately three years ago. At that time, he was one of two partners in a limited liability partnership law firm. The remaining partner in the firm purchased the majority of his interest in the partnership; however the retiring partner retains a 0.01% interest in the partnership. The last name of the retired partner continues to be part of the firm name and the retired partner is listed on the firm’s letterhead and in advertisements as “of counsel.” Since his retirement, the attorney has conducted no legal business and his status with the Nebraska State Bar Association is characterized as “regular inactive.”

The attorney plans to request reinstatement into the Nebraska State Bar and resume a limited (part time) practice outside and apart from the law firm which still carries his name and identifies him as being “of counsel.”

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-507.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

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

RULE § 3-507.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if:

- (1) A trade name includes the name of at least one of the lawyers practicing under said name. A law firm consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm;
- (2) The trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection; and
- (3) A trade name is not otherwise in violation of Rule 7.1.

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

DISCUSSION

I. AN ATTORNEY MAY ONLY BE LISTED ON FIRM LETTERHEAD AND IN FIRM ADVERTISEMENTS AS “OF COUNSEL” WHERE THERE IS CLOSE, ONGOING, REGULAR, AND FREQUENT CONTACT WITH THE FIRM FOR THE PURPOSE OF PROVIDING CONSULTATION AND ADVICE.

Neither the Nebraska Rules of Professional Conduct nor the ABA Model Rules of Professional Conduct address the “of counsel” relationship directly. However, there have been no changes involved in the transition from Model Code to Model Rules that have any substantive effect on the use of the term “of counsel.” ABA Formal Ethics Op. 90-357 (1990). The matter appears to be governed generally by Rule § 3-507.1 and Rule § 3-507.5(a) and (d). The ABA Ethics Committee, which formerly had limited “of counsel” designations to no more than two firms, has more recently taken the position that there is no formal numerical limit that need be placed on “of counsel” relationships. The committee warned, however, that as a practical matter, “of counsel” designations will be circumscribed both by the requirement that each relationship be close and continuing and by the effect of imputed disqualification that extends among all lawyers and firms connected by the “of counsel” relationship. ABA Formal Ethics Op. 90-357 (1990).

The more traditional view is that a lawyer may be “of counsel” to only one firm at a time. See Iowa Ethics Ops. 82-19 (1982) and 87-9 (1987). Texas limits “of counsel” affiliations to two firms. Texas Ethics Op. 402 (1982). However, most states now follow the ABA’s view rather than the traditional view.

Various types of practitioners have been deemed acceptable for “of counsel” affiliation, including the following:

- sole practitioner – Connecticut Informal Ethics Ops. 99-31 (1999)
- retired lawyer – Florida Ethics Op. 00-1 (2000)
- retired judge – New York County Ethics Op. 727 (1999)
- withdrawing partner or associate – Pennsylvania Informal Ethics Op. 7-81 (1997)
- part-time practitioner – South Carolina Ethics Op. 98-31 (1998).
- lawyer in another firm – Missouri Informal Ethics Op. 980143
- non-practicing government official or law professor – Iowa Ethics Op. 87-12 (1987)
- spouse -- Maine Ethics Op. 142 (1994)

In fact, most jurisdictions permit a *law firm* to be “of counsel” to another law firm, even though a few states take a more restrictive view of this practice. Regardless of whether Nebraska follows the ABA’s view or the traditional view, it is clear that as long as the “of counsel” designation fairly characterizes the attorney’s affiliation with his former firm, he may be identified as “of counsel” on the firm’s letterhead and in advertisements. This is true despite the fact he is simultaneously practicing law as a sole proprietor.

In order for an attorney to be listed as “of counsel” on firm letterhead and in advertisements, the relationship between the attorney and the firm must meet certain criteria. The “of counsel” relationship has been defined as “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 ‘single associate,’ which is to say a junior non-partner lawyer, regularly employed by the firm.” ABA Formal Ethics Op. 90-357 (1990). The “of counsel” relationship also has been described by the Nebraska State Bar Association Ethics Committee as being a close, ongoing, and regular relationship involving frequent contact for the purpose of providing consultation and advice. Nebraska Ethics Op. 92-3 (1992). Consultation for collaboration on an occasional basis is generally not sufficient, although daily contact is not required. ABA Formal Ethics Op. 90-357 (1990); Illinois Ethics Op. 92-07 (1993). Occasional consultation appears to be the norm, however, for retired lawyers who become “of counsel” to their former firm. Michigan Informal Ethics Op. RI-102 (1991).

While “of counsel” is the most common phrase to describe the association between a lawyer (or a law firm) and a firm in which the affiliated lawyer is not a partner, shareholder or associate, the designation is appropriate as long as the requirements for a valid “of counsel” relationship are met. This goes to the heart of Rule 7.5 (d). In other words, an attorney may ethically hold himself out as “of counsel” only when that is the fact. An attorney who conducts “no legal business” during retirement and who is listed as “regular inactive” by the Nebraska State Bar Association, is not acting in an “of counsel” capacity. The attorney’s listing as “of counsel” on his former firm’s letterhead appears to the Committee to be false and misleading in violation of Rule § 3-507.1.

II. A FIRM NAME MAY RETAIN THE NAME OF A RETIRED PARTNER, BUT NOT IF THE RETIRED PARTNER RESUMES THE PRACTICE OF LAW ELSEWHERE, EVEN IF HE MAINTAINS AN “OF COUNSEL” RELATIONSHIP TO THE FORMER FIRM.

The Nebraska Rules of Professional Conduct, like those in most jurisdictions, allow a law firm name to retain the names of retired or deceased partners of the firm. Rule § 3-507.5(a)(1). If a named partner of a firm retires from practice but assumes “of counsel” status to the firm, the ABA Ethics Committee and several state committees have taken the position that the attorney’s name may remain in the firm name in that circumstance as well. See ABA Formal Ethics Op. 90-357 (1990); Florida Ethics Op. 00-1 (2000); Rhode Island Ethics Op. 94-65 (1994); Iowa Ethics Op. 91-5 (1991); Michigan Informal Ethics Op. RI-90 (1991).

If a named partner of a firm merely withdraws from the firm to practice elsewhere, there is general agreement that continued use of that attorney’s name in the firm name is misleading and therefore impermissible under Model Rule 7.1 (Nebraska Rule § 3-507.1). See North Carolina Formal Ethics Op. 2006-20 (2007); Washington Informal Ethics Op. 2164 (2007); District of Columbia Ethics Op. 277 (1997); Iowa Ethics Op. 95-23 (1996); Michigan Informal Ethics Op. RI-102 (1991). However, if the named partner who withdraws to practice elsewhere maintains an affiliation with the former firm in an “of counsel” capacity, there is a split of opinion on whether the firm name can retain the attorney’s name.

Some ethics committees have concluded that a firm name cannot retain the name of a former partner who withdraws to practice elsewhere even if the attorney remains affiliated with the former firm as “of counsel.” See Rhode Island Ethics Op. 94-65 (1994); Florida Ethics Ops. 71-49 (1971) and 00-1 (2000). Both the Rhode Island and Florida committees concluded that a named partner who withdraws from a law firm to practice elsewhere but remains “of counsel” to the firm may not continue to include his name in the firm name because such inclusion connotes a partnership and is misleading to the public.

Other committees have allowed a firm name to retain the name of a partner who withdrew to actively practice elsewhere but became “of counsel” to the former firm. See South Carolina Ethics Op. 98-31 (1998); New York City Ethics Op. 1995-9 (1995); Vermont Ethics Op. 83-07. In each instance, the committee was convinced there was little risk the public would be misled by continued use of the lawyer’s name in the firm name. The Vermont committee allowed a firm to retain the name of a partner who was withdrawing to practice in another state but maintaining an “of counsel” relationship to the firm. Vermont Ethics Opinion 83-07. The committee concluded that although the question was close, the situation was akin to that of a lawyer who was retiring from the firm, because his new practice would be located in another state. Thus, there was “no real fear of deceiving the public.” Id.

The South Carolina committee addressed whether a law firm could retain the name of a partner who was leaving the partnership and forming his own professional association through which he would practice part-time. South Carolina Ethics Opinion 98-31 (1998). He would continue to share office space, equipment, telephone, and administrative staff with the firm, and he would maintain an “of counsel” relationship to the firm. The South Carolina committee concluded that the firm could retain the attorney’s name as part of its firm name if the attorney’s

status and that of his P.A. was clearly shown on the firm's letterhead. The committee concluded that listing the attorney's P.A. as "of counsel" to the firm on the firm's letterhead would be "sufficient to dispel any notion" that the attorney was a partner of the firm and would make clear his relationship to the firm. Id.

The ABA Ethics Committee has not addressed the specific question of whether a firm name can retain the name of a partner who withdraws to practice elsewhere but maintains an "of counsel" affiliation to the firm. In Formal Opinion 90-357, the committee recognized only two circumstances in which use of an of-counsel attorney's name in a firm name may arise. The first is when a named partner retires from active practice and assumes "of counsel" status to the firm. The second circumstance the committee foresaw is when the of-counsel attorney's affiliation to a firm is "altogether new," and although the attorney lends his or her name to the firm name, the attorney is not undertaking the responsibilities of a partner or principal. The committee observed that the issue in both circumstances is whether there are implicit representations to the public that are misleading. In the case of an of-counsel attorney's new or recent affiliation with the firm, use of the attorney's name in the firm name implies that the lawyer is a partner in the firm "with fully shared responsibility for its work," and is therefore misleading to the public. On the other hand, the committee believed there is no similar misleading implication when a firm name retains the name of a retired partner who becomes "of counsel" to the firm, where the firm name is long-established and well-recognized. ABA Formal Ethics Op. 90-357 (1990).

In the instant inquiry, this Committee concluded above that the inquiring attorney's relationship to the firm after the attorney retired does not meet the requirements of an "of counsel" relationship. Regardless, the attorney has retired from active practice and it is therefore permissible for the firm to retain the attorney's name in the firm name under Rule 3-501. However, if the retired attorney resumes the practice of law as a solo practitioner outside and apart from the firm, the Committee views the attorney's status as akin to that of a partner who has withdrawn from a firm to practice elsewhere. In such a circumstance, continued use of the attorney's name in the name of the former firm is misleading under Rule § 3-507.1, and therefore impermissible.

The Committee believes this is true even if the attorney were to affiliate with the former firm in a true "of counsel" relationship after resuming practice as a solo practitioner. As the Committee concluded above, an attorney can have an "of counsel" relationship to a firm and be listed on the firm's letterhead as "of counsel" even if the attorney is practicing separately as a solo practitioner. However, the Committee agrees with the view that use of an "of counsel" attorney's name in a firm name must be limited to the circumstance in which a named partner or principal has retired from active practice and assumed "of counsel" status to the firm that bears the attorney's name.

When an attorney is actively practicing law and the attorney's name appears in a firm name, the Committee believes there is an implicit representation to the public that the lawyer is a partner or principal in that firm with fully shared responsibility for the firm's work. If an attorney in active practice has only an "of counsel" relationship to a firm, use of the lawyer's name in the firm name is misleading to the public. The Committee agrees with the ABA Ethics Committee that there is no such misleading implication when a firm name retains the name of a

partner or principal who has retired from active practice and assumed “of counsel” status to the firm.

CONCLUSION

An attorney may be listed as “of counsel” on a law firm’s letterhead and in advertising, as long as the attorney has on-going regular contact with the members of the firm for purposes of providing consultation and advice. In Nebraska, there is no numerical limit on the number of “of counsel” designations for attorneys as long as each relationship with a law firm exists pursuant to active involvement such that it meets the required definition. An “of counsel” designation may only be utilized when the attorney’s responsibilities in that role are factually correct.

A firm name may retain the name of a retired partner or principal of the firm. If the retired partner assumes “of counsel” status to the firm, the firm name may continue to retain the attorney’s name. If the retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney’s name in the former firm’s name is misleading to the public and therefore prohibited. This is true even if the attorney becomes “of counsel” to the former firm after resuming practice. Use of an “of counsel” attorney’s name in a firm name must be limited to the circumstance in which a named partner or principal has retired from active practice and assumed “of counsel” status to the firm that bears the attorney’s name.