

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/2
Letterhead Listing - Use of "Of Counsel" Designation by Inactive Bar Member
December 8, 1988

RULE REFERENCES:

*Rule 7.1
*Rule 7.5

SUBJECTS:

*Advertising and Solicitation
*Letterhead
*Of Counsel

ANNOTATIONS:

It would be misleading for an "inactive member" of NHBA to be included on a law firm's letterhead with the designation "of counsel", and therefore such a designation is barred under Rules 7.1 and 7.5. (Rules 7.1; 7.5)

QUESTION:

Is an "inactive member" of the N.H. Bar prohibited under the Rules of Professional Conduct or the Constitution or By-Laws of the New Hampshire Bar Association from being designated on letterhead as "of counsel?"

RESPONSE:

The New Hampshire Bar Association's Constitution and By-Laws provide that the membership of the Bar shall consist of two classes: "active members" and "inactive members". N.H.B.A. Const. Art. IV, Sec. 1 and By-Laws, Art. II, Secs. 2 and 5. The threshold question is whether an attorney who is serving as "of counsel" is eligible for "inactive member" status in the Bar.

The term "of counsel" appears to have several meanings. *Black's Law Dictionary*, 975 (5th ed. 1979), describes "of counsel" as an attorney retained "to assist in the preparation or management of an action, . . . but who is not the principal attorney of record." Perhaps a more common usage is defined as follows: "This term is now commonly used in the U.S. of lawyers (USU. in semiretirement) who are affiliated with private law firms as senior consultants." B. Garner, *A Dictionary of Modern Legal Usage*, 387 (1987).

Whether retained as an assistant to lead counsel, or as a senior adviser for consultative purposes, an attorney acting in an "of counsel" capacity would be engaged in, or at least be expected to be available for, the provision of legal advice. Yet the Bar Association Constitution provides that "[n]o person shall be eligible for enrollment as an inactive member who is engaged in the practice of law in this State . . . , or who occupies a position the duties of which require the giving of legal advice or service in this State." N.H.B.A. Const. Art. II, Sec. 3. On the basis of the foregoing, we conclude that the provision of legal advice would render an attorney serving in an "of counsel" capacity ineligible for "inactive member" status in the New Hampshire Bar Association.

Under these circumstances, it would be misleading for an "inactive member" of the Bar to be included on a law firm's letterhead with the designation "of counsel." Therefore, we conclude that such a designation would be barred under Rules 7.1 and 7.5 of the Rules of Professional Conduct.