

N. H. ETHICS OPINIONS ANNOTATED

FO 1988-89/20

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1988-89/20  
"Of Counsel" Relationship with Out-of-State Attorney  
April 6, 1989

RULE REFERENCES:

- \*Rule 1.5
- \*Rule 1.7
- \*Rule 1.10
- \*Rule 5.3
- \*Rule 5.4
- \*Rule 5.5(b)
- \*Rule 7.1
- \*Rule 7.2(c)
- \*Rule 7.5
- \*Rule 7.5(b)
- \*Rule 7.5(d)
- \*Rule 8.5

STATUTORY REFERENCES:

- \*RSA 311:7

SUBJECTS:

- \*Advertising and Solicitation
- \*Conflict of Interest
- \*Division of Fees
- \*False Advertisements
- \*Law Firms
- \*Letterhead
- \*Of Counsel
- \*Referrals
- \*Sharing Office Space
- \*Unauthorized Practice of Law

ANNOTATIONS:

There is no absolute bar to an arrangement involving a lawyer working as an employee of one firm while being listed as "of counsel" in another firm. The fact that the firms have offices in different jurisdictions would not preclude the arrangement.

N. H. ETHICS OPINIONS ANNOTATED

A relationship must meet several criteria in order to warrant the use of the term "of counsel":

- a. It must not be merely that of forwarder-receiver of legal business;
- b. It must be continuing or semi-permanent;
- c. It must not be that of a partner, of a fellow member of a professional legal corporation nor that of an employee;
- d. It must be close, regular, and personal;
- f. The "of-counsel" lawyer must be actively engaged in the practice of law.

In using the term "of counsel" a certain relationship between attorneys must exist, an attorney must comply with Rules 7.1 and 7.5, and must refrain from using one's letterhead in a manner which misleads the public. (Rule 7.1; Rule 7.5).

Similar requirements of complying with Rules 7.1 and 7.5 exist for the use of other terms such as "affiliated" or "associated". (Rule 7.1; Rule 7.5).

An attorney practicing in two jurisdictions may be subject to the disciplinary rules of both states. (Rule 8.5).

All attorneys involved in an "of counsel" relationship must be particularly sensitive to potential and existing conflict of interest problems. (Rule 1.7; Rule 1.10).

Attorneys involved in an "of counsel" relationship must be sensitive about fee-splitting arrangements generally, and in particular with a person not admitted to practice in this jurisdiction. (Rule 1.5; Rule 5.4; Rule 7.2(c)).

A New Hampshire attorney may be "of counsel" to an out-of-state attorney. However, an out-of-state attorney not admitted to practice in New Hampshire cannot be "of counsel" in this jurisdiction to a New Hampshire attorney. (Rule 7.1; Rule 7.5(d)).

A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Such activity would include the posting of a sign in this jurisdiction for any attorney who is not admitted in this jurisdiction. (Rule 5.5(b)).

It would be false and misleading communication to post a sign in this jurisdiction for an attorney who is not admitted to practice in this jurisdiction. (Rule 5.3; Rule 7.1).

A lawyer is responsible to a certain extent for the activities of nonlawyer associated with a lawyer. (Rule 5.3).

A lawyer should not allow use of a telephone by an attorney who is not admitted to practice, in a way that constitutes the unauthorized practice of law or that is false and misleading. (Rule 5.5(b); Rule 5.3; Rule 7.1).

## N. H. ETHICS OPINIONS ANNOTATED

FACTS:

A Massachusetts attorney would like to affiliate with the inquiring attorney. The inquiring attorney would handle New Hampshire real estate closings generated by the Massachusetts attorney, and possibly other matters as well. While the inquiring attorney is admitted in both New Hampshire and Massachusetts, the Massachusetts attorney is not. The inquiring attorney would be listed as "of counsel" on the Massachusetts attorney's letterhead.

The Massachusetts attorney wants to put a sign outside and/or inside the inquiring attorney's building which says "Law Offices of [Massachusetts Attorney], Esquire". The Massachusetts attorney also wants to have a telephone line installed in the inquiring attorney's office. The telephone could be call-forwarded to Massachusetts, or answered by the inquiring attorney's staff with the Massachusetts attorney's name.

QUESTION:

Does the Committee see any ethical violation in such an arrangement?

RESPONSE:

The arrangement raises several issues that the Committee will deal with below. We can decide some of the issues on the basis of the information now available. Some of the issues will depend on the specific arrangements ultimately agreed upon. We have raised some of the latter issues for the inquiring attorney to consider in forming the actual working relationship.

## I. AFFILIATION WITH MASSACHUSETTS ATTORNEY.

## A. Simultaneous employment.

This Committee has previously considered whether a lawyer may work as an employee of one firm while being listed as "of counsel" in another. In NH Op. 1985-6/5, the Committee found no absolute bar to an arrangement involving a lawyer who sought to remain "of counsel" to his or her previous firm after taking a job as a salaried employee with a new firm. See also NH Op. 1986-7/10.

The fact that the lawyers in this case have offices in different jurisdictions would not preclude the arrangement. Opinion 84-66 (Ala. 1984); Opinion 1986-88 (Cal. 1986); Opinion CI-749 (Mich. 1982).

## N. H. ETHICS OPINIONS ANNOTATED

## B. Use of term "of counsel".

The term "of counsel" appears to have several meanings. Black's Law Dictionary 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." *Id.* at 975 (5th ed. 1979). The term is perhaps more commonly used in the United States to describe lawyers, usually in semi-retirement, "who are affiliated with private law firms as senior consultants". A Dictionary of Modern Legal Usage 387 (1987). See, generally, NH Op. 1988-89/2.

In using the term "of counsel", the inquiring attorney must ensure that he or she complies with Rules 7.1 and 7.5. These rules prohibit using one's letterhead in a manner which misleads the public. If the term "of counsel" "lacks a commonly understood meaning for lawyers, and has little or no meaning to the public," [Opinion E-86-10 (Wisc. 1986)], however, a lawyer using the term may encounter practical difficulties.

An American Bar Association Formal Opinion thoroughly examined the relationship represented by the term in 1972. Opinion 330 (A.B.A. 1972). Since then, several state bar committees have reviewed the term and reached similar conclusions. After reviewing these decisions, this Committee concludes that the relationship must meet several criteria in order to warrant the use of the term "of counsel".

a. The relationship must not be merely that of forwarder-receiver of legal business. Opinion 86-28 (Ala. 1986); Opinion 522 (N.J. 1983); Opinion 87-11 (Iowa 1987).

b. Rather, the relationship must be "continuing or semi-permanent". Opinion 88-23 (Ohio 1986); Opinion 87-13 (Md. 1986).

c. The relationship "must not be that of a partner (or fellow member of a professional legal corporation) nor that of an employee." Opinion 330 (A.B.A. 1972); Opinion CI-1018 (Mich. 1984).

d. Nevertheless, the relationship must be "close, regular, and personal." Opinion 80-66 (N.Y.C. undated); Opinion 1986-88 (Cal. 1986).

e. The "of-counsel" lawyer must be "available to the listing firm or lawyer for consultation and advice." Opinion 1986-88 (Cal. 1986).

f. The "of counsel" lawyer must be actively engaged in the practice of law. NH Op. 1988-89/2. Jurisdictional limitations for out-of-state attorneys must be disclosed. Rule 7.5(b).

Similar requirements exist for the use of other terms such as "affiliated" or "associated".<sup>1</sup>

## N. H. ETHICS OPINIONS ANNOTATED

If the relationship between the inquiring attorney and the Massachusetts attorney meets all these tests, then the listing of the inquiring attorney as "of counsel" on the Massachusetts attorney's letterhead would not violate the New Hampshire Rules.

Since the inquiring attorney is admitted to practice in Massachusetts, however, conduct of the inquiring attorney may also be subject to the Massachusetts Canons of Ethics and Disciplinary Rules. Cf. Rule 8.5. This Committee can give no opinion based on the Massachusetts Rules.

C. Other considerations.

This Committee's prior Advisory Opinion involving the "of counsel" relationship warned all involved to "be particularly sensitive to potential and existing conflict of interest problems." NH Op 1985-6/5. See Rules 1.7 and 1.10. See also NH Op 1984-5/3 (relative to conflicts of interest under the former Code of Professional Responsibility).

The Committee would also caution the inquiring attorney to be careful about fee-splitting arrangements generally, and in particular with a person who is not admitted to practice law in this jurisdiction. See Rules 1.5, 5.4 and 7.2(c). See also Peterson v. Anderson, 745 P.2d 166 (Ariz. App. 1987) (fee splitting arrangement with lawyer who was neither licensed to practice in state nor admitted pro hac vice violated ethical rule against sharing of legal fee with "nonlawyer").

While the inquiring attorney may be "of counsel" to the Massachusetts attorney, the Massachusetts attorney is not necessarily "of counsel" to the inquiring attorney. Indeed, the Massachusetts attorney could not be "of counsel" since that attorney is not admitted to practice in New Hampshire. See NH Op 1988-89/2; Opinion 84-5 (Alaska 1984). Accordingly, the inquiring attorney must be careful about representations concerning the nature of the relationship. See Rules 7.1 and 7.5(d).

## II. MASSACHUSETTS ATTORNEY'S ACTIVITIES IN NEW HAMPSHIRE.

Under its procedural rules, the Committee ordinarily will limit its response to the proposed conduct of an inquiring attorney, and can give no response to any issues that may be raised about the conduct of a third party. The proposed conduct of the attorneys involved, however, is so intertwined that it raises issues under several Rules.

A. Sign.

Signs in and around office buildings are primarily used to direct a visitor or client to the office of an ongoing business. The proposed sign clearly suggests that the Massachusetts attorney has a law office in New Hampshire, and is licensed to practice law here. Since the Massachusetts attorney has not been admitted to practice in New

## N. H. ETHICS OPINIONS ANNOTATED

Hampshire, however, and thus cannot maintain a law office here, without engaging in the unauthorized practice of law. See RSA 311:7.

Under Rule 5.5(b), a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Accordingly, it would be improper for the inquiring attorney to participate in such a venture.

If the Massachusetts attorney is not engaged in the practice of law in New Hampshire, the sign would be misleading. Under Rule 7.1, the inquiring attorney cannot make any "false or misleading communication about the lawyer or the lawyer's services." If the sign were associated with the inquiring attorney's office, it would mislead the Public about the nature of the services offered by the inquiring attorney, or offered through the inquiring attorney's office.

Even if the sign were not associated with the office of the inquiring attorney, however, it would still mislead the public about the activities of the Massachusetts attorney. Under such circumstances, the Committee believes that Rule 5.3 would prohibit the inquiring attorney from allowing the sign to be displayed.

Rule 5.3 makes a lawyer responsible to a certain extent for the activities of "a nonlawyer ... associated with a lawyer." This section usually applies to assistants such as "secretaries, investigators, law student interns, and paraprofessionals ..., whether employees or independent contractors." ABA Model Code Comments. Given the "close, regular, and personal" nature of the relationship between the inquiring attorney and the Massachusetts attorney, the Committee believes Rule 5.3 is broad enough to cover the situation presented here.

B. Telephone.

The proposed use of the telephone presents issues similar to those raised by the sign. The Committee can find no absolute prohibition against a lawyer purchasing telephone service in a state where he or she is not licensed to practice. See Opinion U2 of 1986 (Ind.) (Kentucky lawyer, not licensed in Indiana, may advertise in Indiana Yellow Pages, with appropriate disclosures). Nevertheless, the particular use of the telephone in this situation raises some serious questions.

The Committee takes no position on whether the activities of the Massachusetts lawyer constitute the practice of law in New Hampshire. That would depend on the specific circumstances. If activities do constitute the unauthorized practice of law, however, the inquiring lawyer would violate Rule 5.5(b), as discussed above.

Alternatively, the use of the telephones would seem to actively foster, at a minimum, the same impressions created by the sign. Accordingly, the telephone setup would likely

N. H. ETHICS OPINIONS ANNOTATED

mislead the public either about the nature of the activities carried on in the inquiring attorney's office or about the activities carried on by the Massachusetts attorney. For the reasons discussed above, the inquiring attorney should not allow this to happen.

SUMMARY:

Given the whole situation, as outlined above, the Committee believes that the Massachusetts attorney desires to establish a "presence" in New Hampshire. The Massachusetts attorney is not licensed to practice in New Hampshire, however. Accordingly, the inquiring attorney should carefully avoid participating in any activity that furthers that apparent purpose.

STATE COURT OPINIONS

[From ABA/BNA Lawyers' Manual on Professional Conduct.]

Alabama State Bar Disciplinary Commission, Opinion 86-28, 2 Current Reports 154 (1986).

Alabama State Bar Disciplinary Commission, Opinion 84-66, Ethics Opinions 1980-1985 801:1077 (1984).

Alaska Bar Association, Opinion 84-5, Ethics Opinions 1980-1985 801:1203 (1984).

California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1986-88, 2 Current Reports 438 (1986).

Indiana State Bar Association Legal Ethics Committee, Opinion U2 of 1986, Manual 901:3301 (undated).

Iowa State Bar Association Committee on Professional Ethics, Opinion 87-11, Manual 901:3606 (1987).

Maryland State Bar Association Committee on Ethics, Opinion 87-13, 2 Current Reports 418 (1986).

Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-749, Ethics Opinions 1980-1985 801:4839 (1982).

Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-1018, Ethics Opinions 1980-1985 801:4882 (1984).

N. H. ETHICS OPINIONS ANNOTATED

New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 522, Ethics Opinions 1980-1985 801:5811 (1983).

New York City Bar Association Committee on Professional Ethics, Opinion 80-66, Ethics Opinions 1980-1985 801:6316 (undated).

Ohio Supreme Court Board of Commissioners on Grievance and Discipline, Opinion 88-23, Manual 901:6858 (1988).

Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-86-10, 2 Current Reports 318 (1986).

<sup>1</sup> "An 'affiliated' or 'associated' law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship." Formal Opinion 84-351 (A.B.A. 1984). See generally NH Op 1988-89/5.