

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Advisory Opinion #1985-86/5  
Dissolution of a Professional Association  
July 11, 1986

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RULE REFERENCES:

- \*Rule 7.1
- \*Rule 7.5(a)

CODE REFERENCES

- \*DR2-102(A)(4)
- \*DR2-102(C)

SUBJECTS:

- \*Advertising and Solicitation
- \*Division of Fees
- \*Dual Practice
- \*Employees of Lawyers
- \*Fees
- \*Law Firms
- \*Of Counsel

ANNOTATION:

Dual employment by an attorney as a salaried associate with one firm and "of counsel" with another law firm is permissible.

A professional association may not (because of misleading implications) continue to use the name of a former director in the law firm's name, when that former director is now only "of counsel", and is simultaneously employed as a salaried associate in another law firm. (Rule 7.5(a)).

An "of counsel" lawyer may be compensated on a basis of division of fees in particular cases or on a basis of consultation fees, but not by profit sharing.

In any advertising, it should be made clear to prospective clients the limited nature of employment (i.e. "of counsel"). (Rule 7.1).

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QUESTIONS:

(1) Whether a lawyer, acting in compliance with the recently adopted New Hampshire Rules of Professional Conduct, may simultaneously be employed as a salaried associate with one firm and as "Of Counsel" to his or her previous professional corporation?

(2) Whether a professional corporation may continue to use, in its corporate designation, the name of a former director who now has an "Of Counsel" relationship with the corporation and is simultaneously employed as a salaried associate by another law firm in a different community in New Hampshire?

(3) Whether a lawyer acting as "Of Counsel" to a professional corporation may be compensated on a profit sharing basis directly proportionate to the corporation's gross receipts as generated by that lawyer's efforts?

(4) What notice does the professional corporation give to the general public and its clients?

RESPONSE:

(1) While the recently adopted New Hampshire Rules of Professional Conduct do not address this question directly, opinions of the New Hampshire Bar Association Ethics Committee, the ABA Committee on Ethics and Professional Responsibility, at least one Federal Circuit Court of Appeals, and the Illinois Bar Association Ethics Committee suggest that the type of dual employment described in Question (1) is permissible under comparable rules of professional conduct. See NHBA Ethics Committee Advisory Opinion 1984-6/3; ABA Committee of Ethics & Professional Responsibility, Formal Opinion 330 (1972) and Informal Opinion 1315 (1975); *Cinema 5 Ltd. v. Cinerama, Inc.*, (1976) 528 F. 2d 1384; 68 J.U.B.J. 485 (1980) Opinion 657, January 16, 1980. Both the professional corporation and the dual employee should be particularly sensitive to potential and existing conflict of interest problems.

(2) An analysis of the New Hampshire Rules of Professional Conduct suggests that the continued use, by a professional corporation, of the name of a former director in the corporation's corporate designation, where the former director now maintains an "Of Counsel" relationship with the corporation and is simultaneously employed as a salaried associate by another law firm in a different community in New Hampshire, gives risk to a misleading implication and is, therefore, in violation of Rule 7.5(a). This conclusion is supported by the legal background material to the proposed Model Rules of the American Bar Association, particularly ABA Code 2-102(c) and ABA Code 2-102(A)(4). Full and complete disclosure of Lawyer B's new status in the professional corporation and his other association with the new firm should be made to the professional corporation's clients who are directly represented by Lawyer B.

(3) The recently adopted New Hampshire Rules of Professional Conduct do not directly address this question. Nevertheless, a formal opinion of the American Bar Association Committee on Ethics and Professional Responsibility, which is directly on point, states that "the lawyer who is 'Of Counsel' may be compensated either on a basis of division of fees in particular cases or on a basis of consultation fees." ABA Committee on Ethics and Professional Responsibility, Formal Op. 330 (1972). Therefore, profit sharing with a lawyer who is acting "Of Counsel" may be improper under the Rules of Professional Conduct.

The compensation scheme contemplated in question (3), however, may not be profit sharing. In practice, that compensation scheme may merely be a form of compensation "on a basis of division of fees in particular cases." To the extent that it is a form of profit sharing, it may violate the Rules of Professional Conduct.

(4) No action is required for existing yellow page advertising. All future advertising of any kind and the professional corporation's legal stationery should indicate Lawyer B's status as that of "Of Counsel" so that the public is not misled and such advertising is in compliance with Rule 7.1. In addition, the employees of the professional corporation should make it clear to new or prospective clients that the former lawyer director's employment is of a limited nature.