

You have presented a hypothetical situation in which an elderly lawyer, retired from his law firm, would like to continue to maintain an office in the firm and assume the status of Counsel to the firm. However, neither he nor his firm intends that he will actively engage in the practice of law (though he will be available for consultation with other lawyers at the firm regarding former clients and other matters).

You have asked the committee to opine whether, under the facts of the inquiry, it is proper for a retired lawyer, no longer actively practicing law, but still with an office at the firm and maintaining contacts with and offering counsel to the firm, to be referred to as "Counsel" or "Of Counsel" to his former firm.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-101(A) and DR:2-102(A), which provide in pertinent part that a lawyer or law firm shall not use or participate in the use of any form of public communication, professional card, letterhead, telephone directory listing, or similar professional notice or device if such communication or professional notice contains a false, fraudulent, misleading, or deceptive statement or claim. Further guidance is available through Ethical Considerations 2-13 [EC:2-13] and 2-15 [EC:2-15] which describe circumstances in which a firm name or identification may be construed to be misleading.

The committee has previously opined that the term "of counsel" denotes an expectation that the lawyer is engaged in the practice of law, either directly in the offices of the law firm to which he is "of counsel" or in separate offices but who, by virtue of past partnership or affiliation, continues to maintain direct contact with the firm and its clients. Relevant prior opinions indicate that the relationship turns on the actual practice of law and is not satisfied by a mere business or financial relationship with the firm, a sporadic affiliation over time, or the status of a forwarder or receiver of legal business. Those Opinions were, in large part, predicated upon the committee's adoption of conclusions reached in ABA Formal Opinion 330 (August 1972). See LE Op. 1293, LE Op. 1341, LE Op. 1342.

The committee is cognizant of the issuance of ABA Formal Opinion 90-357 (May 10, 1990), superceding ABA Formal Opinion 330, which significantly broadened the acceptable use of the term "of counsel" to include several lawyer-law firm relationships beyond the actual practice of law.

In the facts you present, the committee is of the opinion that the arrangement you describe, that of a retired lawyer who offers counsel to the firm and its lawyers on matters including those related to former clients, would appropriately be referred to as an "of counsel" relationship. The committee thus adopts the view of (only) that portion of ABA Formal Opinion 90-357 related to an ongoing association between a retired lawyer and his (former) firm: the denomination "of counsel" may properly be applied to designate a retired lawyer of the firm who, although not actively practicing law, nonetheless remains associated with the firm and available for occasional consultation. /1 The committee cautions that the use of such designation would be improper, however, if the association was limited to a pure business affiliation such that the retired lawyer's responsibilities would be limited to either the development of business or the management of the firm's business activities.

1The interpretation of Part Six: Section IV: ¶ 3 of the Rules of the Supreme Court of Virginia regarding distinctions among the various classes of Virginia State Bar membership active, associate, judicial, disabled/retired, is outside the parameters of the Code of Professional Responsibility and, this, beyond the purview of this Committee.

To the extent that this Opinion is in conflict with prior LE Op. 1282, LE Op. 1293, LE Op. 1341, and LE Op. 1342, relevant portions of those Opinions are hereby overruled.

Committee Opinion
October 22, 1993

¹The interpretation of Part Six: Section IV: ¶ 3 of the Rules of the Supreme Court of Virginia regarding distinctions among the various classes of Virginia State Bar membership active, associate, judicial, disabled/retired, is outside the parameters of the Code of Professional Responsibility and, this, beyond the purview of this Committee.