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October 19, 1989

LEGAL ETHICS OPINION 1293 "OF COUNSEL" DESIGNATION: DUAL PRACTICE.

You have asked the Committee to explain the legal and practical significance of listing a lawyer as "of counsel" on a firm's letterhead stationery. In addition, you wish to know whether it is ethically permissible for a lawyer to be: (1) listed concurrently as an associate in two law firms if his work will not be evenly distributed between both firms; (2) a partner in two different law firms at the same time; and (3) a shareholder in a Professional Corporation ("P.C.") which includes his name in the name of the P.C. and lists him as one of the lawyers on the letterhead when his actual office is at the location of another firm. The Committee will address each question in the order in which it was presented in the inquiry.

It is beyond the purview of this Committee to opine on issues concerning a question of law. The Committee will explain, therefore, the criteria under which a law firm may ethically list a lawyer as "of counsel" on its letterhead.

The Committee directs your attention to ABA Formal Opinion No. 330 (August, 1972) in which the term "of counsel" is defined as a relationship between an individual lawyer and a law firm or lawyer that is close, continuing and personal, and such relationship is one that is not that of a partner, associate, or outside consultant. A law firm may not be "of counsel" to another lawyer or law firm; however, a lawyer may conceivably be "of counsel" to two law firms simultaneously, but may not exceed a maximum of two "of counsel" relationships.

This Committee adopts the views expressed by the Committee on Ethics and Professional Responsibility in ABA Formal Opinion No. 330 which provides in part that the term "of counsel" contemplates that the lawyer either practices in the office of the lawyer or law firm to which he is "of counsel" or enjoys a relationship that has led to a continuing close association such that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm. Thus, the designation is not intended to apply to a relationship which is merely that of a forwarder or receiver of legal business. The individual lawyer who properly may be designated as "of counsel" to a lawyer or firm is a member or an integral part of that law office or corporation whose status is not that of a partner or associate/employee.

With regard to public communications made on behalf of the lawyer who is "of counsel," a lawyer should be scrupulous in the representation of his professional status not to hold himself out as being a partner or associate of a law firm if, in fact, he is not one. (See DR:2-101(A), DR:2-102(A), (C), EC:2-15 and LE Op. 395, LE Op. 442, and L E Op. No. 945.)

With regard to the remaining three questions in the inquiry, the Committee directs your attention to LE Op. 802, which in the Committee's view is dispositive of the issues you have raised. There is no provision in the Code of Professional Responsibility precluding a

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Virginia-licensed attorney from simultaneously being a member of two or more firms or professional corporations consisting of the practice of law. (See LE Op. 802) However, the lawyer must actually practice law in both firms; the lawyer must avoid all possibility of misleading anyone to the extent of activities engaged in at both firms; and the lawyer must avoid any activity or relationship which would impair the independent professional judgment to which each client is entitled. The Committee believes that the lawyer and the law firms of which he is a member must adhere to the requirements of DR:2-101(A) and DR:2-102(A) regarding public communications including, but not limited to, the law firm's stationery and DR:2-102(C) which provides that a lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners. In addition, the lawyer and the respective firms with which he practices must adhere to the requirements in Canon 4 for safeguarding the clients' confidences and secrets as well as guard against the potential for conflicts of interests that are more apt to develop. (See DR:5-101 and DR:5-105)

Thus, it is the view of this Committee that an individual lawyer licensed to practice law in Virginia may ethically be an associate member, partner or shareholder of two or more law firms or professional legal corporations on a part-time basis. In addition, it is ethically permissible for that lawyer's name to be listed as such on the firms' letterheads, assuming that it is an accurate indication of the lawyer's professional status with the firms in accordance with DR:2-101(A) and DR:2-102(A) and (C). The Committee believes further that a lawyer/shareholder of a law firm whose name appears in the name of the P.C. and on the letterhead as one of the shareholder/members of the firm, but whose office is located at another address, must clearly make that distinction on the firm's stationery so as not to mislead the public (DR:2-102(A)).

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Editor's Notes. – The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 90-357 on May 10, 1990, which, in pertinent part, withdraws that Committee's earlier Formal Opinion No. 330 which is referenced in Legal Ethics Opinion No. 1293. On January 14, 1991, the Virginia State Bar Standing Committee on Legal Ethics considered the ABA opinion and concluded that it did not alter the conclusions reached in L E Op. No. 1293.

L E Op. No.1293's conclusion which determined that it was improper for one law firm to serve as "of counsel" to another law firm is overruled by L E Op. No. 1467.

Overruled in part by L E Op. No. 1554. See footnote 1 of the opinion for scope.