

LEGAL ETHICS OPINION 1342

LETTERHEAD – OF COUNSEL:
LAWYER AFFILIATING FATHER AND
GRANDFATHER, OUT-OF-STATE
ATTORNEY, AND LISTING EACH ON
LETTERHEAD AS “OF COUNSEL” AND
“RETIRED COUNSEL” RESPECTIVELY.

You have advised that Lawyer X, a member of the Virginia State Bar, endeavors to open an office for the practice of law in Virginia. Lawyer X wishes to affiliate his father, a member of another state's bar with an office outside of Virginia, as “of counsel” to the firm. Furthermore, you indicate that X and his father regularly co-author and publish legal writings and will likely work together on future cases around the country. In addition, you indicate that X wishes to affiliate his grandfather, who was never a member of the Virginia State Bar and who is retired from the active practice of law, as “retired counsel”. You indicate that X's grandfather has been an advisor to X and still acts as an aid to the new firm in terms of business advice and financial assistance.

You have asked the Committee to consider the propriety of listing both senior and out-of-state lawyers' names on X's letterhead, notices and announcements, if those items indicate their bar memberships, limitations and status.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-101(A) and DR:2-102(A) which provide that a lawyer or law firm shall not use or participate in the use of any form of public communication, professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal 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 earlier opined that the establishment of multi-jurisdictional firms is not improper provided that appropriate denominations of jurisdictional limitations are included in all communications of the firm. (See DR:2-102(D); LE Op. 264, LE Op. 762, LE Op. 858 and LE Op. 1026) Furthermore, while the Committee has also earlier opined that it is not *per se* improper for a law firm (professional corporation) to practice law under a fictitious name, the Committee is currently of the opinion that it is *per se* improper for any lawyer or law firm to indicate any affiliation with another lawyer which is not factual and which may be perceived as misleading by members of the public. (DR:2-102(B); EC:2-15; LE Op. 937)

It is the opinion of the Committee 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

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affiliation, continues to maintain direct contact with the firm and its clients. In either situation, the relationship turns on the actual practice of law and is not satisfied by a mere business or financial relationship with the firm. (See ABA Formal Op. 330) Furthermore, the Committee is of the opinion that the relationship must be ongoing rather than sporadic in that only a single affiliation or several such affiliations over a long period of time would not rise to the anticipated level of direct contact. (See ABA Informal Decision 678) The Committee is further of the view that it is not *per se* improper for lawyers from other states to be “of counsel” to a Virginia lawyer or law firm, provided that the requisite relationship exists. (See LE Op. 1282)

Based upon the facts you have provided and the Committee's adoption of the aforementioned requirements for the establishment of an “of counsel” relationship, the Committee finds that it would not be improper for Lawyer X to affiliate his father as “of counsel” provided that the actual practice of law is conducted in an ongoing fashion.

The Committee is of the opinion, however, that the relationship you have described between Lawyer X and his grandfather does not properly lend itself to the designation you have suggested (“retired counsel”) since the grandfather clearly had no past affiliation with Lawyer X's practice of law and is not presently engaged in the practice of law. It is the Committee's opinion that the relationship you describe, that of aiding the new firm in terms of business advice and financial assistance, is not properly encompassed by any title which would imply affiliation with Lawyer X or his firm. To indicate any such relationship would be clearly misleading and deceptive. (DR:2-101(A), DR:2-102(A), EC:2-15)

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Editor’s Note. – The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 90-357 on May 10, 1990, which, in pertinent part, withdraws that Committee’s earlier Formal Opinion 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 Legal Ethics Opinion No. 1342.

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