

Inquiry:

Can two law firms use the term “affiliated” or “associated” to describe the relationship between the firms on their letterhead?

Opinion:

The communication that one firm is “affiliated” or “associated” with another is not prohibited by the Rules of Professional Conduct, as long as the relationship between the firms is such that the communication is not false or misleading. The opinion also states that if “associated” or “affiliated,” the law firms must adhere to the applicable rules regulating disclosure of confidential information and conflicts of interest as if they were a single firm. *See* ABA Formal Op. 84-351. The questions in this opinion relating to lawyer advertising will be addressed by the Standing Committee on Lawyer Advertising and Solicitation (“SCOLAS”). The questions in this opinion relating to confidentiality and conflict will be addressed by the Standing Committee on Legal Ethics (“Ethics Committee”). This is a joint committee opinion.

Advertising

The appropriate and controlling disciplinary rules are Rule 7.1 and 7.5. Rule 7.1 governs communications concerning a lawyer’s services. It prohibits the communication if it contains false, fraudulent, misleading or deceptive statements or claims. Rule 7.5 deals with firm names and designations that must be truthful and accurate and not otherwise in violation of Rule 7.1 and 7.2.

RULE 7.1 Communications Concerning A Lawyer's Services

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:

(1) contains false or misleading information; or

(2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

(b) Public communication means all communication other than “in-person” communication as defined by Rule 7.3.

RULE 7.5 Firm Names And Letterheads

(a) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 and 7.2.

(b) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

SCOLAS has observed a trend for more lawyers and firms to practice in multiple states. When lawyers or firms practice together regularly, particularly in the multi-state practice, but not as a single firm, communications describing these firms as “affiliated” or “associated” can, in appropriate circumstances, provide useful information to clients and potential clients in selecting a law firm. An absolute prohibition of such a description is not justified. SCOLAS agrees with the analysis employed by the American Bar Association in ABA Formal Op. 84-351 and finds many of the examples from that opinion instructive. The following serves as guidelines to explain where the use of these terms is permissible.

First and foremost, the use of the terms like “affiliated” or “associated” are permitted under Rule 7.1 because they accurately describe the relationship that exists. This opinion then

Committee Opinion
Standing Committee on Lawyer Advertising
and Solicitation
Standing Committee on Legal Ethics
March 16, 2005

discusses the application of the provisions on conflict of interest and confidentiality under the Rules of Professional Conduct.

The basic requirement regarding lawyer advertising under Rule 7.1(a) is that communications by a lawyer concerning legal services must not be false or misleading. Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including private communication with a client or other person, as “affiliated” or “associated” with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is “affiliated” or “associated” is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or if used only with other information necessary to adequately describe the relationship and avoid confusion. 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.

Webster’s Collegiate Dictionary (1997) defines “affiliate”, a noun, as “an affiliated person or organization; specifically: a company effectively controlled by another or associated with others under common ownership or control.” “Affiliated,” an adjective, is defined as “closely associated with another typically in a dependent or subordinate position; closely connected (as in function or office) with another.” The word “associate,” a noun, is defined as “partner, colleague, friend.”

The use of these terms currently in relation to the field of law seems quite clear. The term “associate” is frequently used to refer to an individual lawyer employee of a law firm. In another context, a lawyer or law firm is sometimes said to be “associated” with another lawyer or firm in a specific lawsuit or on a specific legal matter. In those instances, the meaning is clear. A different type of relationship is implied by the use of the term “affiliate” as a noun; therefore SCOLAS believes that a lawyer or law firm must be mindful of this distinction. The proper use of the noun “affiliate” would only be in circumstances where organizations exist under common ownership and control but maintain separate identities, which is not common in the legal field.

The type of relationship that is implied in designating another firm as “affiliated” or “associated” is analogous to the ongoing relationship that is required by the designation of “Of Counsel” as clarified in LEO 1293. The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The “affiliated” or “associated” firm must be available to the other firm and its clients for consultation and advice.

Availability may be on a limited basis if, for instance, the “affiliated” or “associated” firm performs all of the tax, labor, patent or other specialized work for the firm. Availability may also be limited to performing legal services that have a relationship to or must be performed in another state. More descriptive language may be required to explain the precise relationship between the firms and to avoid misleading clients and others. For example, a firm might be described as “available for association on all tax matters,” if that is true and tax work is the only

work that its members will perform for clients of the other firm. An out-of-state firm might be described as “associated” or “affiliated” on all matters in the particular state or pertaining to its law. Whether this further description is, itself, false or misleading depends on the actual relationship. Care must be used to describe the relationship precisely and with sufficient information that no material facts are omitted that are necessary to keep the description of the relationship from being misleading.

Conflicts of Interest and Confidentiality

When a law firm lists another as “affiliated” or “associated” with it, potential clients of the listing firm are led to believe that lawyers with the “affiliated” or “associated” firm are available to assist in the representation, at least in matters that the designation may describe. The client ordinarily also expects the lawyers of the “affiliated” or “associated” firm will not simultaneously represent persons whose interests conflict with the client’s interests, just as would be true of lawyers who occupy an “Of Counsel” relationship with the firm. See LEO 1467 affirming “Of Counsel” relationship designations between two law firms, provided the requisite close, regular, personal relationship exists between the two firms. Also, Rule 1.10(a) provides:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

Comment [1] to Rule 1.10 points out that what constitutes a firm can depend on the specific facts. Two practitioners that share office space and occasionally consult each other may not ordinarily be recognized as constituting a firm, however, if they present themselves to the public in such a way that they suggest they are a firm, then they should be regarded as a firm under the Rules. Important factors to consider are the terms of any formal agreement between the lawyers and the fact that they may have mutual access to client information.

Generally, lawyers in the same law firm may not simultaneously represent two clients whose interests are adverse even when the representation is in unrelated matters. Rule 1.7 provides that “[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless ... the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and ... each client consents after consultation” or if the lawyer’s “representation of that client may be materially limited by the lawyer’s responsibilities to another client ... unless ... the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation.” Comment [1] to Rule 1.7 states further that a lawyer’s duty of loyalty to the client generally prohibits the lawyer from accepting employment directly adverse to the client without the client’s consent.

Rule 1.9 follows the vast majority of cases in creating an irrebuttable presumption that present affiliates will share a former client’s confidences where the adverse representations are in substantially related matters. The use of the “Chinese wall” approach to screen confidential information is not accepted, as the basis of the Rules of Professional Conduct is centered

Committee Opinion
Standing Committee on Lawyer Advertising
and Solicitation
Standing Committee on Legal Ethics
March 16, 2005

principally on the need to protect client confidences even after the lawyer-client relationship ceases.

The Ethics Committee believes that the same rationale applies where law firms hold themselves out as “affiliated” or “associated” with one another, as applies under the Rules of Professional Conduct and the foregoing examples, where conflicts arise within law firms. When a firm elects to affiliate or associate another with it and to communicate that fact to the public and clients, there is no practical distinction between the relationship of affiliates under that arrangement and the relationship of separate offices in a law firm. The Ethics Committee is of the opinion that ordinarily the same analysis would apply to both arrangements to determine when the firms have a disqualifying conflict of interest treating the “affiliated” or “associated” firms for this purpose as a single firm.¹

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

¹ This opinion does not address the issues of liability exposure and insurance associated with firms who hold themselves out as “affiliated” or “associated.”