ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 7.5(c). See also ABA Formal Opinion 90-357. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 817 **Topic: "Of Counsel" and "Counsel"**
December 4, 1982 **Relationships; Lawyer-Legislator**

Digest: A legislator having a relationship with a law firm sufficient to satisfy traditional notions of what constitutes "of counsel", but not "actively and regularly" practicing law as a member of the firm, may be held out as "of counsel" to the firm.

Ref.: Rule 2-102(a)
ABA DR 2-102(a)(4)
Former ISBA DR 2-102(a)(4), 2-102(b)
ISBA Opinion Nos. 352, 373, 433, 657, 776
ABA Formal Opinion 330
ABA Informal Opinions 710, 1134 and 1205
CBA Opinion 71-9

FACTS

A firm is in the process of developing a relationship with an Illinois legislator who wishes to use the firm's office as a base for practicing law for his own clients as well as to do certain work on behalf of the firm's existing clients. Due to the nature of his work in the legislature, he will be in the firm's office only on an intermittent basis, although the work he does will likely be typed and sent from the firm. The legislator maintains no independent office from which he practices law, although he has a local office in his capacity as a state legislator.

QUESTION

Whether it is appropriate for the legislator to be termed "of counsel" or "counsel" to the firm.

OPINION

The issues presented by the present inquiry are essentially two-fold:

> (a) whether the relationship described by the inquiring attorney fits within the traditional definition of what constitutes an "of counsel" or "counsel" relationship; and
>
> (b) whether such designation, if otherwise appropriate, is precluded by Rule 2-102(a), which deals specifically with the proper designation of lawyers assuming legislative, judicial, or other similar posts or offices.

As regards to the first such issue, it is our view that the proposed relationship does satisfy the traditionally accepted test of what constitutes an "of counsel" relationship. The nature of such a relationship has often been discussed in our prior opinions and elsewhere, and reference is made to our recent Opinion 776, dated March 27, 1982, for a comprehensive discussion of the issue. See also ISBA Opinions 373, 433, 657 and ABA Formal Opinion 330. Suffice it to say that the proposed relationship as described by the inquiring attorney is of a continuing nature such as would satisfy the "of counsel" definitions contained in former DR 2-102(a)(4) of the ISBA Code of Professional Responsibility and current DR 2-102(a)(4) of the ABA Code of Professional Responsibility. Moreover, it is equal to or in excess of the semi-retired/consultation relationships recognized as proper for "of counsel" designation in ISBA Opinions 373 and 433 and ABA Informal Opinion 710. In fact, the proposed relationship is closely analogous to that in ISBA Opinion 657, wherein an attorney who intended to rent space from a firm in order to conduct a modest practice, and who would be available to the firm for consultation, was deemed to stand in an "of counsel" relationship to the firm. The present relationship suffers from none of the infirmities found in ISBA Opinions 373 and 776, such as the maintenance of separate practice or law offices, or a relationship which is essentially that of a forwarder or receiver of business. It is thus our view that the relationship described by the inquiring attorney is, absent other considerations, one which may appropriately be described as "of counsel".

The second question raised by the present inquiry is more complex. We are advised that the legislator who is the subject of this inquiry would be in the law firm's office only on an intermittent basis. Rule 2-102(a) provides:

> "A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of that firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm." (Emphasis added)

It does not appear in the present instance that the legislator's activity rises to the level of an active and regular practice of law as a member of the firm. It is apparent that Rule 2-102(a) would thus

preclude him from being identified as a partner or associate of the firm. However, it is less clear whether this Rule would also preclude him from acting "of counsel" to the firm.

Prior ISBA Opinions provide little guidance. While ISBA Opinion 352 does make reference to a possible "of counsel" designation of a legislator seeking to affiliate with a law firm, it neither analyzes such issue in light of any statutory scheme nor even sanctions the designation on the facts there presented.

However, certain informal opinions of the ABA, as well as by The Chicago Bar Association Committee on Professional Responsibility, have interpreted identical language as contained in former
DR 2-102(B) of the Illinois Code of Professional Responsibility as being applicable to the question of a legislator's "of counsel" designation. Thus, in ABA Informal Opinion 1134, the "actively and regularly practicing law" requirement was deemed applicable, without analysis, to the question of whether a legislator may be shown as "counsel" to a firm. (It should be noted that the legislator there involved was determined to have satisfied such statutory standard although his activities with the firm appeared no more "active" and "regular" than those involved here". The finding of such opinion was followed in ABA Informal Opinion 1205. Similarly, CBA Opinion 71-9 concluded without any discussion of the issue that the prohibitions of former DR 2-102(B) applied to a legislator's designation as "of counsel".

Despite this authority, we are of the contrary view that Rule 2-102(a) does <u>not</u> preclude a legislator otherwise satisfying the traditional notion of an "of counsel" relationship from being so held out by the firm. Rather, it is our belief that Rule 2-102(a) is designed only to preclude a legislator from holding himself out as being engaged in something he is not - the active, regular practice of the law. The Rule is designed to prevent the deception or misleading of the public. However, no such false impression is given if the person described as "of counsel" is honestly performing the functions of such. In this regard, we see no more reason to preclude a legislator from accurately being described as being in an "of counsel" relationship than would exist in a similar relationship involving a semi-retired person. To the contrary, a deception would be committed on the public were a legislator to be designated as "of counsel" when in fact his relationship and involvement with the firm were sufficient under the Rule to authorize his being held out as a member of the firm.

Moreover, such an interpretation of the Rule as requiring a legislator's involvement to be the same in order to be held out as either "of counsel or a member of the firm would render the "of counsel" designation in such instance superfluous. Such is not, in our view, the intention of Rule 2-102(a).

We recognize that the result here reached could more easily have been arrived at, as it was in ABA Informal Opinion 1134, by merely characterizing the intermittent relationship involved here as being sufficient to constitute the regular and active practice of law on the part of the legislator. However, such would have had the effect of at the same time rendering such intermittent activity sufficient under Rule 2-102(a) to justify a holding out of the legislator as a practicing member of the firm. This in our view would have undermined the purpose of Rule 2-102(a).

Finally, we note that the inquiring attorney has also inquired as to the propriety of describing the legislator as "counsel" to the firm. It appears that such term has no generally recognized meaning

and has, when referred to, been deemed interchangeable with "of counsel". See ABA Informal Opinions 1134 and 1205. Thus, in order to prevent needless confusion as to the true relationship existing, it is our opinion that only the term "of counsel" should be used.

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