



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 1.2(e). 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.

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**Opinion No. 840**  
**January 4, 1984**

**Topic: Referrals and referrals fees;**  
**"Of Counsel" and "Affiliate" relationships.**

**Digest:** The Code of Professional Responsibility does not sanction the creation of a network of independent attorneys to whom a law firm is contractually committed to obtain and subcontract legal work.

The relationship between a law firm and attorneys with whom it contracts to perform services for its clients does not support "Of Counsel" or "Affiliate" designation.

**Ref.:** Rules 2-107(a), 2-103(d), 5-107(c)  
Committee Comments, Canon 2.  
EC 2-13  
ISBA Opinions 764, 776, 817, 826  
ABA Formal Opinion 330

## FACTS

A law firm actively solicits attorneys to enter into a network of contractual agreements whereby the attorneys will provide legal services required by clients of the law firm in exchange for the law firm's undertaking to use its best efforts to obtain work to be subcontracted to the attorneys. The contracts entered into provide that the attorneys are to be deemed independent contractors rather

than employees of the law firm, and that the law firm retains the exclusive right of assignment of legal work to the various affiliated attorneys. Both the law firm and attorneys are stated in the contract to be deemed counsel to the client, but the law firm is to be the sole judge of the quality of legal services being rendered, retaining the right to withdraw any work deemed deficient. Fees for legal services performed are to be paid by the client directly to the law firm, with the attorney performing the work to receive a specified percentage of the fees from the law firm. The law firm is to be designated as "of counsel" to the attorneys on all matters assigned to the attorneys, with the attorneys being listed on the law firm's letterhead as "affiliates". The attorneys are also to be allowed to serve as "of counsel" to the law firm on certain matters as agreed between the parties. Finally, the attorneys are precluded from independently agreeing to perform work for clients who they have worked for pursuant to an assignment from the law firm.

### QUESTIONS

1. Is the proposed creation of a network of "independent contractors" to whom the work of the law firm is to be assigned pursuant to contractual agreement violative of the Code of Professional Responsibility?
2. Can the law firm and attorneys under the proposed plan appropriately be designated as "of counsel" or "affiliates"?

### OPINION

In our view, the proposed plan, pursuant to which the law firm is contractually committed to obtain and subcontract work to a network of independent attorneys violates numerous provisions of the Code of Professional Responsibility.

Initially, the contractual and obligatory nature of the law firm's undertaking to refer matters to its so-called affiliated attorneys puts the present situation beyond the purview of permitted activity under Rule 2-107(a). The Rule, while generally serving to sanction a division of fees between referring and receiving counsel, has as its purpose the promotion of the public interest by encouraging lawyers to refer matters to those more skilled in a particular area. (See Committee Comments, Canon 2.) This end would not be served by a sanction of the present plan, which, by contractually mandating the referral of cases to a multitude of independent attorneys, could well result in the referral of cases on an ad hoc basis for the sole purpose of satisfying contractual commitments. Thus, while Rule 2-107(a) permits and even encourages a referral of cases and division of fees in appropriate circumstances, we do not believe that a contractual and obligatory plan of referral such as is presented here is sanctioned by the provisions of the Rule.

The proposed plan also conflicts with Rules 5-107(c), which prohibits a lawyer from permitting a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering the services. In the present instance, the referring law firm remains the sole judge of the quality of services, and retains the right to withdraw work previously assigned. This fact, when viewed in light of the overall relationship between the parties to the contract, serves to undermine the independence of the affiliate attorneys contrary to the dictates of Rule 5-107(c) and obviates a well settled principle that it is a client's right to retain or

discharge his lawyer.

Rule 2-103(d) lends further support for our conclusion. That rule prohibits a lawyer from promising or giving another person anything of value to initiate contact with a prospective client on behalf of the lawyer. In our view, the entry into a contractual commitment whereby the affiliated attorneys undertake the performance of work for the law firm's clients under penalty of suit for breach of their obligations constitutes the giving of such value or consideration to the law firm as to violate Rule 2-103(d).

Finally, even where the relationship between the law firm and attorneys otherwise appropriate, we do not believe it would in any event support an "of counsel" or "affiliate" designation between the parties. As recognized in ISBA Opinion 776, as well as ABA Formal Opinion 330, the lawyer who may properly be shown as "of counsel" to a law firm is a member or component part of that law firm and not one who, as in the present instance, stands in a relationship best described as a forwarder or receiver of legal business. See also ISBA Opinions 817, 826. Use of an "of counsel" designation under the present circumstances would thus be inappropriate. Similarly, the term does not appear to have a generally recognized meaning and may be misleading to the general public. See ISBA Opinions 764, 776, EC 2-13.

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