ISBA Ethics Committee Defines Relationship Of an Attorney With One From Another State

LEGAL ETHICS COMMITTEE
FORMAL OPINION NO. [redacted] 1-1972

The Legal Ethics Committee has been consulted concerning the propriety of an Indiana law firm listing as "of counsel" or as "correspondent counsel" an attorney from another state.

The facts generally are as follows: The Indiana law firm is composed of several partners and an associate. During the past year the firm had worked with an attorney located in another state on various individual cases, both within the state of Indiana and in surrounding states. The Indiana law firm contemplates the establishment of a permanent working arrangement with the attorney from the other state. However, it is stated that the "continuing relationship" will be only "on a case-by-case basis." The Indiana law firm states that it will consult with the attorney from the other state regularly when it is felt the attorney's expertise could be of service and that the other attorney would handle legal work of the Indiana law firm in his state of residence.

Under the facts involved in this inquiry, there are two questions presented which are dealt with by this opinion:

1. *May an Indiana attorney or law firm associate in a continuing relationship with an attorney from another state?*

   Rule DR2-102 (D) of the Code of Professional Responsibility of the American Bar Association reads, in part, as follows:

   > "A partnership shall not be formed or continued between or among lawyers censed in different jurisdictions unless all enumerations of the members and associates of the firm on a letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions . . ."

   At this point in time the Committee believes that the practice of law in Indiana is not so provincial and should not be so restrained as to inhibit the ability of attorneys to properly associate together as a law firm, notwithstanding the fact that that they may reside in different cities or in different counties within the State of Indiana and notwithstanding the fact that one or more of the attorneys in the relationship may not be a resident of the State of Indiana. Therefore, the Committee sees no *per se* objection to an Indiana law firm having as a *partner or associate* an attorney not residing within the State of Indiana and not admitted to the practice of law within the State of Indiana. Nonetheless, it would be grossly improper for such a partnership of attorneys to use any form of public communication, including letterheads, that might in anyway be misleading or confusing. The statement contained in Rule DR 2-102 (d) quoted above is deemed completely appropriate for any partnership involving attorneys engaged in the practice of law in the State of Indiana and in other jurisdictions.

2. *When is it appropriate to use "of counsel" or similar descriptive words on letterheads?*

   The question presented to the Committee as to whether or not the designation "of counsel" or "correspondent" can be utilized in the manner stated, is in a general way covered by Rule DR2-102 (A) (4) of the Code of Professional Responsibility of the American Bar Association. That rule reads as follows:

   > "A lawyer may be designated 'of counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm other than as a partner or associate."

   The above rule is approved as a general guideline.

   Inasmuch as the inquiry presented to us indicates that the relationship will be only "on a case-by-case basis" and for other reasons hereafter stated, it is the opinion of the Committee that in the situation presented to us it would not be appropriate to use the designation "of counsel," "correspondent counsel" or any other similar designation.

   It is the Committee's opinion that "of counsel" would only be appropriate where there is a close continuing relationship on a routine or regular basis. It is our opinion that the continuing relationship necessary for the designation "of counsel" usually would require close "in house" association. An exception to the "in house" test which would permit such characterization would be where the attorney to be so designated had a *prior* continuing relationship as a partner or associate with such other attorney or firm but the relationship had been interrupted by the designee's inability to come regularly to the office or by his removal from the city of his prior practice. Another exception to the "in house" test which would permit such characterization would be where the attor-

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ney to be so designated is a professor-of-law or an attorney not engaged in the full time practice of law who consults exclusively with the attorney or firm, though not necessarily on a daily basis. Normally there would be no such continuing relationship unless a significant portion of the practice of the attorney to be named "of counsel" is conducted in the geographical area where the law firm with which he is "of counsel" is engaged in the practice of law.

While the Committee believes that modern practice requires that proper arrangements should be permitted between attorneys located in different cities, different counties and, indeed, in different states; in order to permit the profession to face up to the problems of the metropolitan areas, interstate business and to permit the public to be served in an adequate way, the Committee is of the clear opinion that designations such as "of counsel" should only be utilized where there is a *clear and continuing relationship* of the type described above and should never be utilized in a manner that would tend to be improper advertising or in anyway misleading to the public.

When there is such a clear and continuing relationship the appropriate designation would be "of counsel" rather than "correspondent counsel".

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ISBA Ethics Committee Issues Opinion on Conflict of Interest in Close Association

LEGAL ETHICS COMMITTEE
FORMAL OPINION NO. 2-1972

Two fact situations, together with certain questions have been propounded through the office of the General Counsel of the Indiana State Bar Association. Because of the peculiar nature of the questions asked, the inquiries were referred to the Professional Responsibility Committee as a whole for an opinion. The situations, together with the questions are as follows:

"Situation A. (Names fictitious)

A. Smith, B. Smith, and C. Smith practice law together in the same law offices. A. Smith is the prosecuting attorney and C. Smith, an associate of A. Smith, is deputy prosecuting attorney. A. Smith and B. Smith are not partners but share operating expenses. The stationery used by the Smiths and the lettering on their building is as follows:

Law Offices
A. Smith
B. Smith
C. Smith

A. Smith and C. Smith represent the State of Indiana in Circuit and Superior Courts. They do not appear in Marion City Court for the State of Indiana. The State is represented in Marion City Court by A. Jones, another deputy prosecuting attorney.

Question.

Does B. Smith have a conflict of interest if he enters his appearance for a defendant and represents him in a criminal case being tried in the Marion City Court?

Situation B. (Names are fictitious)

A. Jones, B. Jones, and C. Jones practice law together in the same law offices. A. Jones is a deputy prosecuting attorney who represents the State of Indiana in the Marion City Court and will occasionally appear with the prosecuting attorney in a criminal case in Circuit Court. A. Jones, B. Jones, and C. Jones are not partners but share operating expenses. The stationery, lettering on their building, and telephone listing is as follows:

Jones, Jones, and Jones

Question 1.

Does B. Jones or C. Jones have a conflict of interest if he enters his appearance for a defendant and represents him in a criminal case being tried in the Circuit Court or the Superior Courts?

Question 2.

Does B. Jones or C. Jones have a conflict of interest if he enters his appearance for a defendant and represents him in a criminal case being tried in the Marion City Court, where by virtue of a Motion for Change of Venue From Judge, A. Doe becomes the deputy prosecuting attorney prosecuting the case instead of A. Jones?"

Note: The Legal Ethics Committee, a sub-committee of the Standing Committee on Professional Responsibility of the Indiana State Bar Association has re-numbered Formal Opinion No. 3, May, 1972, to be Formal Opinion No. 1, of 1972. Under the previous organization of the committees of the Association, now amended, the May, 1972, opinion on Relationship of an Indiana Attorney With One From Another State, was given No. 3. This was a continuation of numerical numbering begun in 1971. In that year only two opinions, No. 1 and No. 2 were required. Continuing the numerical sequence on into 1972, the first opinion issued this year was given No. 3. Since the reorganization of committees it has been decided that the first opinion that may be issued in any year shall be given the No. 1 and any later opinions in the same year shall be numbered in progressive sequence. If you are filing these opinions for future reference—a policy strongly recommended—it is suggested that the opinion of May, 1972, above defined, be numbered in your file as "Legal Ethics Committee Formal Opinion No. 1 of 1972.

Conflicts Are Created

It appears to the Committee, that in all essential respects, the two situations are similar, and that the answers to all the questions are in the affirmative.

In Formal Opinion No. 30 of the American Bar Association Committee on Professional Ethics rendered in 1931, it was held that a Prosecutor in one state could not ethically defend a person accused of a crime in another state even though the case was to be tried in the other state. The Committee, referring to former Canon 31 of Judicial Ethics, wrote:

> "In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.
>
> We believe this statement can properly be said to apply to prosecutors also who should, even at personal financial sacrifice, be and remain above suspicion."

The Legal Ethics Committee of this Association has affirmed that stand on many occasions.

Limitation On Prosecutors

It has been held by the Legal Ethics Committee of this Association that both the Prosecuting Attorney and his deputies are members of the State Constitutional Judicial System, are representatives of the State of Indiana, and therefore, cannot ethically defend a person accused of a crime anywhere in this state or in an adjoining state.

In both fact situations set forth above, the associated attorneys are

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CONFLICT OF INTEREST OPINION IS ISSUED

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using one office, are sharing expenses, have their names listed together on the door, and are sharing stationery. From the facts set forth, it would appear that there should be some inquiry as to the proper use of a firm name and the appropriate designations on stationery and doors where lawyers are practicing in one location but not associated in a partnership. The Committee would strongly recommend a study of Formal Opinion No. 318, issued July 3, 1967, by the Committee on Professional Ethics of the American Bar Association dealing with firm names. Both of the above situations contain designations which could be misleading to the public.

However, this problem has no bearing on the particular questions asked.

Opinion No. 104 Is Clear

Formal Opinion No. 104 of the Committee on Professional Ethics of the American Bar Association rendered March 9, 1934, dealt with a situation where two lawyers occupied the same suite of offices but were not associated as partners. One of them served as a police magistrate. The Committee held that the other could not accept employment to appear for a person charged before the police magistrate in later proceedings before the grand jury and the county judge. The Committee made the following statement:

> "We are of the opinion that a lawyer who occupies the same suite of offices with a police justice and is associated with him in the practice of law, sharing office expenses, although not in partnership, is nevertheless so related professionally to the police justice that he should not accept retainers in criminal matters, originating before his office associate as such magistrate. If they were partners, of course that relation would forbid one partner accepting employment in a criminal case originating before the other partner as magistrate."
>
> "A and B, however, are not copartners, and it may appear to be indulging in too much refinement if we advise against B accepting employment as counsel for the accused after he has been held for the Grand Jury by A, as committing magistrate, but the public, knowing of their intimate relation as office associates, may infer that there is some influence operating in their establishment by reason of which a person arraigned before A is induced to employ B, and against inference, however unfounded, both A and B should guard themselves. Lawyers should not conduct themselves in such a way as to impair the confidence which the community have in the administration of justice."

As to the Code of Professional Responsibility, we feel that any representation of anyone accused of crime by any of the lawyers mentioned in either of the fact situations stated above would violate Canon 5, DR5-101 and DR5-105. It certainly violates both the letter and the spirit of Canon 9, DR9-101.

The entire matter of conflicting interest is discussed in detail in Wise, "Legal Ethics" (Mathew Bender & Co., 1970) Chapter 17, entitled "Conflicting Interests."

The Professional Responsibility Committee is aware of the many difficulties involved. Many lawyers who serve as either prosecutor or deputy prosecutor are affiliated with others—some of them in offices containing several lawyers. In some communities, the number of lawyers is extremely limited. It is the feeling of the Committee, however, that the issue of professional responsibility is clear and that there can be no exceptions.

F. E. Rakestraw, Chairman,
Professional Responsibility
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