NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1137 (10/23/17)

Topic: Law firm name; "of counsel" lawyers

Digest: A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel," which requires a close, continuing, and personal relationship with the firm.

Rules: 1.10(a). 7.5(a), 7.5(b), 8.4(c)

FACTS

1. The inquirer, Lawyer A, practices in a law firm, A&B that has two partners and two attorneys – C and D -- designated "of counsel." Lawyer B plans to leave the firm at the end of the year. The inquirer asks whether it is permissible to call the new firm "A & Associates." The inquirer characterizes the relationship of the two "of counsel" lawyers as "continual day-to-day." Both are covered by the firm's malpractice insurance policy.

QUESTION

2. May a lawyer designate the lawyer's firm "A & Associates" when the only other lawyers in the firm are designated as "of counsel" lawyers?

OPINION

3. Rule 7.5(b) of the N.Y. Rules of Professional Conduct (the "Rules") provides that "a lawyer in private practice shall not practice under a trade name" or "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name."

4. Comment [1] to Rule 7.5 says that, "to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."

5. Rule 8.4(c) provides that "A lawyer or law firm shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

6. The question raised here is whether using the firm name "A & Associates" as the name of the law firm would be a trade name or misleading when the inquirer does not have any partners, and the other lawyers who work at the firm are "of counsel" to the firm.

"Of Counsel" Lawyers

7. For purposes of this opinion, we assume that the two lawyers who are designated "of counsel" are properly so designated. *See* Rule 7.5(a)(4) ("A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.") As we explained in N.Y. State 955 ¶ 6 (2005):

> Whether the relationship meets the "continuing relationship" test is fact-specific and no additional information is provided in this inquiry. Thus, as long as the inquiring firm is satisfied that the "continuing relationship" test is met, it may have an "of counsel" relationship with a lawyer.

See also N.Y. State 788 at note 5 (2005) ("We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis'"); N.Y. State 773 (2004) (*quoting* N.Y. State 262 (1972)); ABA Op. 90-357 (1990) (The use of the title "of counsel," or variants of that title, in identifying the relationship of a lawyer with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading). *See also* Rule 7.5, Cmt. [1] ("Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.")

8. Whether lawyers C and D each have the close, regular, personal relationship required to merit the title "of counsel" is a question of fact that the inquirer must determine.

"Of Counsel" Lawyers as "Associated" with the Firm

9. If lawyers C and D are properly designated "of counsel," then the next question is whether they are "Associates" for purposes of calling the law firm "A & Associates." One objective of the Rules is to ensure that the public is not deceived about the identity, responsibility, or status of the individuals using a law firm name. *See* N.Y. State 732 (2000); N.Y. State 636 (1992); N.Y. State 459 (1977); N.Y. State 495 (1978); *Matter of Shepard*, 92 A.D.2d 978, 459 N.Y.S.2d 632, 633 (3d Dept. 1983); *see also* EC 2-11 (Ethical Considerations under the predecessor of the Rules provided that "[t]he name under which a lawyer practices may be a factor in the selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder").

10. The Rules do not define the terms "associate" or "associated." The term "associate" often conveys the status of a junior lawyer who is not a partner or principal but is regularly employed by the firm. *See* ABA Formal Op. 90-357. Nevertheless, both the Rules and our prior opinions indicate that lawyers with other relationships to the firm are "associated" with the firm. For example, in N.Y. State 715 (2004), in which we considered the rules applicable to temporary lawyer working with a firm, we indicated that conflict rules apply to lawyers who are "of counsel" to a firm: "The Code does not define the term 'associated.' Although the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm, it does not apply to all lawyers who are in any way 'connected' or 'related.'"

11. Rule 1.10(a) provides that, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of them, practicing alone, would be prohibited from doing so under Rule 1.7, 1.8 or 1.9. Both this Committee and the courts have concluded that "of counsel" lawyers are "associated" with a firm for purposes of the conflict of interest rules. *See* N.Y. State 876 (2004) (conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel); N.Y. State 793 (2006) (under the former Code of Professional Responsibility, conflicts imputed to an attorney under DR 5-105(D), other than personal conflicts under DR 5-101(A), will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship); N.Y. State 788 (2005), N.Y. State 773 (2004) (lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of former DR 5-105(D)); *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); Restatement (Third) of the Law Governing Lawyers § 123 cmt. c(ii) (1998) (same).

12. Accordingly, in the context of selecting a name for a law firm, we do not believe that the public would assume that the term "Associates" is limited to persons who are non-partner employees of the firm assigned the title of "associate." If, for instance, the inquirer elects to identify C and D on the firm's letterhead or website, the inquirer may fulfill the requirement of Comment [1] to Rule 7.5 to be "scrupulous in the representation of professional status" by clarifying that lawyers C and D are "of counsel." *Compare* N.Y. State 931 (2012) (name of law firm of solo practitioner cannot include "and Associates" based on employment of paralegal).

CONCLUSION

13. A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel" that they have a close, continuing, and personal relationship with the firm.

(28-17)