



ISBA Professional Conduct Advisory Opinion

Opinion No. 20-04
May 2020

Subject: Law Firm Name and Letterhead; Of Counsel Designation

Digest: Lawyers may state or imply that they practice in a partnership only when that is the fact. A law firm's name may not imply a partnership when none exists. A law firm's name must not mislead the public. But for limited exceptions, a law firm's name should not include the name of a non-practicing lawyer. To be of counsel to a firm one must have a continuing and regular relationship with the firm. To practice as a limited liability partnership, the partnership's name must end with one of several designations prescribed by statute.

References: Illinois Rule of Professional Conduct 7.1 and 7.5

Estate of Goldstein, 1293 Ill. App 3d 700, 688 N.E.2d 684 (1st Dist. 1997)

Rizzo v. Rizzo, 3 Ill.2d 291, 120 N.E.2d 546 (1954)

ISBA Advisory Opinion Nos. 776, 817, 840, 865, 03-02, 16-04

805 ILCS 206/1002

ABA Formal Opinion 90-357 (1990)

The Nuts and Bolts of a Law Firm Letterhead, Thomas K. Byerly, Michigan Bar Journal, November 1997

From Office Sharing to Letterhead: The Ethics of Holding Yourself Out to the Public, Deane Beth Brown, 89 Illinois Bar Journal 369, July 2001

FACTS

Jane and John Smith are spouses, and both are lawyers licensed to practice in Illinois. The Smiths are the only two partners in Smith & Smith, LLP., an Illinois Limited Liability Partnership conducting its business in Illinois.

The Smiths have actively practiced law as partners in the LLP. However, John has recently ceased practicing in order to pursue a career as a college admissions counselor at a local high school. John continues to maintain his Illinois law license and recognizes the possibility that he may return to practicing law with the firm at some time in the future.

On the firm's letterhead stationery, the firm's name continues to be shown as "Smith & Smith, Attorneys at Law." Additionally, the margin of the letterhead lists the firm's attorneys to be:

Jane Smith, Partner

John Smith, Partner

Ron Doe, Associate

ISSUES RAISED

The inquiring attorney asks the following questions:

1. With John Smith currently, and perhaps permanently, pursuing a non-legal career, must the firm change its name by deleting the "& Smith" from its name and its letterhead?
2. Must the firm delete "John Smith/Partner" from the margin of its letterhead?
3. May the firm keep John Smith's name on the margin of the letterhead if it changes John's designation from Partner to Of Counsel?
4. Must the firm add "LLP" to its name on the letterhead?

ANALYSIS

Two of the Illinois Rules of Professional Conduct, i.e., Rules 7.5 and 7.1, govern how lawyers may hold themselves out to the public. First, as relevant, Rule 7.5 provides as follows:

Rule 7.5. Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. 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

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

Rule 7.1. Communications Governing a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Illinois case law provides that a partnership exists when (1) parties join together to carry out a venture for their common benefit, (2) each party contributes property or services to the venture, and (3) each party has a community of interest in the profits of the venture. *Estate of Goldstein*, 293 Ill.App.3d 700, 688 N.E.2d 684 (1st Dist. 1997). Moreover, and most importantly, the Illinois Supreme Court has recognized the essential test of a partnership to be the sharing of profits. *Rizzo v. Rizzo*, 3 Ill.2d 291, 120N.E.2d 546 (1954). Additionally, as previously recited, Rule 7.5(d) provides that lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Although Jane and John were clearly members of a partnership so long as each actively practiced law in the firm, such ceased to be the case when John left the firm and discontinued the practice of law. At such point in time John presumably (although not stated in the inquiry) discontinued his entitlement to share in the firm's profits, discontinued contributing property or services to the firm, and ceased carrying out a venture for their common benefit. Thus, despite the fact that John remains licensed to practice as an attorney and recognizes that he may at some time in the future choose to return to the firm, his present discontinuance of his relationship with the firm undermines his status as a partner of the firm and, pursuant to Rule 7.5 (d), precludes John and Jane from holding themselves out as a partnership. To view it otherwise would imply the existence of a partnership where none exists and serve to mislead the public contrary to the dictates of Rules 7.1 and 7.5.

It should be noted, however, that whether or not John and Jane may fairly be considered as remaining partners is not necessarily determinative of the right of the firm to continue to hold itself out as "Smith & Smith, Attorneys at Law." Rather, the names of partners no longer with a firm may nonetheless remain in its name under certain limited circumstances which would not serve to mislead the public. To this effect, and as is referenced in Comment 1 to Rule 7.5, a firm may be designated by the names of deceased members where there has been a continuing succession in the firm's identity. It is similarly recognized, and is confirmed in ISBA Opinion No. 03-02, that a law firm may continue the name of a retired partner provided that the firm takes reasonable steps to accurately reflect the retired partner's status. See also ISBA Opinion No. 865 to the effect that if an attorney withdraws from a partnership to retire from the practice of law (as opposed to practicing elsewhere) the firm can continue to use the attorney's name provided that the firm is a bona fide successor of the firm of which the retired partner was a member, using the name is authorized by law or contract and, most importantly, the public is not misled. Thus, the firm may in such circumstances continue using the name of a retired lawyer but, so as to not mislead the public, should show that the partner is retired such as by indicating on the firm's stationery the years during which the retired partner practiced or reflecting his status as a retired partner.

The inquirer also asks whether John's name may remain on the letterhead if his status is changed from "Partner" to "Of Counsel." As discussed in our Opinion No. 16-04, "Of Counsel" is a professional designation used by a lawyer to denote a continuing relationship with a lawyer or law firm other than as a partner or associate. The "Of Counsel" relationship has as its core characteristic a close, regular and permanent relationship that is more than a mere forwarder of legal business, more than an occasional consultant relationship, and more than a relationship for the purposes of one case. See also ISBA Opinion Nos. 776, 817, and 840; ABA Formal Opinion 90-357 (1990).

While it is not uncommon for a retired or semi-retired attorney to be held out as "Of Counsel," to do so the attorney must still maintain the continuing and regular relationship with the firm as is the keynote to the attorney's being deemed "Of Counsel" to the firm. To hold someone out as "Of Counsel" when no such continuing relationship exists would be misleading to the public. Such appears to be what is happening in the present instance. On the facts provided to us, John has undertaken a career change and a discontinuance of the practice of law. The inquiry does not enumerate any continuing or on-going relationship with the firm as would satisfy the requirements for holding John out as "Of Counsel" to the firm. This is not to say that John's relationship could not be restructured so as to allow him both to pursue his career as a guidance counselor while still maintaining an on-going relationship with the firm so as to satisfy the traditional role of being "Of Counsel." However, this does not appear to be what is contemplated at the present time. Accordingly, to now hold John out as "Of Counsel" to the firm would be misleading to the public and thus impermissible.

Finally, in response to a further question raised by the inquirer, if the firm can continue as a partnership (which as above discussed is questionable), and more specifically as a limited liability partnership, its name must end with one of the following LLP designations; i.e., "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP," or "LLP." 805 ILCS 206/1002 To do otherwise would serve to mislead the public. See *The Nuts and Bolts of a Lawfirm Letterhead*, Thomas K. Byerly, Michigan Bar Journal, November, 1997.

For a good discussion of some of the issues raised here, as well as others, see "From Office Sharing to Letterhead: The Ethics of Holding Yourself Out to the Public," Deane Beth Brown, 89 Illinois Bar Journal 369, July 2001

CONCLUSION

In summary, in addition to the other limitations discussed herein, a law firm's name may not mislead the public or imply the existence of a partnership when none exists.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

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