ADVISORY ETHICS OPINION 91-15

SYNOPSIS:

A law firm may not include a partner's name in its law firm title or on its letterhead when the partner takes a full-time position in State Government, even though the partner may intend to return to the firm following the tenure in public office.

FACTS:

Attorney A is a named partner in a law firm. Attorney A plans to accept a full-time position of prominence in State Government for a time and later return to the firm. The attorney will take a leave of absence from the firm, and is not permitted to be compensated by the firm, but will not permanently sever all financial rights and obligations with the firm. Although the time period is not specified and could be terminated at any time by the government, Attorney A has made a moral commitment to serve the State for a period of at least 8 months to one year.

DISCUSSION:

DR 2-102(C) provides that:

> "The name of a lawyer holding public office shall not be used in the name of a law firm, or in communication on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm."

Following the practice of this Committee in not revealing the names of attorneys seeking a ruling, the Committee is not disclosing the public office involved, but that office is a full-time obligation. By agreement with the State, the attorney has made a commitment that outside activities will not diminish the duty to provide full-time services to the State. The attorney will be paid by the State and is not permitted to accept additional compensation from the firm during the period of service to the State. Under these circumstances, the attorney would not be able to "actively and regularly" practice with a firm within the meaning of DR 2-102(C). "Active and regular practice" denotes carrying on a private law practice for clients of the firm as a person's primary professional role and means of earning a living. No matter how actively Attorney A might wish to remain involved with the firm's clients on nights and weekends, private law practice would still not be the primary profession, nor is it permitted to be the means of earning a living. Thus, Attorney A will not "be actively and regularly practicing with the firm."

It is true that EC 2-12 makes provision for a situation in which an attorney who occupies a public executive or administrative position *and* has the right to practice law concurrently may allow his or her name to remain in the name of the firm if he or she continues to practice. This is a narrow exception, contained in an Ethical Consideration and not a Disciplinary Rule, and it is limited to situations in which the attorney's time is explicitly permitted to be allocated between two active professional roles. In the situation presented to the Committee, it is clear that Attorney A's position with the State is the job in which Attorney A is actively and regularly engaged. Under the terms of the employment agreement with the State, Attorney A is not free to actively practice law for a private firm and receive compensation as a practicing attorney. Hence, the limited exception described in EC 2-12 is not applicable, and the remainder of EC 2-12 applies: "Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer."

Another issue to be considered under DR 2-102(C) is whether Attorney A will be assuming the office for a "substantial period." The minimum time period for which the arrangement is established is in the range of eight months to one year. There is no agreed-upon termination date, leaving the maximum extent open-ended. No bright line defines the term "substantial period," and the Committee believes this issue must be considered in light of all the circumstances and with respect to the Rule's purpose. DR 2-102(C), like other provisions under Canon 2, is intended, in part, to avoid confusion about whether a lawyer or a firm can obtain results for a client on a basis other than the merits of the client's cause. If a firm name included, for example, the head of a State agency, confusion may arise over whether a firm whose name included that office holder can achieve results based on factors beyond the merits of a cause. Under these circumstances, the continued presence of the attorney's name on firm letterhead would also implicate the admonition of DR 9-101 that a lawyer avoid "even the appearance of impropriety," and, more specifically, the prohibition of DR 9-101(C) that a lawyer "not" imply that he is able to influence improperly or upon the irrelevant grounds any . . . public official."

By contrast, if a private attorney took a public office as a special prosecutor to investigate a particular incident without any ongoing responsibilities for any matters other than the particular incident, confusion (in that case between the attorney and the Attorney General) is less likely.

Attorney A is about to assume a public office closer to the first example than the second, *i.e.,* an office with broad jurisdiction over many governmental responsibilities rather than an office limited to a particular incident or issue. The attorney will be designated as the office holder, not as the "acting" office holder. The attorney's sole compensation will come from the State position, not the private practice. Attorney A contemplates holding the office of an open-ended period of not less than eight months. In these circumstances, the provisions of DR 2-102(C) and EC 2-12 restricting the use of Attorney A's name in the firm name and on the letterhead apply, and Attorney A's name should not be included in the name of the firm on the letterhead. In addition, the Rule provides that the attorney's name should not be used in communications on behalf of the firm.[1]

[1] *See also* VBA Opinion 82.5.