



DISTRICT OF COLUMBIA COURT OF APPEALS
COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW
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OPINION 22-17

**OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW**

March 2, 2017

Pursuant to District of Columbia Court of Appeals Rule 49 (the “Rule” or “Rule 49”), and specifically its section 49(d)(3)(G), the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law (the “Committee”), by a majority vote of a quorum of its members then present, approved the following opinion at its meeting on January 12, 2017:

**USE OF THE TERMS “ASSOCIATE” OR “COUNSEL”
AS “HOLDING OUT” TO PRACTICE LAW**

The Committee has received several inquiries about whether an individual’s use of the words “associate” or “counsel” constitutes “holding out” as authorized to practice law in the District of Columbia within the meaning of Rule 49(b)(4).

The Committee concludes that the terms “associate” or “counsel,” when used in a legal context, convey to members of the public that an individual is authorized to practice law. The Committee therefore concludes that, unless an individual is authorized to practice law in the District of Columbia as a member of the District of Columbia Bar or pursuant to one of Rule 49(c)’s exceptions, the individual, in a legal context, cannot describe himself or herself as an “associate” or as “counsel” in connection with an office or location within the District of Columbia. Individuals who identify themselves, in a legal context, as associates or as counsel in the District of Columbia must satisfy all of the requirements of one of Rule 49(c)’s exceptions unless enrolled as active members of the District of Columbia Bar.

Analysis

Rule 49(a) provides, subject to specific exceptions in Rule 49(c), that no person shall “in any manner hold out as authorized or competent to practice law” in the District of Columbia unless that person is an active member of the District of Columbia Bar. Rule 49(b)(4) defines “[h]old out as authorized . . . to practice law” as “to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia.” The Rule explains that, “[a]mong the characterizations which give such an indication” are “Esq.,” “lawyer,” “attorney at law,” “counselor at law,” “contract lawyer,” “trial or legal advocate,” “legal representative,” “legal advocate,” and “judge.”

The Commentary explains that Rule 49(b)(4), as a regulation “with a purpose to protect the public,” requires that communications by non-Bar members “must avoid giving the impression to persons not learned in the law that a person is a qualified legal professional subject to the high ethical standards and discipline of the District of Columbia Bar.” The Commentary also explains that the listing of terms, “which normally indicate one is holding oneself out as authorized or qualified to practice law, is not intended to be exhaustive.” The definition “is intended to cover any conduct which gives the impression that one is qualified or authorized to practice.” The Commentary cites *In re Banks*, 561 A.2d 158 (D.C. 1987).

In *Banks*, the Court of Appeals held that a former administrative law judge, who had graduated from law school, but who was never admitted to a state bar, had held himself out as an attorney through various advertisements, as well as through his personal conduct and interactions with clients. 561 A.2d at 160-64. Banks had asserted, *inter alia*, “that he was a former hearing examiner, also known as an administrative law judge, an administrative trial advocate, an in-house counsel, a founding member of the World Council (or Association) of Lawyers, and a member of the National District Attorneys Association.” *Id.* at 162-66. The Court remarked that the “general public, as represented by the several witnesses who testified in this matter, was reasonably led by respondent’s conduct to erroneously believe that respondent was in fact a licensed member of the District of Columbia Bar,” and that the “general public does not understand that in order to practice law in the District of Columbia, one must not only graduate from law school, but also pass a bar examination and be certified as morally fit to be a member of the Bar.” *Id.* at 163.

The Court added that “the public is likely to assume that one must be an attorney prior to attaining such positions as ‘hearing examiner,’ ‘administrative law judge,’ ‘administrative trial advocate,’ ‘consultant representative,’ ‘in-house counsel,’ ‘member of the World Association of Lawyers,’ and ‘member of the National District Attorneys Association.’” *Id.* The Court issued an injunction that, *inter alia*, prohibited Banks from using “such terms to describe himself or his qualifications as ‘lawyer,’ ‘attorney,’ ‘counsel,’ ‘counselor,’ ‘Esquire,’ ‘advocate,’ or any abbreviation of the foregoing terms, *or any other term or description which reasonably denotes that respondent is licensed to practice law in the District of Columbia.*” *Id.* at 168 (emphasis added).¹

Two opinions from the District of Columbia Bar’s Legal Ethics Committee provide useful guidance on the use of the term “associate” in a legal context. First, in D.C. Bar Ethics Opinion 332, issued in October 2005, *Firm Names for Solo Practitioners*, the Legal Ethics Committee addressed the permissible firm names that could be adopted by a solo practitioner. The Legal Ethics Committee noted that “Bar Counsel does report that they have received complaints regarding the use of names of the form ‘Doe & Associates.’ It is useful to reiterate that, as we said in Opinion No. 189 (decided under the former Code of Professional Responsibility), a solo practitioner may not practice under the name ‘John Doe & Associates’ for the use of the word ‘associates’ would naturally be read to necessarily imply the existence of other legal staff in the practice.” *Id.* (citations omitted).

Second, the Legal Ethics Committee addressed, albeit in passing, the use of the term “associate” in D.C. Bar Ethics Opinion 304, *Management of a Law Firm’s Human Resources Functions by an Employee Management Company*, issued in February 2001. In that opinion, the Legal Ethics Committee considered whether a law firm could contract out its human resources functions, noting that “[a] lawyer in this jurisdiction may practice alone, be a partner, *associate or of-counsel in a private firm*, work ‘in house’ as a corporate or labor union counsel, toil in an accounting firm, labor in a public interest position, serve as a government lawyer, teach the law, or engage in any of a host of other activities.” *Id.* (emphasis added).

¹ In a subsequent decision, the Court upheld a finding by the District of Columbia Department of Consumer and Regulatory Affairs that Banks misrepresented himself as the functional equivalent of a lawyer by using the title “administrative advocate” and rendering legal advice. *Banks v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 634 A.2d 433, 437 (D.C. 1993).

The Legal Ethics Committee’s observations on the understanding of the term “associate” as conveying attorney status is consistent with a similar opinion from the State of New Mexico. The Ethics Advisory Committee of the State Bar of New Mexico issued an opinion in which it explained that the use of the phrase “& associates” in a firm name in which each firm’s lawyer’s name already appeared was misleading because it suggested that other *lawyers* authorized to practice were affiliated with the firm.² The committee stated that “[i]t is well accepted in the legal community that an ‘associate’ is an attorney that works for a firm,” and that the word “associates,” at least in the legal context, does not include support staff. The committee stated that “[n]umerous” other jurisdictions had addressed the issue and, “without exception,” had stated that “‘associates’” means lawyers and not support staff.³ *See also* New Mexico State Court Rule 20-104, Committee

² *See Naming Firms “& Associates”* (State Bar of New Mexico, Ethics Advisory Committee, Apr. 3, 2006), accessible at <http://www.nmbar.org/NmbarDocs/AboutUs/committees/Ethics/2005-2006/2006-1.pdf>.

³ *Id.* The New Mexico Committee cited similar ethics opinions from Colorado, *see* Opinion 50, *Definition of Associates as Applied to Lawyers* (Colorado Ethics Committee, Nov. 29, 1972) *Definition of Associates as Applied to Lawyers* (Colorado Ethics Committee, Nov. 29, 1972) (“Traditionally, in connection with the practice of law, the word ‘associates’ is used to describe lawyers who are employees of a firm.”), accessible at http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_50_2011.pdf, and Arizona, *see* Opinion 90-01, *Communications Concerning Services; Firm Name and Letterheads; Tradenames* (State Bar of Arizona Ethics Opinions, Feb. 1990) (The name of “X and Associates” is misleading to the public “because it implies that the lawyer is practicing in association with other lawyers.”), accessible at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=596>

The New Mexico Committee also cited *The Florida Bar v. Fetterman*, 439 So. 2d 835, 839 (Fla. 1983) (“When the word associates is employed on firm letterhead or in commercial advertisement such term refers to lawyers working in the firm who are employees of the firm and not partners”), and *In re Mitchell*, 614 S.E.2d 634, 635 (S.C. 2005), in which an attorney agreed to a public reprimand after admitting that he continued to use the word “associates” in his firm name and to refer to “attorneys and counselors at law” on his letterhead even though he employed no licensed attorneys other than himself. *See also* South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 05-19, 2005 WL 3873354, at *1 (Oct. 21,

Commentary (“The term ‘associate’ is generally construed to mean a lawyer and should be avoided in referring to a paralegal”). Other jurisdictions have reached the same conclusion.⁴

Decisions from other jurisdictions have addressed terms similar to “counsel.” For example, in one case an attorney was held to have aided or abetted the unauthorized practice of law when he affiliated himself with an individual (who was not a barred attorney) who had identified himself as “Of Counsel.” *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 607 n.13 (Cal. 1974) (*en banc*). In another case, a court held that an attorney who had retired from the state bar had engaged in the unauthorized practice of law by identifying himself as “esquire,” “general counsel,” and “attorney-in-fact” on business cards, letterhead, “and other documents subject to dissemination among the general public.” *In re Contempt of Mitterer*, 693 N.E.2d 555, 558 (Ind. 1998) (*per curiam*). One court also has equated the term “counselor” with the term “attorney.” *Crane v. State*, 118 P.3d 1084, 1093 (Alaska Ct. App. 2005).

Another context in which “counsel” always refers to lawyers is with respect to determinations of whether criminal defendants have received ineffective assistance of “counsel.” *See, e.g., Strickland v. Washington*, 466 U.S. 668, 677 (1984). This is consistent with common usage, and laypeople, like judges and lawyers, understand the term “counsel” in a legal context to refer to lawyers.

The American Bar Association’s Model Guidelines for the Utilization of Paralegal Services provides guidance on how paralegals can describe themselves. Guideline 4 explains that “[t]itles that are commonly used to identify lawyers, such

2005) (use of term “John Doe and Associates, P.A.” is misleading “because it implies that there is more than one lawyer in the firm”).

⁴ *See, e.g.,* Opinion No. 20, *Use of the Word “Associates” in a Law Firm Name* (Minnesota Lawyers Professional Responsibility Board, June 18, 2009) (“While the word ‘Associates’ and the phrase ‘& Associates’ undoubtedly have other meanings and connotations in other contexts, in the practice of law the word and the phrase have been used and are perceived as referring to an attorney practicing law in a law firm.”), accessible at <http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2020.pdf>. The Minnesota Board cited bar or court decisions from Oregon, Utah, and New York City as having reached the same conclusion. *See id.* (citations omitted).

as ‘associate’ or ‘counsel’ are misleading and inappropriate.”⁵

Finally, both “lay” and “legal” dictionaries indicate, to varying degrees, that the words “counsel” and “associate” refer to attorneys. The Merriam-Webster online dictionary (2016) [<http://www.merriam-webster.com/dictionary>] identifies the “simple definition” of “counsel” as including: “*law*: a lawyer who represents a person or group in a court of law.” In the “full definition” description, the fourth definition states: “*a plural counsel (1)*: a lawyer engaged in the trial or management of a case in court (2): a lawyer appointed to advise and represent in legal matters an individual client or a corporate and especially a public body.”⁶

Black’s Law Dictionary (at 425 (10th ed. 2014)) defines “counsel” to include: “One or more lawyers who, having the authority to do so, give advice about legal matters; esp., a courtroom advocate.” Black’s provides the familiar example, “the client acted on advice of counsel.” *Id.*

The Merriam-Webster online dictionary includes the following definition of “associate” when the word is used as a noun: “an entry-level member (as of a learned society, professional organization, or profession).” And that dictionary provides the following as an example of “associate” used in a sentence: “She started as an *associate* at the law firm.”

The Black’s Law Dictionary (at 427) defines “associate” to include “[a] junior member of an organization or profession; esp., a lawyer in a law firm, [usually] with fewer than a certain number of years in practice, who may, upon achieving the requisite seniority, receive an offer to become a partner or shareholder. — Also termed *associate attorney*.”

These opinions and commentaries support the Committee’s conclusion that an individual who identifies himself or herself, in a legal context, as an “associate” or “counsel” conveys to members of the public

⁵ See ABA Model Guidelines for the Utilization of Paralegal Services (2012), accessible at http://www.americanbar.org/content/dam/aba/administrative/paralegals/ls_prllgs_modelguidelines.authcheckdam.pdf

⁶ See <http://www.merriam-webster.com/dictionary/counsel>.

that he or she is authorized to practice law.⁷ For example, the term “General Counsel” is a frequently used term; a “General Counsel” is understood to be a lawyer because a general counsel’s function is to provide legal advice to the organization, as implicitly recognized in the Indiana decision cited above. The Committee concludes that the same reasoning applies to an individual’s use of the terms “legislative counsel” or “policy counsel.” Those terms imply that the individual provides (and is authorized to provide) legal advice on legislation or policy.

Accordingly, individuals, law firms, and other organizations, in a legal context, can use the term “associate” or “counsel” (or variations of such terms) in connection with an office or location within the District of Columbia only insofar as the individuals so-titled are authorized to practice law within the District of Columbia. In other words, if the individual is *not* authorized to practice law in the District of Columbia either as a member of the District of Columbia bar or pursuant to one of Rule 49(c)’s exceptions, the attorney cannot describe himself or herself as an “associate” or “counsel” in connection with an office or location within the District of Columbia. The use of that terminology suggests not only that the individual is an attorney, but also that the individual is authorized to practice law in the District of Columbia.

⁷ The Committee has not directly addressed this issue before. In its Opinion 15-05 (Mar. 14, 2005), *Holding Out by Foreign Lawyers With Principal Offices in the District of Columbia*, the Committee noted that a foreign lawyer may identify himself or herself as, *inter alia*, an “international associate,” but subject to “two strict conditions.” The Committee explained that the foreign lawyer must identify in all business documents the jurisdictions in which the lawyer is authorized to practice law. Second, the Committee explained that the foreign lawyer must include in all business documents “an explicit and unqualified statement that the foreign lawyer is not engaged in the practice of law in the District of Columbia.” An implicit predicate for imposing strict conditions on the use of terms like “international associate” is that “associate” connotes a lawyer. This new opinion is consistent with the Committee’s longstanding view that the term “associate” as applied to people in law firms and other legal organizations is generally understood to refer to lawyers.

By way of example, an individual who is a member of another state's bar and who has submitted an application for admission to the District of Columbia Bar may describe himself or herself as an "associate" or "counsel" if he or she is authorized to practice law in the District of Columbia by Rule 49(c)(8), which sets forth certain requirements. That individual must also indicate in a prominent manner that the individual is not a member of the District of Columbia Bar and is practicing under the supervision of members of the District of Columbia Bar. *See* Rule 49(c)(8); D.C. Committee on Unauthorized Practice of Law Opinion 20-08, *Limitations on Notice of Bar Status Under Rule 49(c)(8)*, issued on January 18, 2008. The Committee notes that many law firms use the title "law clerk," and limit employees to summer associate functions or other functions that are authorized by Rule 49(c) exceptions, until the employees are admitted to a bar. And the term "summer associate" is well-understood in the legal community to mean a law student, not an attorney authorized to practice law.

The staff of the Committee shall cause this opinion to be submitted for publication in the same manner as the opinions rendered under the Rules of Professional Conduct.

Done this 2nd day of March, 2017.

_____/s/
Cynthia G. Wright
Chair
District of Columbia Court of Appeals
Committee on Unauthorized Practice of Law

_____/s/
Theodore C. (Ted) Hirt
Vice Chair
District of Columbia Court of Appeals
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