NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1089 (3/31/2016)

Topic: Retired lawyer's use of "Esq."

Digest: A lawyer who is retired from the practice of law under Section 118.1(g) of the Rules of the Chief Administrative Judge and who therefore may render legal services only without compensation may use the title "Esq.", but must indicate the retired status or the limitations on his or her right to practice if there is a risk of confusion regarding his or her role.

Rules: 8.4(c).

FACTS

1. The inquirer is retired from the practice of law. Pursuant to Section 118.1(g) of the Rules of the Chief Administrative Judge of the State of New York, the inquirer qualifies for an exemption from payment of the annual registration fee for attorneys. Under that rule, a retired lawyer may render legal services only without compensation.

QUESTION

2. May a retired attorney use the term "Esq." after his or her name on business cards and stationery in connection with a non-legal business?

OPINION

May a retired lawyer use the term "Esq."?

3. Under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR § 118.1(g), an attorney who certifies that he or she is retired from the practice of law is exempt from the biennial registration fee (currently, $375). A retired attorney also is exempt from the continuing legal education requirements applicable to practicing lawyers. 22 NYCRR § 1500.5(b)(4). An attorney is "retired" for this purpose "when, *other than the performance of legal services without compensation*, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." 22 NYCRR § 118.1(g) (emphasis added). As the definition indicates, a retired attorney may continue to render legal services without compensation.[1]

[1] An alternative to claiming "retired" status is voluntary resignation from the Bar. *See generally* App. Div., 2d Jud. Dept., Attorney Matters: Voluntary Resignation from the Bar of the State of New York, *available at* http://www.nycourts.gov/courts/ad2/attorneymatters_VoluntaryResignation.shtml. A lawyer who has not resigned from the bar remains subject to the Rules of Professional Conduct. We

4. As the ethics committee of the New York City Bar Association observed in N.Y. City 1994-5:

> The title "esquire" does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

5. At the same time, Opinion 1994-5 noted that the term "Esq." does not have precisely the same connotation as, for example, "Attorney-at-Law." Opinion 1994-5 also opined that lawyers acting in a nonlegal capacity—there, at a nonprofit organization in public relations, administration or communicating with members about the organization's positions—could use the term "Esq." without qualification, but identifying themselves as "Attorney-at-Law" might lead the recipient of a communication to conclude that the lawyer was acting in a legal capacity.

6. Rule 8.4(c) of the New York Rules of Professional Conduct prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." A New York lawyer is bound by the New York Rules of Professional Conduct, not only with respect to law practice but also with respect to nonlegal activities, both personal and professional. The ethical question thus is whether a retired lawyer's use of the term "Esq." violates Rule 8.4(c). Under New York's regulatory scheme, a lawyer who has opted for "retired" status remains a lawyer, even if his or her practice must be limited to unpaid legal work. Thus, to that extent at least, the use of the term "Esq." after his or her name is accurate.

Must a retired lawyer indicate limitations on the right to practice law?

7. A related question is whether a retired lawyer who uses the term "Esq." must indicate the restrictions on his or her right to practice or must indicate that he or she is "retired." In Rhode Island Opinion 96-24, the Rhode Island Ethics Advisory Panel opined that a retired lawyer placed on "inactive" status could use "Attorney at Law" or "Esquire" on letterhead "as long as the notation 'Retired' is included." New York's regulatory regime is different; New York has no "inactive" status. In any case, we conclude that whether a retired lawyer must indicate the limitations on his or her status, and how the lawyer must indicate those limitations, depends on the particular circumstances and, in particular, whether there is risk that the lawyer's clients or the public will be confused regarding that status.

8. This Committee and others have opined that when a lawyer engages in a non-legal business, it is not misleading for the lawyer to identify himself or herself as a lawyer – but a lawyer who does so must take care to avoid confusion. The lawyer must ensure that any relevant audience is not misled to believe that the lawyer is acting as a lawyer. Ethics committees have

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express no opinion about whether a person who has resigned from the Bar entirely can use the term "Esq."

recognized various ways to dispel any such confusion.

9. In N.Y. State 170 (1970), for example, this Committee opined that it was not improper for an employee of a professional search organization dealing primarily with placement of lawyers to use the term "esquire," on his or her business card, but we "recommended" that the card also indicate the employee's position with the business "so as to negate any possible interpretation that he is a practicing attorney or general counsel to his employer." In N.Y. State 832 ¶ 9 (2009), the Committee concluded that where a lawyer sold shelf corporations to persons who were not law-firm clients and advertised his or her status as a lawyer (such as by use of the term "Esq."), there was "a substantial risk that the purchaser of the shelf corporations will be misled as to whether an attorney-client relationship exists." The Committee also opined that "one way for a lawyer to avoid application of the Rules to the sale of nonlegal services would be to give the purchaser in writing [a] . . . disclaimer stating that no legal services are being rendered and that the protection of an attorney-client relationship does not exist."

10. Our opinion is consistent with the ethics opinions of several other committees outside New York. *See, e.g.,* California Opinion 1999-154 (lawyer acting as investment adviser and not rendering legal advice," but who used "Esq." on her promotional material and stationery, could avoid confusion by "an express disclaimer that [she] is not offering and does not intend to provide legal services or legal advice"); Maine Opinion 91 (1988) (the use of "Esq." after name of attorney shareholder on the letterhead of a business corporation did not suggest "an intent to mislead or deceive the public" and was permissible "for whatever prestige value it may hold"); D.C. Opinion 149 (1985) (lawyer employed by nonlegal governmental-affairs consulting business could use "Esq." provided no reasonable likelihood the public would be misled that the business is a law firm).

11. Here, we do not think the use of the term "Esq." by a retired lawyer indicates that he or she is acting as an attorney. Nor do we think a retired lawyer's use of the term "Esq." necessarily leads to any confusion about his or her status or role and thus a clarifying term or disclaimer is not always required. In many circumstances, such as in social interactions, a lawyer using the term is simply invoking "whatever prestige value [the term] may hold," as the Maine ethics committee put it. *Cf.* N.Y. State 105(a) (1969) (lawyer may identify his or her professional degree in a social context). There is nothing misleading in that context: the precise limitations on the lawyer's right to practice just do not matter. The same is true in many business contexts far removed from the rendition of legal advice.

12. In sum, just as a lawyer engaged in a non-legal business who may not provide legal advice to the customers of that business need only qualify the use of the term "Esq." if there is a risk of confusion, so here we do not think a retired lawyer needs to qualify his or her use of the term unless there is risk of confusion.

13. That risk could take a number of forms, including, for example, confusion over whether the lawyer is rendering legal advice to the customers of the business and confusion over whether the lawyer is acting as in-house counsel to the business. In each case, if a risk of such confusion

arises, the lawyer must take steps to indicate the limited nature of his or her practice. This could include, for example, using the term "retired" in conjunction with "Esq." or indicating that his or her practice is limited to performing legal services without compensation.

CONCLUSION

14. A lawyer who has taken "retired" status may use the term "Esq." on business cards and letterhead, but if there is a risk of confusion about his or her role, the lawyer must indicate the retired status or the limitations on his or her ability to practice.

(5-16)