FORMAL OPINION NO. 68*

The opinion of this Committee has been solicited as to the propriety of retaining the name of one of a law firm's members on the letterhead of the firm while the member serves as an administrative assistant to an incumbent United States Congressman. We assume that the duties of the position do not allow sufficient time for even the part-time practice of law.

The general subject matter has undergone a fairly rapid evolution over the recent past. Traditionally, the opinions of the American Bar Association have indicated that unless state statutes or local custom prohibit the retention of an officeholder's name in the firm name, such would not be unethical absent a conflict of interest or the representation of a client's interests before the institution containing the member of the firm. ABA Formal Opinion 315 (1965); ABA Informal Decision No. C-403; Informal Decision No. 620.

As pointed out in Informal Decision C-620, March 13, 1963, the rationale for the ABA opinions was grounded in the past and on former governmental practices in a more leisurely, less sophisticated, world.

> "Where members of the legal profession are elected to the United States Senate, to the House of Representatives, and to state and local offices, it is not uncommon for them to continue the use of their names in the firms of which they are members. Doubtless this practice has been established because these positions were at least originally considered part-time only. In recent years, of course, a United States Senator or Representative is in fact pretty well occupied in Washington, except for a limited vacation period."

It is well-known that the position of an administrative assistant to a United States Representative is an important, demanding and highly influential position. The administrative assistant is normally in charge of the day-to-day operation of the congressional office and provides

access to the Representative himself. He is, in fact, the alter-ego of the Representative. However, he is not an agent of the state and, therefore, not a public officer.

A public office is one created by law. The incumbent of such an office is able, by virtue of this office, to exercise some portion of the sovereign power of the state in the fulfillment of his duties.

We draw this distinction because DR 2-102(B) clearly states, in part, that:

> "A lawyer who assumes a judicial, legislative, or public executive or administrator post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm."

We do not believe that an administrative assistant to a United States Representative falls within the above definition. He is not elected by the people. He serves at the pleasure of the Representative, he exercises no public duties, introduces no legislation, votes on no bills, and has no definite tenure.

We conclude, therefore, that an administrative assistant need not remove his name from the firm name as long as he is a partner or principal of the firm and intends to return to the firm to engage in the practice of law following his tenure as administrative assistant.

Because of the importance of the position of an administrative assistant, however, and because the retention of the administrative assistant's name in the firm name may be misleading to the public, it is suggested that the letterhead of the firm, as well as other professional announcements, carry an explanatory note indicating that the administrative assistant is not active in the practice of law without, of course, indicating the present nature

of his activities. Since DR 2-102(B) cautions against the use of "misleading" or "trade names" the explanatory note can eliminate any implied representation that the administrative assistant is engaged in the active practice of law with the firm when, in fact, he is not.

DATED October, 1973.

---

*DR 2-102(B), as it presently appears in the Code of Professional Responsibility, also prohibits the use of such lawyer's name in "public communications by" the law firm and the reference to "trade names" no longer appears in the disciplinary rule. See also, I.S.B. Opinions No. 109 (November 30, 1981) regarding need to state the "nature of the activities" on a letterhead; 52 (July 29, 1971). Cf., I.S.B. Opinion No. 16 (April 13, 1959).