NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 622 - 9/10/91 (7-91)

Topic: Firm name; deceased partner; successor firm.

Digest: One of two law partnerships (but not both) resulting from dissolution of law firm may use in its firm name the name of a deceased founding partner of its predecessor firm if (1) there is sufficient continuity of membership, clientele and professional practice between the new firm and the original firm such that the new firm can reasonably and justifiably claim to be next in a continuing line of succession, (2) the new firm is authorized by law or by contract to do so, and (3) such usage would not be otherwise misleading to the public.

Code: DR 2-102(B);
EC 2-11.

QUESTION

A law firm known as "A, B & C" has dissolved. Lawyer A, one of the founders of the firm, has been deceased for many years. The six partners in the firm immediately prior to its dissolution have formed two three-member firms, which will continue to practice in the same general geographic area as did A, B & C. Can either new firm, or both, use Lawyer A's name in their firm name? If the answer is in the affirmative, would it be proper to list the name of the deceased partner separately on the new firm's letterhead, along with the dates of his membership in the predecessor firm?

FACTS

Lawyers A, B & C formed a partnership in 1948 which operated under a firm name that at all times included the name of Lawyer A, who died in 1959. The firm dissolved as of December 31, 1990. Immediately prior to its dissolution, the firm was known as "A, B & C," and had six partners and three associates. One retired partner, Lawyer B, was listed on the firm's letterhead as "Of Counsel." Effective January 1, 1991, two firms were formed. Firm 1 consists of three of the A, B & C partners, including Lawyer C. Firm 2 consists of the other three A, B & C partners, as well as Lawyer B, who will remain "Of Counsel," and one of the A, B & C associates.

No formal dissolution agreement was executed. Prior to dissolution, the A, B & C partners disseminated a letter to all clients advising them "that the firm of A, B & C will be dissolved as of December 31, 1990" and described the new combinations of former A, B & C partners, together with their addresses and telephone numbers. The letter did not, however, set forth a new firm name for either Firm 1 or Firm 2.[1] We are asked whether Firm 1, Firm 2, or both may properly use the name of deceased Lawyer A in their firm names.

OPINION

Many firms, large and small alike, continue to practice under firm names -- essentially trade names -- that include the names of their founders or other former partners, often long after those lawyers have passed away. They do so to perpetuate the good will associated with their institutional names, as well as to honor lawyers whose efforts and skills laid the foundation for their practice. The question here is whether, upon the dissolution of the firm or the withdrawal of a substantial number of partners, a resulting firm should be permitted to use the name of a deceased partner of the predecessor firm, or whether to do so would be ethically improper.

Resolution of this inquiry depends on whether Firm 1, Firm 2, or both, can properly claim that A, B & C was a "predecessor firm in a continuing line of

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1 The letter to clients further stated:

> Until further advised, if you call our present phone numbers your call will be directed to the attorney with whom you wish to speak.
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> We are parting on an amicable basis and with great respect for one another. Any combination of attorneys will be glad to continue working jointly for any client who wishes us to do so.

succession," within the meaning of DR 2-102(B).[2] In the past, this Committee has opined that the continued use of the name of a deceased partner in a firm name is not improper even where (as here) the firm name also includes names of partners who were not members of the firm contemporaneously with the deceased partner, N.Y. State 2 (1964), or where (as here) over the course of time other names have been added to or deleted from the firm name, N.Y. State 45 (1967), provided no special circumstances exist that render the usage misleading or deceptive.[3] "The justification for sanctioning this practice, in the absence of danger of deception, is that all of the partners contribute to the good will attached to a firm name, and that surviving partners should not be deprived of their right to a benefit to which they contributed their time, skill and labor." N.Y. State 279 (1973) (citing ABA Formal Op. 267 (1945)).

This Committee has not had occasion, however, to address the question posed here. Indeed, precedent regarding the use of names of deceased partners upon the dissolution of a firm, or upon the withdrawal of a substantial number of partners, is sparse. ABA Formal Op. 258 (1943), for example, held that upon the dissolution of the firm of A, B & C, Lawyer A being deceased, Lawyer B could not practice under a firm name incorporating the name of A:

> [W]hen B and C as the sole surviving partners dissolved partnership, the firm ceased to exist. Hence, it is that B's use of the firm name A & B is not in accord with the facts, is misleading and deceptive, and accordingly improper.

Accord ABA Formal Op. 318 (1967).

N.Y. City 725 (1948) declined to set forth any criteria for evaluating whether a firm is a continuation of a predecessor firm. Asked whether Lawyers B and D,

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[2] DR 2-102(B) provides, in pertinent part (emphasis supplied):

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . <u>a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.</u>

[3] These opinions interpreted Canon 33 of the Canons of Professional Ethics, which was adopted by the ABA in 1928 and remained in effect in New York through the 1960s. Canon 33 provided that "[t]he continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use." The "local custom" in this state has long been to continue to use the names of deceased or former partners in the firm name. N.Y. County 316 (1933); *see also* ABA Formal Op. 6 (1925); N.Y. County 67 (1915).

former partners in the dissolved firm of A, B, C & D, could practice under the name A, B & D, Lawyer A being long deceased, the Committee stated:

> B and D may properly use the firm name A, B & D only if the association between B and D will, in fact, be a continuation of the firm of which A was a member. The Committee does not have sufficient information to enable it to give an answer to that question of fact.

Another pertinent opinion is Illinois Op. 89-6 (1989), which involved an inquiry from four partners who, in 1976, had withdrawn from firm X, Y & Z's branch office in "City B" to form their own partnership. In 1986, the X, Y & Z firm opened an office in City B. The former partners asked whether they could properly state on their letterhead that their new firm was "previously affiliated with" X, Y & Z. The Illinois committee opined that there was no "continuing line of succession" between the original firm and the new firm:

> Although one or more of the individual lawyers who now make up the new entity may have been affiliated with the original firm as individuals prior to 1976, that new firm has never been affiliated with the old firm. To state otherwise would be misleading . . . .

A common thread in these opinions is that resolution of each inquiry depends on the factual determination whether the use of the deceased partner's name in a new firm would be misleading to the public. None of the opinions, however, sets forth any criteria for making that determination.

In our view, before a new firm can claim to be a successor of its immediate predecessor, it must be objectively apparent that there is a substantial continuity of membership, clientele and professional practice between the two firms. Specifically, in assessing continuity, the proportion of partners or lawyers from the predecessor firm who constitute the new firm, the similarity between the client base of the new firm and that of the predecessor firm, and the similarity between the nature of the legal services the predecessor firm was capable of rendering to its clients and the capabilities of the new firm, should all be taken into account. Other factors, such as the length of time the lawyers in the new firm were partners in the predecessor firm, whether any of the new firm's lawyers were name partners in the predecessor firm, and whether the new firm continues to practice at the same location as the predecessor firm, also have a bearing on the successorship determination.

Another factor to be considered is the technical form of the separation. While the distinction between the withdrawal of a number of partners from a firm, and the dissolution of the same firm and the immediate formation of two smaller firms, may

have no significance to the public, the form of the separation reflects the lawyers' own perception of the resulting firms' status. Indeed, the fact that a firm was "dissolved" and two new firms were formed may render neither a successor within the meaning of the Code. Similarly, terming a separation a "withdrawal" could be viewed as an admission by the withdrawing partners that those who remain comprise the successor firm.

We emphasize that none of these factors, viewed in isolation, is dispositive, and that the discussion above is not intended as an exhaustive listing of relevant criteria. Neither can the interplay among and relative weights assigned to the various criteria be assessed other than in the context of particular factual inquiries. Additionally, it may be appropriate to give certain of the factors set forth above greater or lesser weight depending upon their anticipated importance to the firms' general clientele.

With respect to the inquiry currently before us, we cannot determine whether Firm 1 or Firm 2 could properly hold itself out as a successor of A, B & C in accordance with DR 2-102(B). Even if all pertinent information were made available for our evaluation, it is not the function of this Committee to engage in the kind of detailed factual analysis that would be required to make the ultimate determination. The members of Firm 1 and Firm 2 must make independent determinations based on their own knowledge of the facts, to which the principles set forth above should be applied.

We do conclude, however, that it would be inappropriate for <u>both</u> Firm 1 and Firm 2 to use the name of deceased Lawyer A in their firm names. Where an individual lawyer is a partner in more than one firm and practices under his or her own name, *see* N.Y. State 231 (1972); N.Y. City 81-104, or where two lawyers with the same name practice in separate firms, *see* N.Y. City 82-27; Illinois Op. 736 (1981), the public is not misled into believing that a lawyer by that name is affiliated with the firm when such is not the case. Similarly, a living lawyer may always use his or her own name when joining or forming a new firm, regardless of whether the new firm is a successor of the lawyer's prior firm. In contrast, use of a deceased partner's name in a firm name connotes much more than the individual lawyers who constitute the firm from time to time. *See* N.Y. State 45 (1967); South Carolina Ethics Opinion, unnumbered (digested in Maru, <u>Digest of Bar Association Ethics Opinions</u>, No. 12738 (1979)); ABA Formal Op. 267 (1945).

Where a firm separates, and two new firms continue to practice in the same general geographic area, as appears to be the case here, it would be inherently misleading for both of them to practice under firm names that include the name of the same deceased member of the original firm. Otherwise, the deceased partner's name would be fragmented, a result antithetical to DR 2-102(B), as future generations claimed to be descendants of the original firm. It also follows that, if either Firm 1 or Firm 2 claimed to be the successor to A, B & C, it would

necessarily be claiming -- and would have to satisfy itself -- that the other firm could not reasonably and justifiably claim to be a successor. Thus, we conclude, with respect to the inquiry before us, that Firm 1 and Firm 2 cannot both properly utilize the name of Lawyer A in their firm names.[4]

Assuming either Firm 1 or Firm 2 were to conclude that it is entitled to use the name of Lawyer A, EC 2-11[5] reminds us that even a "bona fide successor" must also be legally[6] or contractually[7] entitled to use the name of the deceased lawyer in its new firm name. In that regard, we encourage law firms to address, in their partnership or shareholder agreements, the issue of continued use of the names of their deceased partners. In addition, EC 2-11 counsels that the name of the deceased lawyer should not be used if it could mislead the public in ways other than by potentially misrepresenting the status of the firm as a successor firm.

Finally, assuming all of the foregoing conditions are satisfied, and either Firm 1 or Firm 2 concludes that it is the successor to A, B & C and may properly use the name of Lawyer A in its firm name (and that the other firm may not), it would also be proper to list separately on the firm letterhead Lawyer A's name and dates of membership in the predecessor firm. N.Y. State 279 (1973).

CONCLUSION

Upon the separation of a law firm, whether by dissolution or withdrawal of a substantial number of partners, a resulting law firm may incorporate in its firm name the name of a deceased partner of the original firm only if it is a successor of the original firm, that is, if it is objectively apparent upon an evaluation of all relevant facts that there is a substantial continuity of membership, clientele and

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[4] This opinion should not be read as foreclosing the possibilities that two new firms could both use the name of the same deceased member of their common ancestor provided they practiced in disparate geographic areas, or that bona fide successor firms could agree among themselves to allocate the name or names of deceased partners of their mutual predecessor firm so that the new firms are not using the same deceased partner's name in their firm names.

[5] EC 2-11 provides, in pertinent part:

> For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby.

[6] *See*, *e.q.*, *Matter of Brown*, 242 N.Y. 1, 8-9 (1926) (Cardozo, J.); *Bailly v. Betti,* 241 N.Y. 22 (1925); *Mendelsohn v. Equitable Life Assur. Soc.*, 178 Misc. 152 (App. T. 2d Dep't 1942); *Weiner v. Weiner*, 88 Misc. 2d 920, 924-25 (Sup. Ct. N.Y. Co. 1976); *Bailly v. Betti*, 126 Misc. 45 (Sup. Ct. N.Y. Co. 1925) (Proskauer, J.); N.Y. Partnership Law § 80(1).

[7] The A, B & C partnership agreement contained no provision regarding the disposition of the firm name in the event of dissolution.

professional practice between the two firms. In addition, it would be improper in the circumstances presented here for both firms to use the name of the same deceased lawyer in their firm names, and thus if both reasonably and justifiably claim to be successors of the original firm, neither may use the deceased lawyer's name. Furthermore, use of the deceased lawyer's name must be legally or contractually permissible, and must not be misleading in ways other than by misrepresenting the status of the firm as a successor firm.