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Committee on Professional Ethics

Opinion 853 - (3/1/11)

Topic: Law firm name including name of partner who becomes inside counsel to a corporation.

Digest: A name partner who becomes inside counsel to a corporation will not be "retired" under Rule 7.5(b) so as to allow the firm to retain the partner's name in the firm's name. The firm also may not retain the partner's name in the firm's name if the partner's time working as inside counsel is considered an open-ended leave of absence, or if the partner becomes of counsel to the firm and minimizes his participation in the firm while working as inside counsel. Finally, if the partner is simultaneously associated with both the law firm and the corporation's legal department, the conflicts of one may be imputed to the other.

Rules: 1.7(a), 1.10(a)&(e), 5.1, 7.5(a)&(b).

QUESTION

1. Inquirer is a name partner of a law firm (the "Firm"). Another name partner (the "Partner") in the Firm "will transition to an in house corporate position shortly." The Partner has not yet withdrawn from the Firm, and Inquirer hopes that the Partner will remain a partner of the Firm. The Firm wishes to retain the Partner's name in the Firm's name, and Inquirer poses three questions about the permissibility of doing so:

A. May the Firm retain the Partner's name in the Firm's name because the Partner will be "retired"?

B. May the Firm retain the Partner's name in the Firm's name because the Partner may be treated "essentially on a leave of absence, notwithstanding that he continues as a partner and can come and go as he pleases"?

C. May the Firm retain the Partner's name in the Firm's name if the Partner becomes "of counsel" to the Firm and "minimizes his participation" in the Firm?

After addressing these questions, we raise a question of our own regarding whether conflicts of the corporation's legal department will be imputed to the Firm, and vice versa.

OPINION

2. The main rule governing questions about law firm names is Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules"), which provides:

> 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* . . . if otherwise lawful, *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. [Emphasis added.]

Question A: Will the Partner be "retired" under Rule 7.5(b)?

3. Rule 7.5(b) permits a law firm to "include in its name the name or names of one or more … retired members of the firm," so the first question is whether a Partner working in house at a corporation will be "retired" within the meaning of Rule 7.5(b). In N.Y. State 850 (2011), we opined that a lawyer who is still actively engaged in the practice of law as the general counsel to a corporation has not "retired" from the practice of law within the meaning of Rule 7.5(b). We therefore concluded that a law firm "may not use the name of a former partner in its firm name when the former partner departs from the firm but continues to practice law as general counsel to a corporation." For the same reasons, the Partner in the inquiry here will not be "retired" under Rule 7.5(b), and the Firm cannot retain his name in the Firm's name on that basis.

Question B: May the Partner be treated "as essentially on a leave of absence, notwithstanding that he continues as a partner and can come and go as he pleases"?

4. The next question is whether the Partner may be treated as if he were a partner essentially on "leave of absence" while he is working in house at the corporation, allowing the Firm to retain his name in the Firm's name on that basis. In N.Y. State 381 (1975), this Committee opined that the name of a professional legal corporation "may not properly include the name of [a] former partner who is practicing law with another firm." An in-house lawyer at a corporation is practicing with another law firm because Rule 1.0(h) defines "Firm" or "law firm" to include "the legal department of a corporation or other organization."

5. Moreover, while the Partner is working in house at the corporation, the facts suggest that the Partner would not be active in the Firm. In N.Y. State 346 (1974), we

opined that a law firm may not list on its letterhead an "inactive" partner practicing in another jurisdiction because "there is no proper purpose to be served by such a listing," and the "designation of an inactive partner would only tend to confuse the public as to the status and responsibility of the inactive member." Similarly, in N.Y. County 735 (2006), the committee opined that whether a lawyer's name may properly be included in a firm's name under the predecessor to Rule 7.5(b) involves a "qualitative" test of whether the lawyer is "sufficiently involved to provide the supervision required of the law firm collectively and himself individually as a manager of the law firm and partner" under DR 1-104 (the predecessor to Rule 5.1). That committee also concluded that if the lawyer in question "were not in fact practicing with the firm," then the name of the firm that includes the absent lawyer would violate the rule governing law firm names. We agree with that conclusion.

6. Accordingly, we conclude that the name of a partner who is not retired from the practice of law, but is practicing elsewhere and is not actively involved in the supervision and management of the law firm's practice, cannot be included in the firm's name.

7. We note that the inquiry here refers to "essentially . . . a leave of absence," but the facts suggest an open-ended departure to practice elsewhere with no particular expectation by the Firm that the Partner will ever return. We express no view on whether a partner who leaves a firm for a relatively brief period, or leaves in other circumstances with the expectation of returning, must always remove his or her name from the law firm's name.

Question C: May the Firm retain the Partner's name in the Firm's name if the Partner takes "of counsel" status and "minimizes his participation" in the Firm?

8. The third question is whether the Firm may keep the Partner's name in the Firm name if the Partner takes of counsel status and "minimizes his participation" in the Firm. As a threshold matter, there is no prohibition on retaining in a firm's name the name of a former partner who has retired and taken of counsel status. *See* ABA 90-357 (1990) (finding no risk of misleading the public in that situation). *See generally* N.Y. City 1995-9 ("There is no requirement that a firm's name consist exclusively of partners; a person's continuing 'of counsel' relationship with the firm is enough").

9. But the Partner here will not qualify as an "of counsel" lawyer while working full time as an in house lawyer at a corporation. An of counsel relationship is one in which "the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 793 (2006). The ABA Standing Committee on Ethics and Professional Responsibility has described the "core characteristic properly denoted by the title 'counsel'" as "'a close, regular, personal relationship.'" ABA 90-357 (1990). *See also* Rule 7.5(a)(4) ("A lawyer . . . may be designated 'Of Counsel' . . . if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.")

10. In an opinion closely on point, the Ethics Advisory Panel of the Rhode Island Supreme Court opined that a law firm could not continue to use the name of a partner who took a position as inside counsel and became "of counsel" to the firm. Rhode Island Opinion 94-65 (1994). The Panel stated that "if the lawyer is a named partner of the firm and is retiring to become 'of counsel,' the lawyer's name may be retained in the firm name. This is not true if instead of retiring, the lawyer is withdrawing to practice in another place, to take other employment or is taking a leave of absence." (Citations

omitted.) The panel reasoned that retaining the lawyer's name in the firm's name under the circumstances "connotes a partnership and is therefore misleading to the public." The Nebraska Lawyers' Advisory Committee recently reached a similar conclusion. In Nebraska Opinion 10-04 (2010), the committee opined that if a "retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney's name in the former firm's name is misleading to the public and therefore prohibited. This is true even if the attorney becomes 'of counsel' to the former firm after resuming practice." The committee reasoned that "[w]hen an attorney is actively practicing law and the attorney's name appears in a firm name . . . there is an implicit representation to the public that the lawyer is a partner or principal in that firm with fully shared responsibility for the firm's work."

11. We agree with the Rhode Island and Nebraska committees, and we therefore conclude that, as we understand the facts here, the Firm may not continue to include the Partner's name in the Firm's name if the Partner becomes of counsel and minimizes his participation in the Firm while working as inside counsel at a corporation.

Listing of predecessor firm

12. Although we have concluded that it would be inappropriate to retain the Partner's name in the Firm name under any of the alternative scenarios presented, the Firm may wish to consider whether it meets the criteria for listing, on its letterhead and professional announcement cards, "the names and dates of predecessor firms in a continuing line of succession," under Rules 7.5(a)(2), (4). If so, the Firm may note the former Firm name on its letterhead and announcement cards. However, even if the Firm may do so, under the facts here it may not use that former name as the Firm's name on an ongoing basis. *See, e.g.,* N.Y. State 622 (1991) (articulating factors for determining when a law firm may continue to use the name of a successor law firm).

Imputation of conflicts of interest

13. Finally, although Inquirer has focused on questions about retaining the Partner's name in the Firm's name, we perceive an additional issue regarding imputed conflicts of interest. Rule 1.10(a), New York's main rule on imputation of conflicts, provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

14. The term "associated" is not defined in the Rules. We have previously opined that "the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm, [but] it does not apply to all lawyers who are in any way 'connected' or 'related.'" N.Y. State 715 (1999) (whether a contract lawyer is "associated" with a law firm "depends on the facts and circumstances of the employment"). The touchstone is whether the lawyer "has general access to the files of all clients of the firm and regularly participates in discussions of their affairs." *Id.* Thus, conflicts may be imputed from the Partner to the Firm if, after he assumes the position of inside counsel, the Partner continues to be "associated" with the Firm, albeit on a basis that is too attenuated for him to be held out as either a name partner or of counsel.

15. More broadly, if the Partner is simultaneously associated for purposes of Rule 1.10(a) with both the Firm and the legal department of the corporation, the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e). For example, in N.Y. State 793 (2006), we considered the circumstance when an attorney ("L") simultaneously had an of counsel relationship with two law firms, XYZ and ABC. We concluded that if attorney X, a partner with the XYZ firm, was disqualified from a particular representation under the predecessor to Rule 1.7(a), then all lawyers associated with the firm XYZ, including L, were also disqualified, and the disqualification generally extended to the lawyers with whom L was associated in the ABC law firm. *See also* N.Y. City 2007-2 (discussing the imputation of conflicts in the context of a "secondment," such as a temporary assignment of a lawyer to a corporate client, and discussing how to safeguard against imputation); ABA 90-357 ("the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications"); D.C. Opinion 338 (2007) (a lawyer may be a partner in one firm and of counsel to another firm, but "any disqualification of a lawyer in either firm will be imputed to all lawyers in both firms," unless an exception applies).

CONCLUSION

16. The Partner, who is becoming inside counsel to a corporation, will not be "retired" under Rule 7.5(b), and it would therefore be improper to retain the Partner's name in the Firm's name on that basis. Nor may the Firm continue to retain the Partner's name in the Firm's name if the Partner is considered to be on an open-ended leave of absence, or if the Partner takes of counsel status and minimizes his participation in the Firm while working elsewhere as inside counsel. If the Partner is simultaneously "associated" with both the Firm and the legal department of the corporation, the conflicts of the each one will generally be imputed to the other, and the conflict-checking systems of both the corporation's legal department and the Firm need to take the other's conflicts into account.

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