NYCLA COMMITTEE ON PROFESSIONAL ETHICS

OPINION No. 740

Date Issued: October 7, 2008

Topic

Use of the title "partner" in connection with law firm practice.

Digest

Compliance with DR 2-102(C) requires that attorneys holding themselves out to the public as partners, and the law firms in which they practice, be in fact partners under New York partnership law and their individual partnership agreements.

Code Provisions

DR 1-104(A); EC 2-13; DR 2-102(C)

Question

When can a lawyer, and his or her law firm, use the title "partner" in dealing with clients and the public?

Opinion

Today, it is common practice for law firm partnerships to be structured in multiple tiers such that attorneys within each tier possess different managerial rights or rights to share in firm profits, or may earn a fixed income and possess no equity stake in the partnership at all. Within the law firms utilizing these structures, certain attorneys may be referred to as, among other things, "non-equity partners" or "contract partners," but to the public, including the courts, the law firms simply refer to them as "partners." Such practices may implicate the ethical rules regulating attorneys' and law firms' use of the title of "partner" by raising questions about those who may be partners in title only. As discussed below, the New York Code of Professional Responsibility (the "Code") prohibits a lawyer from holding himself or herself out to the public as a partner unless the lawyer is in fact a partner. The Code, however, leaves the term "partner" undefined, and because supplying a definition requires legal interpretation, the NYCLA Professional Ethics Committee (the "Committee") is without jurisdiction to give the term meaning and does not do so in this opinion. The Committee may interpret provisions of the Code, and, in exercising its authority to do so, is of the opinion that the Code requires attorneys holding themselves out to the public as partners, and the law firms in which they practice, be in fact partners under New York partnership law and their individual partnership agreements. In the absence of a definition of a partner under the Code, the Committee finds that it is sufficient if

New York lawyers satisfy the definition of a partner under New York law.[1] Further, the Committee considers whether use of the title of "partner" in the context of contemporary law firm practice may constitute a misrepresentation to the public.

Code Provisions

Several provisions in the Code address whether lawyers who misleadingly hold themselves out to the public as partners are engaging in unethical conduct. Under the Code, "[a] lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners." DR 2-102(C). The Code imposes obligations on law firms as well, requiring them to make "reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." DR 1-104(A). Indeed, EC 2-13 counsels that "[i]n order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. A lawyer should not hold himself or herself out as being a partner or associate of a law firm if not one in fact."

Precedent

The above provisions have been most often applied in circumstances where lawyers who share office space, but have no formal legally recognized organizational structure, nonetheless seek to imply that they constitute a partnership through the use of signage, letterhead (*e.g*., Doe and Roe), or by some other public means. Such practice consistently has been found to mislead the public in violation of DR 2-102(C) or, in other states, a substantially similar provision.[2] This Committee determines that these provisions also reach law firms' and attorneys' use of titles to denote status, such as "partner." At least two ethics opinions of other states interpreting substantially similar provisions appear to reach a similar conclusion. First, a professional ethics committee in Pennsylvania found that including the name of a "non-shareholder associate" in the firm name would be misleading because it would suggest that "the non-shareholder attorney has some interest in the professional corporation when no such interest exits."[3] In the Pennsylvania

---

[1] Upon the recommendation of the Committee on Standards of Attorney Conduct ("COSAC"), the New York State Bar Association has proposed revisions to the Code. Rule 7.5(e) of the Proposed New York Rules of Professional Conduct ("Proposed Rules") states that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact." Commentary to Rule 7.5(e) states that the rule "is substantially the same as NY DR 2-102(C)." The Proposed Rules, unlike the current Code, contain a definition of a partner. Rule 1.0(i) defines "partner" as "denot[ing] a member of a partnership, a shareholder in a law firm organized as a professional corporation or a member of an association authorized to practice law." Commentary to the definition indicates that it is identical to the definition contained in ABA Model Rule 1.0(g).

[2] This Committee has previously found as such stating that "[l]awyers who merely share office space and who do not share joint responsibility and liability for their cases are not partners and may not practice under a firm name." NYCLA Op. 680 (1990).

[3] Pa. Eth. Op. 90-171, 1990 WL 709680 (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. 1990) (interpreting the Pennsylvania Rules of Professional Conduct, Rule 7.5(d), which states that "[l]awyers should not state or imply that they practice in a partnership or other organization unless that is the fact"). Unlike the Code, the Pennsylvania Rules of Professional Conduct, Rule 1.0(g), defines the term "partner" as "an equity owner in a law firm." Thus, Pennsylvania regards equity ownership as a necessary component for ethical use of the title of partner and it is likely

opinion, unlike that where two independent lawyers sharing office space seek to hold themselves out as a partnership, the necessary underlying organizational structure was in place. The issue was that the organization sought to hold out a "non-shareholder associate" as a member of the organization, not that independent attorneys sought to imply the existence of an organization where there was none. Second, a South Carolina professional ethics committee, in finding that a sole practitioner could not include the name of an associate in the firm name (*e.g.*, Doe and Roe), stated that such practice would also cause the associate to run afoul of the disciplinary rules because he would be "holding himself out as having a partnership with the use of the purported firm name."[4] Thus, these other states' opinions found that a lawyer's inaccurate denotation of his or her status within an organization runs afoul of the disciplinary rules.

Moreover, the courts appear to agree that New York's DR 2-102(C) may reach a lawyer's use of the title of "partner." At least two courts in New York, in determining whether an attorney was a partner or an employee of a firm, have noted that using the title "partner" when one is in fact an employee of a firm may violate DR 2-102(C). First, the Second Circuit relied in part on attorneys' representations to the public suggesting they practiced as a partnership when it found that a law firm in a pre-incorporated state was a "collective entity." The court stated that "[t]hese public representations [(in letterhead, business cards, and in 'blue back[s]' for court papers)] are entitled to weight as it would have been a violation of professional ethics for [them] to have held themselves out as members of a law firm were this not so." *In re Two Grand Jury Subpoenas Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 72 (2d Cir. 1986) (citing ABA Model Code of Professional Responsibility, DR 2-102(C) (1969)). Second, in *Sands v. Geller,* the district court noted that "it is a misrepresentation to the public, clients and the Courts and professionally improper to hold a lawyer out as a full member of a partnership, who in fact is merely an employee," when it found that a lawyer was an employee and not a partner, and therefore not a necessary party to an action for dissolution of a law partnership. 321 F. Supp. 558, 561 n.1 (S.D.N.Y. 1971) (citing Code of Professional Responsibility, DR 2-102(C) and EC 2-13).[5]

Historical Background

Prior ethics committee opinions and professional responsibility commentators suggest that the prohibition on use of the title of "partner" when one is not a partner arose from the public's belief that a lawyer using that title had attained a high level of professional achievement and stature and that, as a partner, that lawyer shares liability with the law partnership. Professor

---

that the "non-shareholder associate" could not be called a partner regardless of any other rights and obligations with respect to the organization that that attorney may have.

[4] S.C. Adv. Op. 85-12, 1985 WL 303434 (S.C. Bar. Eth. Adv. Comm. 1985) (interpreting DR 2-102(C) of a previous version of the South Carolina Code, which in pertinent part stated that "[a] lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are, in fact, partners").

[5] The Wisconsin Supreme Court, under a provision similar to DR 2-102(C), has suggested the same. Specifically, the court found a lawyer was subject to discipline for improperly holding himself out as a partner where the lawyer sold his practice to another lawyer but continued to practice under a firm name containing both his name and the name of the lawyer to whom he sold the practice though both lawyers denied the existence of a partnership. *See In the matter of disciplinary proceedings against Miles Laubenheimer*, 335 N.W.2d 624 (Wis. 1983).

Roy Simon reasons that the public "may believe that a person with the title 'partner' has been carefully chosen by the other partners for a long term relationship . . . based on merit and good character" and that "the partners will share liability and responsibility for the partnership's work." *Simon's New York Code of Professional Responsibility Annotated,* at 255 (2007 ed.). The latter factor, presumed shared liability, has been viewed as indicating to the public that one who may be held personally liable with the partnership will have greater motivation to provide quality lawyering than one who does not share liability with the partnership.

Early opinions of the American Bar Association on this issue suggest that the rule may have been intended to protect the public from misunderstanding the status of lawyers with whom it deals. In a 1934 opinion interpreting a predecessor to DR 2-102(C), the ABA ethics committee stated that it was a misrepresentation to the public for a group of attorneys to hold themselves out as a partnership "when one member of the group employs the others at fixed salaries and no partnership, in fact, exists." The committee reasoned that

> [i]t is a well-known fact that ordinarily a lawyer is not taken into a law partnership, even as a junior member, until he has acquired a standing at the bar through practice and experience and demonstration of his professional qualifications and ability. To hold a lawyer out as a full member of a partnership, who is merely an employee, dignifies him with a professional position which he has not attained.

ABA, Formal Opinion 106 (1934). One year later, the ABA ethics committee stated that "[a]n agreement between attorneys to use a partnership name for court appearances only, when in fact no partnership exists, is improper" and noted that such conduct "may result in deception of the court." ABA, Formal Opinion 126 (1935).[6]

Contemporary Use of the Title of Partner

Public use of the title of "partner," for a lawyer who may be referred to internally as a "non-equity partner," or a "contract partner," or by some other description, may not implicate the Code's traditional concerns about lawyer titles. The underlying purpose for the prohibition appears to have been to ensure that the public, when dealing with a law partner, could safely believe that the partner was professionally accomplished and personally shared liability with his or her law firm. The Committee believes that in light of modern changes in the practice of law, neither of these considerations supports the prohibition.

First, regarding whether use of the title of "partner" connotes professional accomplishment, from the public's perspective, all partners' actions have an impact on their respective firm's reputation in the same way, regardless of any individual partner's rights and obligations within the partnership. Indeed, the New Jersey Supreme Court acknowledged as

[6] Consistent with the ABA opinions on predecessors to DR 2-102(C), in 2006, this Committee found that a foreign lawyer admitted to practice in New York who, because of issues relating to his immigration visa, was not permitted to possess partner status, could not list his name in the firm's title without clarification. The Committee stated that doing so would "generally convey that such attorney is a partner," which is prohibited under DR 2-102(C). NYCLA, Op. 735 (2006).

much in its affirmation of a state ethics committee opinion finding that lawyers practicing as employees of an insurance company may not use a firm name consisting of the senior attorneys' names (*e.g.*, A, B & C) on the basis of connotations associated with a law firm partnership (*i.e.*, its organizational structure), not on the senior attorneys' lawyering ability, which the court described as "first-class." *In re Weiss, Healey & Rea*, 109 N.J. 246, 254 (1988). Specifically, the court stated that from a law firm's name (and by implication, from an attorney's use of the title of partner) the public "infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the 'kind and caliber of legal services rendered.'" *Id*. at 252. Though it could have, the court did not state that the public makes any inferences about the "kind and caliber of the legal services rendered" from distinctions between the rights and obligations of partners within a law firm. Nonetheless, law firms do not take lightly the decision whether to permit their attorneys to use the title of "partner." They certainly consider a lawyer's skill and stature in making promotion decisions. Moreover, the decision to allow an attorney to use the title "partner" is often made for business-related reasons (based upon that lawyer's book of clients, for example), and not solely on the basis of the prospective partner's lawyering ability. Thus, under these circumstances, whether one is a partner is not always an indication of one's lawyering ability.

Second, whether a lawyer shares liability with his or her firm may have little bearing on that lawyer's motivation to provide firm clients with quality legal services. Most modern law firms are structured in a manner such that individual partners may not be held personally liable together with their firm. In fact, an ABA ethics committee opinion condoning the use of a limited liability partnership for the practice of law where permitted by applicable law stated that "the limitation of liability achieved through practice in such a partnership does not violate the Model Rules." ABA, Formal Opinion 69-401 (1996).[7] Thus, for those lawyers, joint or vicarious liability provides no additional motivation to provide quality legal services to the public.

Accordingly, the Committee believes that holding oneself out as a "partner" where one is satisfied that he or she is in compliance with New York partnership law and with his or her partnership agreement does not misrepresent to the public either that lawyer's lawyering ability or that lawyer's (or that lawyer's firm's) exposure to liability in the event of malpractice.

Ethically permissible designation by a firm of a lawyer as its "partner" should in substantial part be a factual determination. That determination should depend on the degree to which clients and other third persons may safely rely upon the acts of that lawyer being recognized by the firm as those of a partner. If the lawyer is provided with the emoluments of partnership (*e.g.*, the power to bind the firm to the same degree as other partners both contractually and otherwise and as the manager of matters assigned to him or her by the firm), as a matter of professional ethics, the private financial arrangements as to the lawyer's compensation should be irrelevant. Moreover, a lawyer who is in fact treated as a partner under

[7] Similarly, a Michigan ethics opinion stated that use of a limited liability partnership structure may eliminate vicarious liability of partners in certain circumstances and that lawyers practicing in such an organization "do not have any ethical obligations to disclose the details of their business arrangement . . . ." State Bar of Mich., Eth. Op. R-17 (1994).

the standards of the Partnership Law is justifiably characterized as a partner regardless of whether the lawyer is paid a fixed amount or a percentage of net income.

Conclusion

The Committee recognizes that where a lawyer represents to the public that he or she is a partner in the absence of any underlying organizational structure (*e.g.*, a partnership or limited liability company), such conduct would likely be a misrepresentation in clear violation of, among other regulations, DR 2-102(C). The Committee also recognizes that where a lawyer in a law firm is an associate or staff attorney, but conveys to the public that he or she is a partner, this too constitutes a misrepresentation. If, however, a lawyer, together with his or her law firm, conveys to the public that he or she is a partner, such conduct does not misrepresent that lawyer's skill or exposure to personal liability to the public, but may nonetheless violate DR 2-102(C). Therefore, it is the Committee's opinion that compliance with DR 2-102(C) requires that attorneys holding themselves out to the public as partners, and the law firms in which they practice, be in fact partners under New York partnership law and their individual partnership agreements. In the absence of a definition of a partner under the Code, the Committee finds that it is sufficient to satisfy the definition of a partner under New York law.