

Ethics Advisory Opinion 20-03

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

S.C.R. Prof. Conduct: Rules 7.1, 7.5(a), and 7.5(e)

Factual Background: A, B, C & D, P.A. is the name of an existing law firm. A is a retired member. B is currently the 100% equity owner of the firm. C & D are non-equity members of the firm who have each practiced with the firm for more than 10 years.

Lawyer B intends to retire. Lawyer C will go to work for another firm at a separate location in a nearby city contemporaneous with B's retirement. Upon B's retirement, Lawyer D intends to purchase the assets (except for certain accounts receivable and certain contractual rights that are not assignable) of A, B, C & D, P.A. ("Prior Firm") and operate a new law firm organized as a new professional association. Lawyer D would like to name the firm A, B, & D, P.A. ("New Firm"). D will likely be the only attorney for a short period of time at which point Lawyer E will join the firm. The new firm will have the same address, physical location, phone number, website URL and will retain two or more of the employees of the prior firm. Lawyer D will continue to represent B's current clients in current ongoing and future matters should the clients elect to retain New Firm's services (via formal substitution of counsel). The new firm will provide substantially similar services in the same practice areas as the prior firm. Prior Firm will be dissolved, and Prior Firm will not be engaged in the practice of law. The only activities of Prior Firm will be winding up and collection of certain accounts receivable and payment of outstanding expenses.

Question Presented:

May Lawyer D utilize the names of retired lawyers A and B in the New Firm name (A, B, & D, P.A.) and be in compliance with Rules 7.5 and 7.1 of the Rules of Professional Conduct? Stated differently, is New Firm considered a "bona fide successor" firm to Prior Firm as discussed in Ethics Advisory Opinions 79-06 and 75-01 such that the trade name of the firm can include the names of retired or deceased members? Is the analysis different if Lawyer B serves in an "of counsel," non-equity role for a short time for New Firm prior to B's retirement?

Summary: Lawyer D may use the names of retired lawyers A and B in the new firm name, formed subsequent to B's retirement. Pursuant to Rules 7.5 and 7.1, new firm will be a bona fide successor firm.

Response: The Committee chooses to opine on this matter in an effort to bring current the opinions decided under the prior sets of canons and rules. Given that most recent opinion relied upon in this regard is from 18 years ago, and the prior opinions to that are from 40 years ago, offering the Bar an analysis using the most current Rules of Professional Conduct was prudent. While an update may apply to the Rule numbers, the reasoning in this matter has remained constant.

Rule 7.5, Firm Names and Letterheads, refers to Rule 7.1 to ensure that a name is not misleading. Here, a partner has already retired, a partner is retiring and a non-partner is leaving. The remaining current non-partner will be buying the assets of the firm, and would like to use the name of the two retired partners and her own name in the new firm name. The committee assumes, for the purposes of this analysis, that the lawyer posing the question to us has the legal right to use the names of the two retired partners.

In a 2002 opinion, this Committee opined that, “a law firm may continue to use the name of a deceased or retired partner if the firm is a bona fide successor to the firm of which the deceased or retired partner was a member.” (02-19).

Thus, the question is, “what determines the bona fides of the successor?”

Advisory Opinion 75-01 emphasizes that lawyers who desire to use a firm name that includes the names of deceased or retired partners, may do so only "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." The Committee there reiterated that the use of a deceased partner's name as part of a continuing line of succession was permissible; however, if there is a contemporaneous separation of lawyers practicing in that firm, and one or more members of that firm withdraw from it, only those who stay with the firm may continue to use the deceased partner's name. Here, our purchaser has been a member of the firm, in the broad sense of the word, for a decade, and will be a part of the continuing line of succession.

Additionally, drawing from the 2002 opinion, the rationale for continuing a law firm remains applicable:

All of the partners have by their joint and several efforts over a period of years contributed to the good will attached to the firm name. In the case of a firm having wide-spread connections, this good will is disturbed by a change in the firm name every time a partner dies, and that reflects a loss in some degree of the good will to the building up of which the surviving partners have contributed their time, skill and labor through a period of years. To avoid the loss, the firm name is continued...” (Ethics Adv. Opinion 02-19).

We also commend to the inquirer review of Comment 1 to Rule 7.5, and we suggest that Attorney B remaining at the firm subsequent to purchase of the firm by the inquirer, and prior to Attorney B’s retirement, would likely increase the “bona fides” of the firm name, as both will have worked together under the newly established firm name prior to B’s exit by retirement, therefore providing a “continuing succession in the firm’s identity.” Additionally, we caution the inquirer to take care in not misleading the public. We suggest the consideration of asterisks, or some other identifier that the other name partners are retired, as that becomes the case. For further guidance, we refer the inquirer to SC Ethics Advisory Opinion 05-19.