Enduring Ethics Opinions: Opinion #77 (Inclusion of Deceased Partner on Office Letterhead) and #86 (Firm Name including "Of Counsel") - By David L. Herzer Jr., Esquire - Professional Ethics Commission

In 1987 and 1988, the Professional Ethics Commission addressed the ethics of listing attorneys in the name of a law firm or on letterhead in the event of a named attorney's death and when an attorney assumes "of counsel" status. Opinion #77, March 4, 1987 (deceased attorney); Opinion #86, August 31, 1988 ("of counsel" role of attorney). The factual scenario addressed in Opinion #77 involved a law firm named "A, B, C & D" in which Attorney C had passed away. The firm wanted to know whether and on what conditions the Bar Rules permitted listing Attorney C in the law firm name and including Attorney C's name in the list of attorneys on the letterhead and whether the firm was required to identify all other deceased partners with the same surname. In Opinion #86, Lawyer E was a long-time solo practitioner looking to reduce the client and administrative workload. Lawyer F proposed assuming "of counsel" status at Lawyer F's separate firm, where Lawyer E would provide consultations at the office of Lawyer F. Lawyer F wanted the Commission to advise whether it would be ethically proper to name the firm "E & F."

The Commission answered these questions by consulting then applicable Maine Bar Rule 3.9. At the time, the Rule provided, in relevant part,

a. False Advertising Forbidden. A lawyer shall not, on behalf of the lawyer or any affiliated lawyer, knowingly use, or assist or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. A public communication is any communication, through mass media, direct mail, or other means including professional cards, announcements, letterheads, office signs, and similar accoutrements of a law practice.

b. False Advertising Defined. Without limitation, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim that:

1. Contains a material misrepresentation of fact or law;
2. Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
3. Is intended or is likely to create an unjustified expectation;
4. Violates Rule 3.8;
5. Is intended, or is likely, to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official; or
6. Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived thereby, or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive.

Me. B. R. 3.9(a) & (b).

In Opinion #77, the Commission concluded that Rule 3.9 permitted retaining the deceased partner's name in the firm's name. It was not misleading or deceptive because, traditionally, law firm names do not change when a named partner dies, so the appearance of the lawyer's name did not imply that the partner still was an active member of the firm. However, listing lawyers associated with a firm on the firm's letterhead, on business cards etc. implied that the lawyers listed were in active practice. In order not to deceive or mislead the public, deceased members must be identified in some form, e.g., John Smith (1900 - 1987). The rationale for identifying those listed attorneys who were deceased did not, however, require the firm to list all deceased partners with the same surname as an attorney whose name was listed.
In Opinion #86, it was decided that the firm name "E & F" was not misleading or deceptive under the meaning of then applicable Maine Bar Rule 3.9, but under very specific assumed facts:

- the relationship of the two lawyers was more than mere office sharing;
- to the extent Lawyer E practiced law, that practice occurred in conjunction with Lawyer F;
- Lawyers E and F consulted with each other on a continuing basis and otherwise cooperated with each other;
- Lawyers E and F shared some significant level of mutual responsibility for providing professional services to clients of the newly formed firm; and
- clients of the individual lawyers were considered clients of the new firm for purposes of conflicts of interest, confidences, and secrets.

The Commission was divided, and the dissenting opinion of one member was expressly noted. The concern was that the new firm name created an unjustified expectation that the semi-retiring attorney, Lawyer E, was a partner actively involved in the firm and responsible for partnership debts, thereby violating Maine Bar Rule 3.9(b)(3).

The results under today's Maine Rules of Professional Conduct would be the same as the results under the abrogated Maine Bar Rule 3.9. Rules 7.1 and 7.5 address the specific facts presented in the 1987 and 1988 opinions of the Commission:

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." M. R. Prof. Conduct 7.1.
- "A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." M. R. Prof. Conduct 7.5(a).
- "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." M. R. Prof. Conduct 7.5(d).

The only difference between the current Maine Rules of Professional Conduct applicable to these facts and the former Maine Bar Rule underlying Opinions #77 and #86 is that the Maine Rules of Professional Conduct are more generally stated and do not include the enumerated examples of false advertising appearing in Maine Bar Rule 3.9(b)(1)-(6).

Several other Maine Rules of Professional Conduct also are implicated by the facts presented to the Commission in Opinions #77 and #86. The duty to communicate honestly with third parties, generally and not just in the firm's name or letterhead, is addressed in M. R. Prof. Conduct 4.1, "Truthfulness in Statements to Others." The mutual responsibility incumbent on named lawyers in a firm for providing professional services to clients mentioned generally in Opinion #86 is delineated more specifically in M. R. Prof. Conduct 5.1, "Responsibilities of Partners, Managers, and Supervisors"; M. R. Prof. Conduct 5.3, "Responsibilities Regarding Nonlawyer Assistants"; and M. R. Prof. Conduct 5.7, "Responsibilities Regarding Law-Related Services."