

## Who May Use The Title “Partner?”

BY ROY SIMON

New York’s Ethical Consideration 2-12 (as renumbered in November 2007) states: “In 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 ....” DR 2-102(C) provides: “a lawyer may not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.” What is the meaning of the phrase “are in fact partners”? More specifically, when may a lawyer use the title “partner,” and when may a law firm describe a lawyer as a “partner”?

On October 7, 2008, the New York County Lawyers association Committee on Professional Ethics issued NYCLA Ethics Op. 740 to address this issue. Because New York law firms use a wide variety of organizational structures, including traditional partnerships, limited liability partnerships, and professional corporations, and because the current economic freefall may cause many firms to cut down on the number of lawyers who are made partners, Opinion 740 grapples with issues that are likely to become increasingly important. In this column, I will describe Opinion 740 and its reasoning, and provide a running commentary on it.

### **Background: Why is this opinion necessary?**

The NYCLA ethics committee explained why an opinion was needed on the question of who may use the title “partner.” Many law firm partnerships today are structured in “multiple tiers.” Attorneys in the different tiers have different rights. Attorneys in some tiers may possess greater managerial rights than attorneys in other tiers. Attorneys in higher tiers may have rights to a greater share of the firm’s profits than attorneys in lower tiers. Attorneys in some tiers may earn a fixed income and possess no equity stake in the partnership at all. Internally, law firms utilizing these multi-tier structures may refer to certain attorneys as, “non-equity partners” or “contract partners.” In public, however – including in the courts – law firms typically refer to these non-equity partners or contract partners simply as “partners.”

Given that DR 2-102(C) “prohibits a lawyer from holding himself or herself out to the public as a partner unless the lawyer is in fact a partner,” describing a non-equity or contract partner to the public simply as a “partner” may implicate the ethics rules, “raising questions about those who may be partners in title only.”

Unfortunately, the Code does not define the term “partner.” Moreover, because defining the term “partner” would require legal interpretation of New York partnership law, the NYCLA Committee concluded that it was “without jurisdiction to give the term meaning ....” (Ethics committees have jurisdiction to interpret provisions of the Code of Professional responsibility but not to decide questions of law. The definition of the term “partner” is a question of law.)

In NYCLA Op. 680 (1990), the ethics committee concluded that lawyers “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” (emphasis added). But defining who is not a partner is easier than defining who is a partner, and no New York ethics committee has yet defined the term “partner” as it relates to the Code.

Some ethics codes do offer definitions of the term “partner”. In 2002 the ABA added a definition of the term to the ABA model rules of Professional Conduct. According to model rule 1.0(g), the term “partner,” denotes “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.” The N.Y. State Bar has recommended this definition to the appellate Divisions, which are now considering it, but they have not yet adopted it. Pennsylvania has taken a different approach. under Rule 1.0(g) of the Pennsylvania rules of Professional Conduct, the term “partner” means “an equity owner in a law firm.” As the NYCLA ethics committee observed, “Pennsylvania regards equity ownership as a necessary component for ethical use of the title of partner and it is likely 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.”

Although the Code lacks a definition of the term “partner” and the NYCLA ethics committee lacked authority to supply one, the committee reached an abstract resolution of the problem – “The Code requires [that] attorneys holding themselves out to the public as partners ... be in fact partners under New York partnership law and their individual partnership agreements.” How did the NYCLA arrive at this resolution? And does it really offer any solution except to return us to the law of partnership?

### **The history of DR 2-102(C)**

The committee speculated that the prohibition on holding oneself out as a partner when that is not a fact was originally “intended to protect the public from misunderstanding the status of lawyers with whom it deals.” Specifically, the prohibition on use of the title “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.” The committee found evidence of this in ABA Formal Opinion 106 (1934) (interpreting the predecessor to DR 2-102(C) in the old Canons of Professional Ethics). In that opinion 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 ABA committee reasoned as follows:

[O]rdinarily 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.

The following year, in ABA Formal Opinion 126 (1935), the ABA ethics committee stated: “an agreement between attorneys to use a partnership name for court appearances only, when in fact no partnership exists, is improper,” in part because such conduct “may result in deception of the court.” To reinforce these old ethics opinions, the NYCLA committee quoted from the 2007 edition of my book on the New York Code of Professional responsibility. Specifically, the committee noted my theory 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.”

### **New York case law**

Turning to New York authorities, the NYCLA ethics committee relied on two New York federal cases indicating that DR 2-102(C) may inhibit an individual lawyer’s use of the title “partner.” Both courts noted that the use of the title “partner” by a lawyer who is only an employee may violate DR 2-102(C). The cases are interesting in their own right, so I will describe them in considerably more detail than the NYCLA ethics committee did.

The first New York case, *Sands v. Geller*, 321 F. Supp. 558 (S.D.N.Y. 1971), began when Sands filed suit in state court against Geller and Webb seeking dissolution of the law firm partnership and seeking an accounting. Geller removed the case to federal court based on diversity jurisdiction, but Sands moved to remand on grounds that Webb, the other defendant, destroyed diversity. In particular, Sands alleged that Webb was designated as a “special partner” who “agreed to lend his name to the firm” – but Sands also alleged that Webb “was to receive no shares of profits nor suffer losses and was to receive a stipulated drawing in return for his services.” Because a partner is an appropriate defendant in a suit for dissolution and accounting but a mere employee is not, the question was whether Webb was a partner or an employee.

Sands pointed out that Sands, Geller and Webb had all signed and filed a Business Certificate for Partners in the office of the New York County Clerk certifying that they were conducting business as members of a partnership under the name “Sands, Geller and Webb,” and that the firm had used, this name in court appearances and with clients. The district court, however, was not fooled. It stated:

It is perfectly plain that Webb was merely a salaried employee and was not a partner .... Within the organization, Webb undertook no responsibility of partnership. He had no share in the profits or losses; he made no contribution to the capital; his services were compensated on a salaried basis. In their submission, Geller’s attorneys confirm the status of Webb as alleged by Sands; they say, ‘Harold Webb ... was not a partner of Sands and Geller ... Webb cannot, by any stretch of the imagination, be a partner; he is nothing more than a salaried employee.’

As for the Business Certificate, the court had sharp words, stating that “use of a firm name and the filing of a Business Certificate, conveying as they did, a partnership status for Webb, were a euphemism, an unwarranted representation to the public, clients and the Courts.” The Business Certificate and the use of the firm name Sands, Geller, and Webb, the court continued, “did not elevate Webb to a partnership status so far the litigating parties herein are concerned. Lawyers may not hold themselves out as a partnership when no real partnership exists in fact.” In a footnote, the court pointed out that under DR 2-102(C) and former EC 2-13 (now EC 2-12), 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. ... The firm style used here falsely suggested the existence of a partnership when there was no such partnership.”

The *Sands* case helps slightly to understand the purpose of DR 2-102(C) – to avoid “an unwarranted representation to the public, clients and the Courts” – and makes clear that a lawyer is an employee rather than a partner if he has “no share in the profits or losses,” makes “no contribution to the capital,” and is “compensated on a salaried basis.”

The second case discussed by the NYCLA ethics committee, *In re Two Grand Jury Subpoenas Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69 (2d Cir. 1986), arose in a grand jury investigation of a personal injury law firm referred to before its incorporation as “The Law Practice of John Doe”, and after its incorporation as “Doe and Roe, P.C.”. Specifically, the grand jury was investigating possible criminal tax law violations in connection with the payment of settlements and awards to personal injury clients whom the firms represented on a contingent-fee basis. The investigation focused on “the possible manipulation of the flow of money from litigation and settlements to the firms’ escrow accounts and the ultimate distribution of the money to clients, their creditors, and the firms’ own accounts.” The grand jury issued subpoenas directing the firms to produce records relating to fee arrangements with its clients and disbursements on their behalf. Invoking the fifth amendment privilege against self-incrimination, the firms refused to produce cancelled checks drawn on the escrow accounts of the firm, retainer agreements, closing statements, correspondence relating to client recoveries, invoices and receipts for disbursements, and records relating to liens upon funds received on behalf of clients. It was clear that the fifth amendment did not protect the subpoenaed records of the post-incorporation law firm (Doe and Roe, P.C.) because “[n]o artificial organization may invoke the personal privilege against self-incrimination.” But the district court granted the motion to quash the subpoena directed to the pre-incorporation firm. The government appealed.

The key question on appeal was whether the pre-incorporation law firm was a solo practice, in which case John Doe as an individual could claim the protection of the fifth amendment, or was instead a partnership (or other “collective” or “artificial” entity), in which case it could not claim fifth amendment protection. The Second Circuit had little trouble resolving this issue. It agreed with the government that the pre-incorporation firm should be treated as a “collective entity”, not as a solo practice, and that Doe’s personal privilege against self-incrimination was therefore inapplicable. The Second Circuit reasoned as follows:

The firm held itself out to the public and the legal community as a collective entity before its incorporation in 1981. It used a letterhead, “Law Offices of ‘John Doe’ and ‘Richard Roe’” listing Doe and Roe at the top (ostensibly as partners) and listing the names of associated attorneys below. Three attorneys were at various times listed as “Counsel” to the firm, further indicating the firm’s institutional character.

The firm’s “blue back” for court papers contained Doe’s and Roe’s names in printed form, and, in a state court affidavit, Roe described himself as a “member of the firm of ‘John Doe’ and ‘Richard Roe,’ attorneys for the plaintiffs.” These public representations are entitled to weight as it would have been a violation of professional ethics for “Doe” and “Roe” to have held themselves out as members of a law firm were this not so. *See* model Code of Professional responsibility DR 2-102(C) (1969).

The internal structure of the pre-incorporation firm also indicated to the Second Circuit that the pre-incorporation firm was a collective entity. Roe received one fourth of either the firm’s gross or its net income, a “fixed division of income that reflected more than an informal fee-splitting arrangement that

might exist between attorneys collaborating in just a few cases.” The firm disposed of approximately 250 cases per year, and, in one year, deposited over \$19 million in its escrow account. To handle this volume of business, the firm employed as many as fourteen lawyers and a clerical staff of ten, including four paralegals. “The size of the firm and the magnitude of the legal work it performed strongly suggests that the pre-incorporation firm was an organized unit, not a loose association of individuals,” the court said, adding that when “Doe” and “Roe” incorporated, they did not change their pre-incorporation personnel or the essential features of their operation.

Nor did it matter that Doe and Roe “did not enter into a formal partnership agreement or file a partnership tax return” in the pre-incorporation period. “An organization may constitute a collective entity even when it has not taken steps to formalize its status,” the Second Circuit said. “The critical issue is whether the organization had an institutional identity separate from that of its individual members.” The Second Circuit concluded that the pre-incorporation firm did have such an institutional identity and that the subpoenaed documents were the records of the firm, not those of the individual, Doe. The fifth amendment therefore did not shield them.

*Two Grand Jury Subpoenas* is helpful in distinguishing a solo practice from a “collective entity” such as a partnership, but the case is of little help in determining when and whether a lawyer working with an acknowledged law firm partnership is allowed to use the title “partner” when the lawyer does not enjoy all of the traditional rights or bear all of the responsibilities of a partner.

### **New York ethics opinions**

The NYCLA committee also discussed a few New York ethics opinions, none of them very illuminating. For example, in one footnote, the committee cited NYCLA Op. 680 (1990), *supra*, which stated, unremarkably, 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.”

In another footnote, the committee cited NYCLA, Op. 735 (2006), which addressed an inquiry from a foreign (i.e., non-U.S.) lawyer who was admitted to practice in New York but whose immigration visa barred him from attaining the status of partner. The question was whether the foreign lawyer, though not a partner, could list his name on the firm’s letterhead. The committee decided that the foreign lawyer “could not list his name in the firm’s title without clarification.” The committee’s rationale was that listing the foreign lawyer on the letterhead without clarification “would generally convey that such attorney is a partner,” which is prohibited under DR 2-102(C) when the attorney is not in fact a partner. That opinion is not very helpful in classifying contract and non-equity partners because it is limited to a situation in which everyone agreed that the lawyer in question was not a partner. New York firms and their non-equity partners need help deciding whether the title “partner” is permissible in more ambiguous situations.

### **Authorities from other jurisdictions**

Turning to precedents from other jurisdictions, the NYCLA ethics committee noted that DR 2-102(C) (and equivalent ABA model rules provisions that have been widely adopted in other states) “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.” That practice “consistently has been found to mislead the public” in violation of DR 2-102(C) or its equivalent.

The committee also looked at opinions from other states that presented more unusual factual settings.

In one footnote, the committee discussed *In the Matter of Disciplinary Proceedings Against Miles Laubenheimer*, 335 N.W.2d 624 (Wis. 1983). There the Wisconsin Supreme Court disciplined a lawyer for improperly holding himself out as a partner. The lawyer had sold his practice to another lawyer but continued to practice under a firm name containing both his name and the buyer’s name, even though both lawyers denied the existence of a partnership.

The NYCLA committee also discussed *In re Weiss, Healey & Rea*, 109 N.J. 246, 254 (1988). There, the new Jersey Supreme Court affirmed 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”). The problem was that the name carried with it the connotations associated with a law firm partnership. Specifically, the new Jersey Supreme 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.’”

The NYCLA committee also found guidance in two out-of-state ethics opinions. First, the committee analyzed Pennsylvania Bar Ethics Op. 90-171, 1990 WL 709680 (1990). That opinion concluded that including the name of a “non-share-holder associate” in a law firm’s name would be misleading because it would suggest that “the non-shareholder attorney has some interest in the professional corporation when no such interest exists.”

Second, the NYCLA committee looked at South Carolina Advisory Ethics Op. 85-12, 1985 WL 303434 (1985). That opinion concluded that a sole practitioner could not include the name of an “associate” in his law firm’s name. As a corollary, the South Carolina opinion stated that the associate himself would also be violating DR 2-102(C) by “holding himself out as having a partnership with the use of the purported firm name.” These opinions confirm that a lawyer’s inaccurate denotation of his or her status within an organization can run afoul of the disciplinary rules.

Based on these foreign judicial and ethics opinions, the NYCLA ethics committee determined that New York’s DR 2-102(C) not only governs individual lawyers who improperly hold themselves out as partners when they are not in fact partners, but also extends to a law firm’s use of the title “partner” to denote a lawyer’s status when the lawyer is not in fact a partner. This is not a surprising conclusion, and it is a logical one, especially because DR 1-102(a)(1) and (a)(2) prohibit a “law firm” as an entity from violating a Disciplinary rule or circumventing one through the actions of another. Nevertheless, the express extension of DR 2-102(C) to law firms appears to break new ground in New York.

### **The NYCLA committee’s analysis and conclusions**

In light of all of the authorities described above, the NYCLA analyzed the application of DR 2-102(C) to non-equity and contract partners. Surprisingly, the NYCLA concluded that public use of the title “partner,” by 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.” Why not? Because, according to the NYCLA:

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.

The NYCLA then found two bases for suggesting that DR 2-102(C) does not bar non-equity partners or contract partners from using the title “partner.”

First, regarding whether the “partner” designation “con-notes professional accomplishment,” the NYCLA said that 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.” In *In re Weiss, Healey & Rea*, 109 N.J. 246, 254 (1988), for example, the new Jersey Supreme Court did not suggest that the public draws any inferences about the “kind and caliber of the legal services rendered” from differences in the rights and obligations of partners within a law firm. nonetheless, the NYCLA recognized that:

[L]aw 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, the NYCLA observed that “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.” In most modern law firm structures, individual partners may not be held personally liable together with their firm. Yet both ABA Formal Opinion 69-401 (1996) and State Bar of Michigan Eth. Op. R-17 (1994) approved the use of a limited liability partnership structure for the practice of law. The ABA ethics committee stated that “the limitation of liability achieved through practice in such a partnership does not violate the model rules.” For lawyers in a limited liability partnership, the NYCLA noted, “joint or vicarious liability provides no additional motivation to provide quality legal services to the public.” Moreover, the public may be in the dark about this. The Michigan ethics opinion, while recognizing that a limited liability partnership structure may eliminate vicarious liability of partners in certain circumstances, nevertheless stated that lawyers practicing in an LLP “do not have any ethical obligations to disclose the details of their business arrangement” to their clients or to the public.

Accordingly, the NYCLA committee concluded 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.”

Of course, that conclusion raises potentially vexing questions about whether a lawyer is in compliance with New York partnership law and with the firm’s partnership agreement. That, the NYCLA said,

“should in substantial part be a factual determination,” and 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.” Elaborating, the NYCLA said:

If the lawyer is provided with the emoluments of partner-ship (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 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.

On the other hand, if “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).” Likewise, if a lawyer in a law firm is an associate or staff attorney, but conveys to the public that he or she is a partner, that would also constitute a misrepresentation. Finally, if a lawyer and the lawyer’s firm convey to the public that the lawyer is a partner, even if that designation “does not misrepresent that lawyer’s skill or exposure to personal liability to the public,” it may nonetheless violate DR 2-102(C).

Therefore, the NYCLA concluded 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.”

### **Conclusion: What does it all mean?**

NYCLA Op. 740 addresses the important issue of who is a “partner,” and reaches a conclusion that sounds quite liberal – “a lawyer who is in fact treated as a partner under 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.” This appears to bless, quite broadly, the common practice of describing non-equity and contract partners as “partners” without any qualifying or clarifying language. But the opinion ultimately leads lawyers and law firms back to where they started. Stripped to its essentials, the opinion says that if a lawyer is a “partner” under New York partnership law and under the partnership agreement of the law firm holding the lawyer out as a partner, then neither the lawyer nor the firm is violating DR 2-102(C).

Since the NYCLA committee lacked jurisdiction to decide who is a partner under New York partnership law and did not examine any particular partnership agreements, lawyers and law firms wishing to describe non-equity partners and contract partners as “partners” will have to research New York partnership law and examine their partnership agreements, just as they presumably have always done when seeking to comply with DR 2-102(C).

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