New York State Bar Association
Committee on Professional Ethics

Opinion 1159 (12/14/2018)

Topic: Sharing legal fees with the estate of a deceased lawyer

Digest: Following the death of a lawyer who was the sole shareholder of a law firm, and the firm's dissolution, a former associate of the firm may share legal fees with the deceased lawyer's estate only as permitted by Rule 5.4(a) or as required by court order.

Rules: 1.5(g), 1.17, 5.4(a) & (d)

FACTS

1. The inquirer was an associate in a firm wholly owned by the firm's senior lawyer. The firm represented plaintiffs on a contingent-fee basis in personal injury and other actions. The senior lawyer/sole owner died unexpectedly, having made no succession plan or agreement regarding the disposition of the law firm or regarding the payment of legal fees from ongoing cases upon the senior lawyer's death. The estate held the deceased lawyer's interest for a period of time, during which the inquirer continued to represent the law firm's existing clients and undertook the representation of new clients. Thereafter, rather than selling the law firm, the estate's representative dissolved it. The inquirer established a new law firm, and the new law firm continued to represent former clients of deceased lawyer's now-dissolved firm. The estate of the deceased lawyer now seeks to recover a portion of the fees generated in matters originating with the deceased lawyer's firm.

QUESTION

2. May a law firm pay a portion of the legal fees earned in actions to the estate of a now deceased lawyer who wholly owned a since-dissolved firm in which the actions originated and, if so, in what amount?

OPINION

3. Preliminarily, we note that, before the dissolution of the deceased lawyer's law firm, the former associate could continue to work in the law firm for a reasonable period. Ordinarily, under the N.Y. Rules of Professional Conduct (the "Rules"), in particular Rule 5.4(d), a lawyer may not practice with a law firm if "a nonlawyer owns any interest therein." But, as an exception, Rule 5.4(d)(1) permits "a fiduciary representative of the estate of a lawyer [to] hold the stock or interest of the [deceased] lawyer for a reasonable period during administration." During that period, the estate representative may take steps to dissolve the firm or to sell the deceased lawyer's practice to another lawyer or law firm pursuant to Rule 1.17(a), and meanwhile, the inquirer could maintain the firm's practice.

4. We do not address questions concerning the sharing of fees with a deceased lawyer's estate before the firm's dissolution, or concerning the sharing of fees with a lawyer who acquires a deceased lawyer's practice pursuant to Rule 1.17. *Cf.* N.Y. State 961 (2013) (addressing issues concerning the sale of a law business under Rule 1.17). Here, the question is whether the former associate may share legal fees with the estate after the firm has been dissolved. The question is governed by Rule 5.4(a), which provides, subject to exception, that: "A lawyer or law firm shall not share legal fees with a nonlawyer." Absent an applicable exception, legal fees from pending personal injury (or other) matters may not be shared with the estate of the former law firm's deceased owner because the estate is not a lawyer.

5. One potentially applicable exception is Rule 5.4(a)(1), which provides: "an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons." In this case, the exception is inapplicable, because the deceased lawyer/sole owner never entered into an agreement with the inquirer (or anyone else) "for the payment of money . . . to the lawyer's estate" or to specified others.

6. The other potentially applicable exception is Rule 5.4(a)(2), which provides: "a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased." This exception applies here to a limited extent. If the deceased lawyer/sole owner rendered services in a matter before dying, then the inquirer may pay the estate a portion of legal fees from the matter corresponding to "that portion of the total compensation that fairly represents the services rendered by the deceased." This provision would not allow fees to be shared in matters undertaken after the onetime owner's death. *See* Phil. Op. 92-1 (1992) (opining, under language identical to Rule 5.4(a), that "[i]t would not be appropriate to pay a referral fee to the [deceased] referring lawyer's estate for services rendered to an executor or trustee when those services had not started during the lifetime of the referring lawyer").

7. In N.Y. State 1128 (2017), we addressed a question similar to this one. There, the inquirer's lawyer friend passed away, leaving (as here) no agreement or understanding concerning the sale or dissolution of the decedent's firm, though before dying the friend told an assistant to refer contingent-fee cases to the inquirer. At the time, the inquirer knew that the decedent had worked on at least one of the matters (labeled "Matter A") but was as yet unaware of the work, if any, done on the others. In that instance, we concluded that, "under Rule 5.4(a)(2), the inquirer could, at the conclusion of Matter A, pay the estate a portion that represents the services rendered by the deceased attorney, or at any time pay an amount representing *quantum meruit* for those services." We explained that the proportional contribution fairly representing the value of the decedent's services could not be calculated until the matter concluded, but that the *quantum meruit* amount of fair compensation for those services "could be calculated immediately." *Id.* ¶ 9. With respect to the other matters, however, we said that, "if the deceased lawyer did not provide any legal 'services' on those matters" before death, "then the inquirer may not ethically pay the estate a portion of the fees," because, among other things, such a payment would be an improper division of fees with a nonlawyer in violation of Rule 5.4. *Id.* ¶ 10.

8. Other than as permitted by Rule 5.4(a)(2) to compensate for services rendered by the deceased lawyer before death, no rule authorizes fee-sharing with the deceased lawyer's estate.

In N.Y. State 1128 ¶ 10, we declined to opine, as we do here, on whether a deceased lawyer's signing or filing of a retainer agreement, and thus perhaps assuming liability for a matter, amounts to a service rendered by the deceased lawyer. This Committee renders opinions interpreting the Rules but not interpreting other law; therefore, we also do not opine on whether the decedent's estate has a contractual claim, or other legal claim, to legal fees from matters that originated in the now-dissolved firm, whether before or after death. We add only that, notwithstanding Rule 5.4(a), it would be ethically permissible for the inquirer to satisfy an adverse judgment issued by a court, in the event that the estate brought a civil claim to recover a portion of legal fees in lawsuits pending while decedent was alive. While a lawyer might raise an objection based on Rule 5.4, insofar as it reasonably appears to be applicable, we see nothing in the Rules that would call on a lawyer to defy a court's judgment in this situation once it is issued. *Cf.* N.Y. City Op. 2018-5 (2018) at n. 12 (recognizing that, in litigation against lawyers, courts do not invariably enforce Rule 5.4's proscription on fee sharing with a nonlawyer).

CONCLUSION

9. Following the death of a lawyer who was the sole owner of a law firm, and the firm's dissolution, a former associate of the firm may share legal fees with the deceased lawyer's estate only as permitted by Rule 5.4(a) or as required by court order.

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