

# NEW YORK STATE BAR ASSOCIATION

## Committee on Professional Ethics

Opinion 636 - 12/4/92 (8-92)

TOPIC: Wills; preparation of standard form wills and sale to public as practice of law; name of law firm.

DIGEST: Lawyer's operation of business selling standard will forms to public is not practice of law unless forms are individualized or advice is rendered as to selection of form; if business is not practice of law, any lawful trade name can be used.

CODE: EC 2-5, 2-11, 3-5; DR 2-102(B), 2-104(E), 3-101(A), 3-102(A), 3-103(A)

### QUESTIONS

(1) May a firm or a lawyer establish an independent organization, operating under an assumed name not including the names of its attorney principals, to engage in the business of selling prepared will forms to the public?

(2) May such an organization prepare and supervise the execution of wills for individual members of the public?

### OPINION

A law firm proposes to establish a separate entity operating under a name, such as "The Will Store", that does not include the names of the attorney principals (a) to sell to the public "prepared Last Wills and Testaments" or (b) to prepare and supervise the execution of wills for individual members of the public.

A lawyer may freely write on legal topics and, indeed, be compensated for those writings, provided he or she does not purport to render individual legal advice in such writings. EC 2-5; DR 2-104(E); N.Y. State 625 (1992); N.Y. State 204 (1971). See *New York County Lawyer's Ass'n v. Dacey*, 28 A.D.2d 161 (1st Dep't) (Stevens, J. dissenting), *rev'd on dissenting opn.* 21 N.Y.2d 694 (1967). Thus, an attorney may prepare and engage in the general publication of standard form wills, provided that they

are accompanied by an appropriate warning that they are general in character and the reader should not endeavor to solve individual problems on the basis of such wills. See N.Y. State 625 (1992).

There is, moreover, no ethical proscription against a lawyer engaging in a separate business not constituting the practice of law, N.Y. State 557 (1984), provided that the lawyer does not use the separate business as a means of soliciting legal practice in violation of any statute or court rule and the lawyer does not recommend to his or her clients the purchase of a product from the separate business, N.Y. State 536 (1981), and provided further that the lawyer does not violate any ethical or legal rules. N.Y. State 584 (1987); N.Y. State 307 (1973). Thus, a lawyer or law firm could establish a separate entity to prepare and engage in the general publication of standard form wills, subject to the same requirement that the wills be accompanied by an appropriate caveat that they should not be used to solve individual problems. So long as the practice of law is not involved, moreover, the business could be conducted under any lawful trade name and in conjunction with nonlawyers. See DR 3-103(A).

We observe, however, that when a lawyer holding himself or herself out as such performs services or conducts activities that touch upon the practice of law or fall within the ambit of services or activities that a lawyer might provide to or conduct on behalf of a client, the lawyer will be held to all professional standards, even though those services or activities may be provided or conducted outside the context of a professional practice (e.g., in a separate business) and even when the same services or activities provided or conducted by a nonlawyer could not constitute the unlawful practice of law. Accordingly, just how the separate business is conducted will have an important bearing on whether, in conducting the separate business, the lawyer is engaged in the practice of law and, consequently, held to the standards of the Code of Professional Responsibility. N.Y. State 557 (1984). What constitutes the practice of law is, in any given case, a question of law and, as such, beyond the scope of this opinion and this Committee's jurisdiction. We believe, however, that a few helpful observations can be made.

First, to the extent that the wills are individualized and offered as specific solutions to individual problems or other services requiring the professional judgment of a lawyer are rendered, the business becomes the practice of law. EC 3-5. Furthermore, if in selling such forms to individual members of the public, an employee provides assistance or advice in selecting the appropriate form or forms or in adapting their language to particular circumstances, the business becomes the practice of law. See *State v. Winder*, 42 A.D.2d 1039 (4th Dep't 1973)(sale of divorce kit coupled with advice and counsel by lay seller to individual purchasers concerning their specific legal problems constitutes practice of law) and *People v. Divorce Associated and Publishing Ltd.*, 95 Misc. 2d 340 (Sup. Ct. 1978).

If the business does not involve the practice of law, it may be operated under any lawful trade name. If, however, the business is the practice of law, the lawyer is held to the standards of the Code. Thus, for example, it would be necessary for an attorney or

law firm carrying on such will practice to use the name or name of one or more attorney principals in the name of the will practice. EC 2-11; DR 2-102(B); N.Y. State 445 (1976). We see nothing inherently misleading in the phrase "The Will Store" and thus perceive no *per se* ethical proscription on the use of that phrase as a motto in conjunction with the name or names of one or more lawyer principals, but a trade name may not stand alone if the firm is comprised of lawyers and some of its activities, if carried on by lawyers, would constitute the practice of law. *See von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163 (1984); DR 2-102(B). Furthermore, it would be improper, as well, to include a nonlawyer as a principal or to share fees with a nonlawyer. DR 3-101(A); DR 3-102(A); DR 3-103(A); N.Y. State 557 (1984).

### **CONCLUSION**

For the reasons stated and subject to the qualifications herein, the first question is answered in the affirmative. The second question is answered in the negative.

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