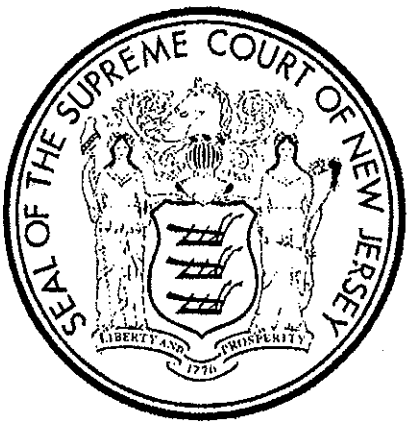
NEW JERSEY SUPREME COURT

AD HOC COMMITTEE ON LAW FIRM

TRADE NAMES



REPORT AND RECOMMENDATIONS

May 6, 2014

Table of Contents

INTRODUCTION 1

WHETHER REGISTRATION OR PRIOR APPROVAL SHOULD BE REQUIRED FOR USE OF A LAW FIRM TRADE NAME TO ENSURE THAT A NAME IS NOT MISLEADING, DECEPTIVE, OR TOO SIMILAR TO ANOTHER FIRM'S TRADE NAME 3

A. Whether Mandatory Registration of Law Firm Trade Names is Advisable 3

B. Whether Pre-Approval of Law Firm Trade Names by the Committee on Attorney Advertising for Compliance With the Rules of Professional Conduct is Advisable 5

C. Enhanced Guidance to the Legal Community on Permissible and Prohibited Law Firm Trade Names 7

RECOMMENDATIONS 10

INTRODUCTION

The New Jersey Supreme Court recently reviewed Rule of Professional Conduct 7.5 concerning law firm names. In re Letter Decision of the Committee on Attorney Advertising, Docket No. 47-2007, 213 N.J. 171 (2013). Rule of Professional Conduct 7.5 requires law firm names to include the full or last name of a lawyer practicing with the firm or the names of lawyers who are no longer associated with the firm through death or retirement. Law firm names may include only limited additional information pertaining to the firm, such as "& Associates."

The Court decided to revise Rule of Professional Conduct 7.5 to permit the use of trade names within certain limits. Permitted trade names must include the name of a lawyer and additional language in the law firm name may only "describe the nature of the firm's legal practice" – i.e., the legal practice area and/or geographical area in which the firm practices. In re Letter Decision, supra, 213 N.J. at 184. Specifically, amended Rule of Professional Conduct 7.5(e), in pertinent part, will state:

> Use of a trade name shall be permissible so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the name of the attorney who is responsible for the management of the organization.

The amended rule will be accompanied by this Official Comment:

> By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Millburn Personal Injury Group, John Smith, Esq." However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results.
>
> [In re Letter Decision, supra, 213 N.J. at 184-85.]

Revised Rule of Professional Conduct is not effective until this Committee reviews matters pertaining to its implementation and the Court acts on its recommendations. Id. at 185. The Court directed the Committee to

> consider whether registration must be or is advised to be required for use of a trade name, thereby providing a mechanism for acquiring prior approval that a name is not misleading, deceptive, or too similar to another firm's trade name; whether such a registration system feasibly can be established and, related thereto, whether a registration fee would be required to cover the administrative expenses of a registration requirement; whether a law firm that uses only the name or names of deceased and retired members of the firm should be required to register such trade names if registration is to be required; and whether a name can be registered if it is not to be used in an active practice (essentially reserving it from use by other attorneys).
>
> [Id. at 185-86.]

For the reasons set forth below, the Committee recommends that there be no mandatory registration or pre-approval of law firm trade names by the Committee on Attorney Advertising. The Committee recommends that the legal community be provided enhanced guidance on permissible and prohibited law firm names and that the Committee on Attorney Advertising monitor, regulate, and enforce the amended Rule.

WHETHER REGISTRATION OR PRIOR APPROVAL SHOULD BE REQUIRED FOR USE OF A LAW FIRM TRADE NAME TO ENSURE THAT A NAME IS NOT MISLEADING, DECEPTIVE, OR TOO SIMILAR TO ANOTHER FIRM'S TRADE NAME.

As noted above, the Court requested this Committee to consider "whether registration must be or is advised to be required for use of a trade name, thereby providing a mechanism for acquiring prior approval that a name is not misleading, deceptive, or too similar to another firm's trade name . . . ." In re Letter Decision, supra, 213 N.J. at 185. The Committee reviewed regulatory approaches and experiences of other jurisdictions; considered whether mandatory registration to review too-similar law firm trade names is advisable; and considered whether pre-approval of law firm trade names for compliance with the Rules of Professional Conduct is warranted. The Committee also considered how the Judiciary can monitor law firm trade names if registration or pre-approval is not enacted and what guidance can be provided to lawyers regarding permissible and prohibited law firm names.

A. Whether Mandatory Registration of Law Firm Trade Names is Advisable.

The Court requested the Committee to review approaches taken by other jurisdictions, particularly North Carolina. Committee staff communicated with North Carolina State Bar officials and 17 other jurisdictions that permit some form of law firm trade names.[1] At this point in time, only North Carolina requires mandatory registration of law firm names through its State Bar "membership department" to review whether the

[1] The 17 other jurisdictions are Florida, Washington, D.C., Arkansas, Pennsylvania, Louisiana, Michigan, Georgia, Indiana, South Carolina, Virgin Islands, Oregon, Colorado, Nevada, Arizona, New Hampshire, Virginia, and Rhode Island.

name is too similar to already-registered law firm names. Significantly, North Carolina does not require that a lawyer's name be part of the firm name. According to the North Carolina State Bar, one law firm name is distinguishable from another if it contains the same words though one word is different (Outer Banks Law is distinguishable from Outer Banks Lawyer); key words are the same but in a different order (DUI Legal Assistance is distinguishable from Legal DUI Assistance); or one name is a URL (Raleigh Law Firm is distinguishable from www.raleighlawfirm.com).

The Committee notes that registration of law firm trade names is advisable only if the Judiciary finds it necessary to limit lawyers' use of too-similar firm names. Unlike North Carolina, New Jersey will require that a law firm trade name include the name of a managing lawyer in the firm; this diminishes the likelihood of too-similar trade names.

Significantly, the Committee reviewed the existing safeguards against identical law firm trade names in the form of statutory regulations on registration of corporate names with the Secretary of State and its system of corporate name checks. All corporate names must be distinguishable and the Secretary of State offers a system to browse corporate names to check whether a name is available. N.J.S.A. 14A:2-2(1)(b) (corporate names must be distinguishable); N.J.S.A. 42:2C-8(b)(1) (limited liability company names must be distinguishable); https://www.njportal.com/DOR/businessrecords/ (Secretary of State website to browse corporate and trade names). Law firms that practice in a corporate form will not have identical names.

Lastly, the Committee considered what Judiciary policy goals would be furthered by controlling whether one law firm's name is too similar to another firm's name. The public could be confused if many law firms have identical names but the Committee does

not find it likely that there will be an abundance of same-name or too-similar-name firms. Accordingly, the Committee recommends that there be no mandatory registration of law firm trade names.

The Committee considered whether registration should be required also to ensure that law firm trade names are not false or misleading, likely to create an unjustified expectation about results the lawyer can achieve, or compare the lawyer's services with other lawyers' services. The Committee decided that registration of law firm trade names for this purpose is not necessary and any review of such names is more appropriately handled by the Committee on Attorney Advertising.

B. Whether Pre-Approval of Law Firm Trade Names by the Committee on Attorney Advertising for Compliance With the Rules of Professional Conduct is Advisable.

The Court directed the Committee to consider whether prior approval of law firm trade names should be required to ensure that law firm trade names comply with the Rules of Professional Conduct. Rule of Professional Conduct 7.1(a) prohibits statements that are false or misleading, likely to create an unjustified expectation about results the lawyer can achieve, or compare the lawyer's services with other lawyers' services. This Rule applies to law firm names.

At this point in time, only North Carolina has mandatory pre-approval of law firm trade names through its State Bar Ethics Counsel to determine if they are inaccurate or misleading, comparative, or suggestive of the ability to obtain results and, therefore, violative of Rule of Professional Conduct 7.1. Florida requires pre-approval of all attorney advertising; it effectively approves law firm names since they often are part of

the advertising material it reviews. The other jurisdictions that responded to the Committee's inquiry do not require pre-approval of law firm trade names through their Bar Associations or Judiciary.

All of the jurisdictions further reported that they have not experienced significant problems, abuse, deception, or the like concerning lawyers' selection of law firm trade names. Florida reported that they sometimes see law firm names that characterize quality of legal services or promise results. A few jurisdictions (Washington, D.C., South Carolina, Georgia, and Oregon) reported that they sometimes see law firm names that inaccurately inflate the size of the firm, such as by including words like "& Associates" when there are no associates at the firm. No other problems were reported.

In New Jersey, lawyers may submit inquiries regarding advertising and firm names to the Committee on Attorney Advertising and receive guidance by contacting the attorney ethics research assistance hotline. R. 1:19A-3(a); R. 1:19-9(a). The Committee on Attorney Advertising also reviews grievances concerning advertising. R. 1:19A-4. Lawyers whose advertisements or improper firm names are brought to the attention of the Committee through the grievance process tend to promptly comply with the Committee's order to cease and desist using improper language.

Given the lack of problems reported by other jurisdictions and the current availability of approval through an inquiry to the Committee on Attorney Advertising and nonbinding guidance from the hotline, the Committee decided that pre-approval of law firm trade names is not advisable. The Committee, however, also decided that the Committee on Attorney Advertising should regularly monitor law firm trade names,

perhaps through the annual attorney registration system, and revisit this question in two years.

C. Enhanced Guidance to the Legal Community on Permissible and Prohibited Law Firm Trade Names.

As noted above, the Committee decided that mandatory registration or pre-approval of law firm trade names is not advisable and the Committee on Attorney Advertising can address improper law firm trade names in the ordinary course of its regulatory business. The Committee expressed concern, however, about adequate guidance to the legal community on what language in law firm trade names is permissible and what is prohibited.

The Committee recommends that the Court provide additional guidance to the legal community in the form of an expanded Official Comment to amended Rule of Professional Conduct 7.5. The Committee further recommends that the Committee on Attorney Advertising inform lawyers that law firm trade names will be monitored and reviewed; develop a list of frequently asked questions about law firm trade names and post it on the Judiciary website; and open a comment mailbox for inquiries and complaints. To assist members of the public seeking to identify a lawyer's association with a law firm, and lawyers considering changing their law firm name, the Committee recommends that the Attorney Index on the Judiciary website be expanded to include the law firm name.

As the Committee decided that mandatory registration of law firm trade names is not advisable, it did not consider whether a law firm that uses only the name or names of deceased and retired members of the firm should be required to register such trade names

or whether a name can be registered if it is not to be used in an active practice (essentially reserving it from use by other attorneys).

The Committee decided not to adopt a motion to recommend that law firms be permitted to have more than one trade name, each trade name reflecting a different area of practice. The Committee found that multiple names for the same law firm would be confusing and noted that the current Court Rules do not permit law firms to operate under more than one name. See RPC 7.5; R. 1:21-1A; R. 1:21-1B; R. 1:21-1C. The Committee, however, decided that a law firm trade name should be allowed to include more than one area of practice (for example, John Smith Criminal Defense and Municipal Law).

Lastly, the Committee considered inquiries that may be presented to the Committee on Attorney Advertising regarding the application of amended Rule of Professional Conduct 7.5 and respectfully requests the Court to clarify its intent prior to the adoption of the amended Rule and Official Comment. Specifically, the Committee notes that Rule of Professional Conduct 7.5(a) permits law firm names to "include the full or last name of one or more lawyers" in the firm. The language of amended Rule of Professional Conduct 7.5(e) ("such trade names shall be accompanied by the name of the attorney who is responsible for the management of the organization") is not parallel to 7.5(a). It does not specify whether the name of the lawyer who is responsible for the management of the organization must be the full name or can be just the last name, and it appears only to permit the name of one managing attorney in the firm name.

The Committee respectfully requests that the Court clarify whether paragraphs (a) and (e) of Rule of Professional Conduct 7.5 should have parallel language or whether it

intends to restrict law firm trade names to only one (managing) partner's full name. For example, would it be permissible to have the law firm trade name John Smith and Jane Jones Personal Injury Lawyers, if both Smith and Jones are equal partners in the firm? If Jones is the managing partner in the firm, must the law firm trade name reflect only her name and not include her partner's name? Would only last names -- Smith & Jones Personal Injury Lawyers -- be permissible? If John Smith and Jane Jones are both deceased former partners in the firm, could the law firm use the trade name John Smith and Jane Jones Personal Injury Lawyers or must the name of the current, living managing partner of the firm be added to the law firm name? The Committee anticipates that these questions would be presented to the Committee on Attorney Advertising and respectfully suggests that the Court consider them prior to adoption of the amended Rule and Official Comment.

RECOMMENDATIONS

Based upon its deliberations, the Committee recommends:

1. No mandatory registration or pre-approval of law firm trade names by the Committee on Attorney Advertising be required.

2. The Court provide additional guidance to the legal community in the form of an expanded Official Comment to amended Rule of Professional Conduct 7.5. The Court's Official Comment states:

> By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Millburn Personal Injury Group, John Smith, Esq." However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results.

The Committee recommends that it be expanded to further state:

> By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Millburn Personal Injury Group, John Smith, Esq.," provided that the law firm's primary location is in Millburn and its primary practice area is tax law or personal injury law, respectively. John Smith Criminal Defense and Municipal Law would also be permissible. However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results. Similarly, "Budget Lawyer John Smith, Esq." is not permissible as it is comparative and likely to be misleading; "Million Dollar Personal Injury Lawyer John Smith, Esq." is not permissible as it suggests the ability to achieve results; and "Tough As Nails Lawyer John Smith, Esq." is not permissible as it purports to describe the lawyer and does not describe the nature of the firm's legal practice.

Depending on the Court's decision regarding full or last names of one or more of the lawyers in the firm, clarification and additional examples in the Official Comment would provide guidance to the legal community. If the Court decides that the full name of one or more lawyers in the firm is required and there can be more than one partner's name in

the firm name, then the example John Smith and Jane Jones Personal Injury Lawyers could be included in the Comment; if only last names are permissible then the example could be Smith & Jones Personal Injury Lawyers. If the Court decides that a current, living managing partner's name must be added to a law firm name where all name partners are deceased or retired, then a statement in the Comment to that effect would be helpful.

3. The Committee on Attorney Advertising monitor law firm trade names and revisit this question in two years to assess whether there has been unexpected abuse or other problems with law firm trade names.

4. The Committee on Attorney Advertising inform lawyers that their law firm trade names will be monitored and reviewed.

5. The Committee on Attorney Advertising develop a list of frequently asked questions about law firm trade names and post it on the Judiciary website.

6. The Judiciary open a comment mailbox for inquiries and complaints about law firm trade names.

7. The Attorney Index on the Judiciary website be expanded to include the law firm name.

The Committee thanks the Court for this opportunity to serve. The Committee further thanks its staff, Carol Johnston, for her invaluable assistance.

Respectfully submitted,

SUPREME COURT AD HOC COMMITTEE ON LAW FIRM TRADE NAMES

Hon. Linda R. Feinberg,
Chair
Anthony M. Carlino
Anthony J. DiMarino, III
Christine S. Filip
Angela Foster
Nicholas Kant

Jonathan M. Korn
Jeffrey S. Mandel
Cindy K. Miller
Brian R. Morrison
Thomas H. Prol
David B. Rubin
Arthur H. Saiewitz

David A. Siegel
Melinda L. Singer
Karol Corbin Walker

Carol Johnston,
Secretary