

## NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 12-01

### **A Nebraska Law Firm May Operate in Different Cities with Different Trade Names and Different Attorneys**

#### **QUESTION PRESENTED**

**Whether a Nebraska Law Firm may operate in different cities with different trade names and different attorneys.**

#### **Factual Overview**

A Nebraska firm purchased a law practice from a sole practitioner in another Nebraska city. The sole practitioner continues to practice with the firm in his old office and is officially listed as “of counsel” status on the firm’s letterhead for that office only. The Firm desires to create separate trade names for their original office and their newly-acquired office in another city.

To avoid creating confusion among its clients throughout Nebraska, the Law Firm needs to clearly communicate that the sole practitioner in another city is a member of the firm, just operating out of a different office than the firm’s main office. The challenge in the present case is that there are not two firms with separate identities – there is one firm with two offices with the desire to have a different trade name in place for each of the offices. That would preclude use of “associated” or “affiliated” language to link the two offices. The Firm would have to explain the relationship between itself and the sole practitioner, to every client that used the sole practitioner’s office purchased by the firm.

Perhaps the firm should consider listing the sole practitioner as “of counsel” in both of its offices’ names. That would demonstrate an attempt to avoid confusion.

Avoiding confusion and preventing misleading information to be publicized are the objectives of this present case.

### **THE APPLICABLE RULE AND COMMENTS**

Starting with the basic Rules of Professional Conduct, Rules 3-507.1 and 3-507.5 are instructive:

#### **§ 3-507.5. Firm Names and Letterheads**

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if:

(1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm;

(2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection; and

(3) the trade name is not otherwise in violation of Rule 7.1.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

#### **COMMENT**

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

#### **§ 3-507.1. Communications Concerning a Lawyer's Services**

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.

With these above two rules, the firm needs to make sure the relationship between the partners of that firm are clearly articulated to clients of the former sole practitioner's office that will go by a name which includes the former sole practitioner's office. How to do this successfully is where the two firms run into trouble.

While not specifically applicable in the present case, a lawyer who opens a solo practice may conduct his or her business under any trade name that does not constitute a false or misleading communication about the lawyer or the lawyer's services. A solo practitioner must take care, however, to insure that clients and potential clients are not misled as to the nature of his or her practice.

Rule 3-507.1(a) generally provides that: "A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 3-507.1." Rule 3-507.1(a), in turn, prohibits lawyers from making a "false or misleading communication" concerning the lawyer or the lawyer's services. A statement is false or misleading if it: contains a material misrepresentation of fact; omits a fact necessary to make the statement considered as a whole not materially misleading; or contains an assertion about the lawyer or the lawyer's services that cannot be sustained. *Id.* § 3-507.1(a).

This general prohibition on materially misleading representations is applied to law firm names, in part, through Rule 3-507.5(d), which provides: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." Thus, for example, lawyers who share office facilities but who are not, in fact, partners may not denominate themselves as, say, "Smith and Jones" because that title suggests a

partnership in the practice of law that does not in fact exist. Rule 3-507.5, Comment [2]. More broadly, one may not use the name of a particular lawyer as part of the firm's name if the lawyer is not associated with the firm or is not a predecessor of the firm. *Id.* at Comment [1].

Courts have applied Rule 3-507.5 and its commentary in a manner that furthers the general prohibition on a misleading firm name. Thus, it is commonplace that a firm name must reflect accurately the nature of the entity that bears it and the nature of the relationship of the lawyers who are affiliated with it. Since the former sole practitioner remains an active participant at his old office, along with lawyers from the purchasing firm's office, using their names in the trade name for that office complies with Rule 3-507.5 (and, therefore, 3-507.1). The use of the former sole practitioner's name with the other partner names in the formation of a trade name for the former sole practitioner's office does not create the confusion that Rules 3-507.1 and 3-507.5 are trying to prevent. How to link the two offices while at the same time avoiding confusion is the next step in this present scenario.

The possibility for confusion between these two offices is particularly acute as the connection between and amongst the members of the differently named entities requires an explanation. If two lawyers who share offices maintain a continuing relationship akin to that of "of-counsel" association, they may hold themselves out as such, though they may not take the next step of misleadingly practicing under a trade name such as "Law Offices at X Square" which implies a unitary relationship. *See* N.Y. City Ethics Op. 1995-8 (1995); *see also* ABA Informal Op. 85-1511 (1985) (firm may name itself "The X Partnership" where X is a retired former partner).

Where the question is whether a particular form of firm name might mislead members of the public, the public's actual confusion (or lack thereof) seems germane to the inquiry. It is, therefore, worth asking whether the public could actually be confused by the fact that the former sole practitioner's office is actually a second office for the law firm.

As Rule 3-507.5, comment [1] explains, any analysis of trade names' use should take into account broader constitutional considerations. The United States Supreme Court has held that the First Amendment protects commercial speech and that the public, generally, has a right to receive truthful and non-deceptive information. *See Bates v. State Bar*, 433 U.S. 350 (1977) (commercial speech serves individual and societal interests in assuring informed and reliable decision-making). To be sure, a state may regulate trade names where their use is deceptive, *see Friedman v. Rogers*, 440 U.S. 1 (1979), but the First Amendment clearly prohibits the regulation of lawyer speech where such regulation is based merely on speculative harms. *E.g. In re RMJ*, 455 U.S. 191 (1982) (rejecting restriction on listing expertise); *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91 (1990) (rejecting restriction on advertisement as trial specialist); *Ibanez v. Florida Dept. of Business and Prof. Regulation*, 512 U.S. 133 (1994) (rejecting listing of CPA qualification). As the Supreme Court has said: "[T]he States may not place an absolute prohibition on certain types of potentially misleading information. . . if the information also may be presented in a way that is not deceptive." *In re RMJ*, 455 U.S. at 203.

Thus, at a minimum, in interpreting the Nebraska Rules of Professional Conduct, one should err on the side of permitting lawyers to choose their own trade names unless there is a clear indication that the name is deceptive or misleading.

Cases and opinions on lawyer's speech make clear that the context of trade names, and their relationship with other trade-named firms, matters. Specifically, two firms may reflect their association with each other - but only in a manner that contextually makes clear the nature of their relationship. *See* ABA Formal Op. 94-388 (1994) (provides that if firms retain their own separate identities, but represent that they are an "associated" or "affiliated" firm of another firm, this form of networking is permissible under Rule 3-507.1 and 3-507.5 provided the clients receive "information that will tell them the exact nature of the relationship and extent to which resources of another firm will be available in connection with the client's retention of the firm that is claiming the relationship."); ABA Formal Op. 84-351 (1984) (law firms may list themselves as "Affiliated" or "Associated," so long as communications regarding the nature of the firms' relationship are clear and not misleading).

### **Conclusion**

Practitioners should exercise caution to insure that the manner in which they conduct their practice does not, in context, mislead clients or potential clients. Practitioners are also affirmatively obligated to correct any misimpression that might arise whenever they know or reasonably should know that a client may be confused. The steps that the firm proposes to take to inform their former sole practitioner's clients is a necessity. In addition, it would benefit the firm if they amended their letterhead to more closely resemble the letterhead of both offices.

To avoid confusion, the letterhead of both offices should have both trade names with the names of the attorneys practicing at the respective offices listed under the respective trade name. This would show that the firm has proactively demonstrated the relationship between the two trade names while actively attempting to clarify the relationship between the two offices. These steps are required to be in compliance with Rules 3-507.1 and 3-507.5.