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BY PATRICIA A. SALLEN

Law Firm Trade Names Permissible in 2013

What You Need To Know

"What's in a name? That which we call a rose By any other name would smell as sweet."

And that which we call a law firm? Will a colorful and creative law-firm name smell as sweet as a lawyer's plain name?

Maybe Shakespeare had the answer, as Juliet continues in her famous dialogue from *Romeo and Juliet*:

> "So Romeo would, were he not Romeo call'd,
> Retain that dear perfection which he owes
> Without that title."

Beginning in 2013, Arizona will see if law-firm names retain that "dear"—perhaps even quaint—"perfection" now that they can be something other than lawyers' names.

The state that begat lawyer advertising (remember *Bates v. State Bar of Arizona*[1]?) will, effective January 1, finally join the vast majority of U.S. jurisdictions and allow private law firms to use trade names. Arizona's Ethical Rule 7.5(a) will mirror the American Bar Association's Model Rule 7.5(a). Here's ER 7.5(a) as the Arizona Supreme Court has amended it:

A lawyer shall not use a firm name, letterhead or other professional designation that violates ER 7.1. A trade name may ~~not~~ be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

The court also amended comment 1:

~~A firm may be designated by the names of all or some of its members, or by the names of deceased or retired members where there has been a continuing succession in the firm's identity. Trade names may not be used. A lawyer or law firm may use a distinctive website address that complies with ER 7.1.~~ A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation that complies with ER 7.1.

Except for the phrase "that complies with ER 7.1" and one inconsequential comma, the comment mirrors the first two sentences of the comment to the Model Rule.

The significant change in Arizona's view of trade names makes intellectual sense in a high-tech 21st century in which multijurisdic-

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tional practice is becoming the norm. In fact, the American Bar Association's Center for Professional Responsibility Policy Implementation Committee endorsed the change and noted in its comment that national uniformity is best because "[h]aving uniform states' rules of professional conduct has traditionally facilitated consistent and predictable interpretations and applications of fundamental lawyer ethics concepts."

It also makes sense considering that, due to advertising, many law firms are already known more popularly by their billboard slogans than by their "real" names.

But without getting too dramatic—even in an article quoting one of the most famous dramatists of all time—many lawyers worry that this change will have a profound effect on the Arizona legal profession, much as lawyer advertising did. In that realm, we went from a profession in which a lawyer once was found to have engaged in "indiscretions and unethical practice" by (among more serious misconduct) "advertising by means of book matches"[2] to advertisements on buses and in sports arenas and TV commercials.

This, considering that in 1987 the Arizona Supreme Court cautioned lawyers who choose to advertise to remember that

> they are professionals charged with an important public trust: preserving and protecting the public's commercial, civil, and constitutional rights. Advertising that informs consumers about their rights and about the availability and cost of legal services is a valuable method of increasing access to legal representation and of furthering the rule of law.[3]

As with all "communication about the lawyer or the lawyer's services"—a catchphrase that covers traditional concepts of mass marketing as well as law firm names, business cards and letterhead—trade names can't be false or misleading. But the Ethical Rules don't require that communications regarding a lawyer's services be tasteful or even dignified.

As with all "communication about the lawyer or the lawyer's services," trade names can't be false or misleading. But they need not be tasteful or even dignified.

A Sea Change for Arizona

The Model Rules of Professional Conduct, which the ABA House of Delegates adopted in August 1983, changed the longstanding prohibition in the Code of Professional Responsibility against trade names. As a result, as of August 1983, the profession flipped a switch. Instead of prohibiting trade names, the then-new MR 7.5 explicitly allowed private law firms to use trade names.

In February 1983, when the ABA House of Delegates debated the Model Rules, the State Bar of Arizona delegates moved to amend the MR 7.5(a) proposal to keep the trade-name prohibition. That amendment was defeated by a voice vote.

When the Arizona Supreme Court adopted the Model Rules (effective Feb. 1, 1985), it did not adopt the MR 7.5(a) provision that allowed private law firms to use trade names.

In 2002, when the State Bar's Ethical Rules Review Group reviewed the ABA's proposed sweeping "Ethics 2000" changes to the Model Rules, it could have recommended that Arizona remove the trade-name prohibition and comport with MR 7.5(a), which by then had been around for almost 20 years. ERRG did not recommend jumping on the trade-name bandwagon but did not explain why in its report. The reporter's notes to ERRG's proposed amendments say only that "Arizona, unlike the ABA Model Rule, will continue to prohibit the use of trade names."

The State Bar Board of Governors apparently agreed with that recommendation, although the State Bar's resulting rule-change petition does not offer any insights into why.

In 2008, the State Bar appointed the Consumer Information and Education Task Force to consider lawyer advertising in general and propose any necessary rule changes. After reviewing all applicable Ethical Rules, the lawyer subgroup of the CIE task force recommended not changing ER 7.5(a) to comport with MR 7.5(a), saying in its report to the Board of Governors that it "considered whether [ER 7.5] should permit the use of trade names so long as they are not misleading. The majority of the task force rejected that

No Trade Name Use Until 2013

So what happens until the rule change takes effect?

ER 7.5(a) currently says a trade name "may not be *used*" (emphasis added) by a lawyer in private practice.

Merely reserving a name or making business plans, including taking steps to change one's name, shouldn't constitute "use" under ER 7.5(a). If as a legal matter, however, you need to attest to *using* the name, then the plain language of the current ER 7.5(a) will be a problem for you. How can you attest to using a name when you can't ethically use it?

Law firms that wish to move to a trade name already may use slogans, so those slogans could be used in conjunction with the non-trade name.

option due to concern that permitting trade names would further erode the dignity of the legal profession."

The tide changed this year, however. That's when Michelle G. Breit, a lawyer licensed in both Arizona and California, filed a petition asking the Court to follow the Model Rule.

In response, the State Bar's Committee on the Rules of Professional Conduct drafted a comment in support of Breit's petition. The State Bar Board of Governors approved the comment and filed it as the State Bar's position.

The resulting comment noted that the constitutionality of the trade-name ban "is more than an abstract concern" because of *Michel v. Bare*.[4] In that case, as the State Bar's comment explained:

> [A] Nevada Supreme Court rule prohibiting the use of trade names in private legal practice was held to violate the First Amendment. Among other things, the [federal] court ruled that the state bar had failed to establish a link between the trade name ban and evidence that the ban was intended to address an actual problem. *Id.* at 1151. It also ruled that "[a] blanket restriction on the use of trade names, beyond the existing Rule and Statute which already restrict false, deceptive, and misleading trade names, is more restrictive than necessary." *Id.* at 1155. Although it is possible that a court might reach a different result with respect to Arizona's rule, the decision in *Michel* suggests, at a minimum, that a court might hold that Arizona's blanket ban on trade names suffers from the same constitutional infirmities.

In addition to the ABA and State Bar comments, the rule-change petition attracted written comments from only a handful of lawyers—all of whom supported it.

The State Bar's comment explained that most U.S. jurisdictions already allow trade names, with three dozen adopting or incorporating MR 7.5(a) without imposing additional restrictions. Eight others—Florida, Georgia, Illinois, Indiana, Louisiana, Nebraska, New Jersey and North Carolina—permit trade names but impose restrictions beyond MR 7.5(a).

Arizona was one of only seven states that continued to prohibit trade names, the others being Iowa, Kentucky, Mississippi, New York, Ohio and Texas.

What's in a (Trade) Name?

A 1991 Arizona Ethics Opinion relied on *Black's Law Dictionary* to conclude that a trade name consists of "any designation beyond a simple listing of the names of the attorneys actually practicing with the law firm," and noted that ER 7.5 included some exceptions, such as for deceased members where there has been a continuing firm identity.[5]

The ban on trade names has meant that Arizona lawyers and their law firms have had to create their identities by walking some fine lines and abiding by rules that often produce illogical results, especially if one assumes that a name is supposed to provide guidance to consumers. Here are a few examples from the longstanding rule regime:

- A firm may use the names of long-deceased partners.
- A law firm could be sold and the new owner could continue to use the name of the former owner who no longer had anything to do with the firm.
- A firm could not use a name like "Paradise Valley Family Law Lawyers," even though that name might accurately describe its practice area and location.
- The public might know a firm by its prominent advertising slogan, but the firm would still have to have and use a "real" name.
- A law firm's prominently used and displayed domain name could be the kind of trade name the firm's "real" name couldn't be.
- An out-of-state firm that uses a trade name in another state could not use that same name for its Arizona office.

That last point reflects exactly what prompted Breit's petition that resulted in the rule change. When Breit's California law firm, which uses the name Agility IP Law, wanted to open an Arizona office, it had to use a different name here. Breit currently practices in Arizona under the name Otteson Law Group, using the name of Jim Otteson, the founder of Agility IP Law, because she couldn't use the name Agility IP Law.

Effective January 1, 2013, the Arizona office will be called Agility IP Law.

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Trade Name Steps and Missteps

The *ABA/BNA Lawyer' Manual on Professional Conduct* includes a list of law-firm trade names that courts and ethics opinions have considered. A few of the examples cited by that treatise:

OK

- "Your Legal Power" and "Su Poder Legal." *Michel v. Bare*, 230 F. Supp. 2d 1147 (D. Nev. 2002).
- "[Historical Figure's Surname] Law Firm," reflecting the name of a historical building in which the firm practices. Mich. Informal Ethics Op. RI-173 (1993).
- "Product Liability Associates" for a firm that practices principally in product liability cases. Phila. Ethics Op. 94-26 (1994).

Not OK

- "University Legal Center" inaccurately suggests a formal relationship with the University of Alabama. *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983).
- "Workers' Compensation Relief Center" improperly implies affiliation with governmental agency. Calif. Ethics Op. 04-167 (2004).
- "Med Law Associates" implies that the firm has a medical doctor or personnel on staff as well as a specialty in medical malpractice cases. Phila. Ethics Op. 89-21 (1989).

endnotes

1. 433 U.S. 350 (1977).
2. *In re Maltby*, 202 P.2d 902 (Ariz. 1949).
3. *Matter of Zang*, 741 P.2d 267, 278 (Ariz. 1987).
4. 230 F. Supp. 2d 1147 (D. Nev. 2002).
5. Ariz. Ethics Op. 91-09 (April 2, 1991).