

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2004-167**

ISSUE: Is it professional misconduct for an attorney to use a firm trade name or other professional designation which may be mistaken for a governmental entity or to use a current or former governmental title in promoting the attorney's law practice?

DIGEST: An attorney may not use a firm trade name or other professional designation that implies, or has a tendency to confuse or mislead the public into believing, that the firm is connected to a governmental agency. An attorney may accurately describe a current governmental office held by the attorney in a firm resume or brochure, but may not use a current title in the firm name, letterhead or business card. The same analysis applies to a former governmental title that is not qualified with the use of the word "former" or "retired" or similar indication that the office is no longer held. Even truthful statements about a formerly held office may still be found improper on a case-by-case basis under rule 1-400 (D)(2) or (3) if they tend to confuse, deceive, or mislead the public.

AUTHORITIES

INTERPRETED: Rules 1-400 and 1-710 of the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

Willard White, an attorney, intends to open a private law firm called "Workers' Compensation Relief Center." The new firm will represent applicants who seek workers' compensation benefits.

Joan Smith, a part-time city councilperson for the City of Oz, also operates a private law practice along with two other partners using the firm name Smith, Brown & Williams. On the firm's letterhead, each partner is identified by his or her full name in small type in the right-hand margin. Ms. Smith is listed as, "Joan Smith, Member of the City Council of the City of Oz."

Richard Jones, the former State Senator from the County of Oz, operates a law firm called, "Senator Richard Jones and Associates."

DISCUSSION

"Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." (*Ibanez v. Florida Dept. of Bus. & Prof. Reg.* (1994) 512 U.S. 136 [114 S.Ct. 2084, 129 L.Ed.2d 118].) "But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely." (*Peel v. Attorney Registration and Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 100 [110 S.Ct. 2281, 110 L.Ed.2d 83].)

In California, rule 1-400 of the Rules of Professional Conduct^{1/} governs attorney advertising and solicitation. That rule regulates "communications," which are broadly defined as "any message or offer made by or on behalf of a member concerning the availability for professional employment of a law firm or member to any former, present, or

^{1/} All rule references are to the Rules of Professional Conduct of the State Bar of California unless otherwise noted.

prospective client.” An attorney’s firm name or letterhead constitutes a communication (rule 1-400(A)(1) and (2)), and is subject to regulation under rule 1-400 which requires truthful communications that are not confusing or deceptive (rule 1-400(D)). Pursuant to rule 1-400(E), the California State Bar Board of Governors has promulgated a set of standards that identify certain situations that are presumed to violate rule 1-400. These presumptions may be rebutted. Of particular relevance to the facts presented, Standard 6 presumes improper “any ‘communication’ in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.”

I. Is the firm name “Workers’ Compensation Relief Center” consistent with rule 1-400?

Attorneys in private practices may use “trade names” to describe their law firms and practices so long as they do not violate the specific restrictions set forth in rule 1-400. (Cal. State Bar Formal Opn. No. 1982-66.) A trade name violates rule 1-400 if any of the following three tests is satisfied: [1] the name implies that the firm is publicly supported; [2] the name is deceptive with respect to the identity of the members of the firm who are performing legal services; [3] the name is misleading as to the types of services being offered. Final Report and Recommendation of the Special Committee on Lawyer Advertising and Solicitation, November 1978 (at pp. 25-26.)

Here, the trade name “Workers’ Compensation Relief Center” appears to violate rule 1-400(D) under two of those three tests. Under the first test, the trade name could easily mislead potential clients into believing that the firm is an official governmental office connected with state agencies or departments such as the Division of Workers’ Compensation or the Workers’ Compensation Appeal Board. (Lab. Code, §§ 50, 55, 56, 110.) Further, under the third test set out above, the firm name appears misleading as to the type of services being offered. A prospective client could reasonably believe the office actually grants “relief” by awarding benefits, a function generally performed only by governmental entities, rather than merely offering legal representation in seeking benefits. Our conclusion comports with opinions from other jurisdictions. (See *Mezrano v. Alabama State Bar* (Ala.1983) 434 So. 2d 732 [use of “University Legal Center” by a firm located on University Boulevard near the University of Alabama improperly suggests a formal relationship with the university]; Ohio Comm. on Grievances Disc. Op. 91-004 (2-8-91) (“Debt Relief Clinic” is misleading).) Unless each of the firm’s communications subject to Rule 1-400 clarifies that the firm is not a governmental entity that grants benefits (see below concerning disclaimers), the particular trade name “Workers’ Compensation Relief Center” would violate rule 1-400.

We also believe that the trade name “Worker’s Compensation Relief Center” would trigger Standard 6’s presumption that rule 1-400 has been violated. The trade name implies a relationship between the firm’s private practice and a governmental agency or instrumentality or a public or non-profit legal services organization. Standard 6’s presumption is rebuttable, however, so White may be able to rebut the presumption that his proposed trade name violates rule 1-400. One way in which White can do so may be found in Comment 1 to American Bar Association Model Rule 7.5.² The commentary to Model Rule 7.5 states, “[i]f a private firm uses a trade name that includes a geographical name such as ‘Springfield Legal Clinic,’ an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication.” White, therefore, can rebut Standard 6’s presumption by including a prominent express disclaimer in his communications, such as by adding the words “A Private Law Firm” after his proposed trade name. That would ensure that potential clients could not reasonably view his firm as an official governmental entity or non-profit organization. White may also be able to rebut Standard 6’s presumption in other ways.³

^{2/} See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799] (the ABA Model Rules of Professional Conduct may provide guidance to California lawyers where there is no direct California authority and they do not conflict with California policy).

^{3/} For instance, two out-of-state courts have held that a firm’s otherwise misleading name can be rendered acceptable by including the name of individual lawyers at the firm, thus removing the trade name’s implication that the law firm is something it is not. See, e.g., *Matter of Von Wiegen* (N.Y. 1984) 470 N.E. 2d 838 (phrase “The

II. Use of a Government Title In Private Practice During Government Service

Our analysis of the second hypothetical involving Joan Smith, an attorney in private practice who also serves as a part-time member of the City Council of Oz, is limited to Smith's professional obligations under the California Rules of Professional Conduct. The extent to which Smith's use of her title as a public official may be governed by law other than the law governing lawyers is beyond the purview of this Committee. (See, e.g., Government Code Section 19990.)

Although Smith's identification on her firm's letterhead as "Joan Smith, Member of the City Council of the City of Oz," is not part of the firm name itself, it appears she is using her governmental title as a "professional designation" within the meaning of Standard 6 to rule 1-400. We interpret the Standard to include as a professional designation the way an attorney is officially listed on letterhead because that is how the attorney is formally presenting or "designating" himself or herself as a professional to the public. Singling out her governmental title on the letterhead next to her name as a lawyer in the firm implies a relationship between Smith's private law practice and the city or at least the city council. Smith's listing of her city council title in this manner implies that her membership on the city council is a credential or qualification she holds in her law practice, when in fact Smith does not hold her official position for the purpose of assisting private clients. Thus, we conclude that Standard 6's presumptive violation of rule 1-400 applies to Smith's misleading use of the City Council designation on her letterhead. The same analysis would apply if Smith designated herself professionally as "Joan Smith, Member of the City Council of the City of Oz" on her law firm business cards.

We note that Standard 6's reach is narrow, applying only to "firm name[s], trade name[s], fictitious name[s] and professional designation[s]." Therefore, Smith is free to inform her current or prospective clients and the public at large of her service on the City Council through most other forms of communication. For example, Standard 6 would not prohibit Smith from listing her governmental position in her resume or firm brochure, or from claiming to have gained expertise on governmental law by virtue of her work as a public official. Unlike the simple juxtaposition of attorney name and political office on letterhead (or a business card), these other forms of communication provide context, delineating the public office held as only one piece of biographical information about the lawyer. Such factual descriptions do not by themselves imply a relationship between the governmental office and the lawyer's practice.^{4/} Standard 6 recognizes that firm names, fictitious business names, and professional designations have a special ability to mislead the public because they lack the context provided by other kinds of communications. Stripped of that context, an honorific title in a firm name or trade name suggests the lawyer's special ability to wield influence with a governmental agency due to the public office held by that lawyer and constitutes the principal reason for retaining the lawyer, without reference to any of the lawyer's other qualifications.

Even without reference to Standard 6, rule 1-400(D)(2) and (3) are applicable in Smith's situation. While it is objectively and verifiably true that Smith is a member of the city council, the rule recognizes that even true statements can be misleading. Thus, rule 1-400(D)(2) states that a communication shall not "arrange any matter in a manner or format which . . . tends to confuse, deceive, or mislead the public." Rule 1-400(D)(3) further prohibits an attorney from omitting to state any fact which under the circumstances "is necessary to make the statements made . . . not misleading to the public." As already noted, "[m]isleading advertising may be prohibited entirely." (*Peel v. Attorney Registration and Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 100 [110 S.Ct. 2281, 110 L.Ed.2d 83].)

Country Lawyer" not misleading when used in conjunction with lawyer's own name); See also *In re Conduct of Shannon* (Or. 1982) 292 Or. 339 [638 P.2d 482].

^{4/} The Board of Governors recognized this distinction between these different forms of communication when it differentiated firm names, trade names, fictitious names and professional designations from other communications in establishing the presumptive violation in Standard 6.

Here, Smith’s listing of her official title on her private law firm letterhead blurs her private and public roles in a manner that is likely to be confusing to the public. (Rule 1-400(D)(2).) Singling out an official governmental office for emphasis on the letterhead accomplishes such confusion in a way that inclusion of the same information on a resume or biography would not. As distinguished from the inclusion of the fact in a resume or firm brochure as discussed above, the bare juxtaposition of her governmental title and her name on the firm letterhead violates rule 1-400(D)(3).

Our analysis comports with ethical rules in other jurisdictions^{5/} and with a Los Angeles County Bar Association ethics opinion. Los Angeles County Bar Association Formal Opn. No. 260 (1959). In that opinion, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee addressed a hypothetical situation of an assemblyman engaged in private practice who had printed his law firm address and telephone number on letterhead intended for his official use. Although that opinion interpreted now-superseded and more restrictive rules that banned attorney advertising altogether, and which predated landmark United States Supreme Court precedent restricting state power to prohibit legal advertising,^{6/} the Los Angeles opinion’s reasoning is still persuasive to us on the points we now address. The Los Angeles committee wrote that the assemblyman’s “status as a lawyer has no connection with his official position as an assemblyman, nor with official business.” Thus, the Los Angeles Committee concluded that the assemblyman could not list his private law firm information on his official stationery. Likewise, Smith’s use of the designation, “Member of the City Council,” on her firm’s stationery is misleading because that designation would likely confuse the public.^{7/}

III. Use of a Governmental Title After Completion of Service

This fact situation involves the use of a government title as part of a firm name by Richard Jones, a *former* State Senator.

The first issue we address is Jones’s use of the term senator in his firm name^{8/} with no indication that he is no longer a senator. Paragraphs (D)(1), (2), and (3) of rule 1-400 prohibit firm names that are untrue, false or deceptive, or

^{5/} For example, Texas Rules on Advertising similarly prohibit any communication about the qualifications or the services of a lawyer or firm that “states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.” (Texas Rule 7.02.) Texas Rule 7.01 specifically precludes the use of a letterhead or firm name that violates Rule 7.02. The comment to Texas Rule 7.01 states “because it may be misleading under paragraph (a), *a lawyer who occupies a judicial, legislative, or public executive or administrative position should not indicate that fact on a letterhead which identifies that person as an attorney in the private practice of law.*” [Emphasis added]. This Texas advertising rule evolved from an earlier opinion of the Texas Ethics Committee, Texas Ethics Opn. 11 (1948). That opinion concludes that a lawyer who is a sitting State Senator or State Representative may not so state on his professional card without violating the then controlling rule, Texas Canon 39. Although the current Texas Rule follows the ABA Model Rule, the commentary to and the Texas Bar’s interpretation of that rule is consistent with California standards.

^{6/} (E.g., *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [97 S.Ct. 2691, 53 L.Ed.2d 810]; *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893, 56 L.Ed.2d 417]); see also Los Angeles County Bar Association Formal Opn. No. 494 (1998) (more recent analysis of constitutional standards on the regulation of legal advertising as commercial speech.)

^{7/} We note that one out-of-state ethics committee disagrees. See Wisconsin Ethics Opn. E-90-2 (1990) (advertising that lawyer is “court commissioner” is acceptable and does not imply that the lawyer is able to obtain a specific result because of his or her office). We disagree with that opinion’s analysis and, as noted above, so do a number of other authorities. Further, while not related to the correct interpretation of rule 1-400, we note that California rule 1-710 makes lawyers acting in judicial capacity subject to discipline for violating applicable portions of the California Code of Judicial Conduct, including Canon 6 (D)(2), which prohibits the use of a judicial title “in any written communication intended to advance [his or her] pecuniary interests, except to show [his or her] . . . qualifications.”

^{8/} This opinion does not address the informal use of honorifics by persons introducing Jones as Senator Jones.

omit facts necessary to make statements not misleading, or that “arrange any matter in a manner or format which . . . tends to confuse, deceive, or mislead the public.” Jones has no current official status as a “Senator,” so for Jones to use “Senator” in his firm’s name without qualification that he is retired would be both false and misleading. The term “Senator” in the firm name also implies he is a current office holder, so Jones’s firm name is a communication that implies a relationship between a member in private practice, Jones, and a governmental body, the State Senate. Therefore, under standard 6, the firm name “Senator Jones and Associates” presumptively violates rule 1-400. We conclude it is inherently misleading simply to use the term Senator in Jones’s firm name.

The second issue we address is whether the use of the word “retired” or a similar qualifier would remedy the problem posed under rule 1-400(D)(2). The question is whether a truthful reference to a former office held in the firm name or official letterhead would tend to confuse or mislead the public about the relevance of the previously held office to the member’s practice of law. If so, then it would violate rule 1-400(D)(2). We concluded in Part B that an official’s use of her current title in the margin of her firm letterhead can mislead the public concerning the relevance of her official role to her law practice. A similar, although admittedly more attenuated, tendency to mislead or confuse the public might occur where a former governmental office is referred to in the firm title or letterhead. It is possible that some members of the public may be confused into believing that a member who advertises his or her former governmental title in the law firm name maintains an ability to use that prior official position in his or her law practice to influence a public entity improperly.

The most closely analogous ABA Model Rule, Rule 8.4 provides in pertinent part that: “It is professional misconduct for a lawyer to . . . (e) state or imply an ability to influence improperly a government agency or official . . .” Interpreting their version of Model Rule 8.4, a majority of states that have addressed the issue have concluded that the use of a former judicial office in a law firm letterhead should be banned even when the office is clearly indicated as no longer held. (See discussion in Practice Guide “Firm Names, Letterhead and Cards” ABA/BNA Lawyers’ Manual on Professional Conduct 81:3001(1-30-02), p.235.) Bar Association of San Francisco Informal Opinion 1973-11, interpreting former California rules which banned advertising altogether, is consistent with that approach (former judge cannot be so designated on law firm letterheads once he returns to practice).

We do not interpret the current version of California’s rule 1-400 to prohibit the truthful, unconfusing reference in a firm name, trade name, or professional designation to a former office held. There is no indication that Standard 6, in carving out firm names, trade names, and other professional designations which state or imply a relationship to a governmental agency, was intended to address prior existing relationships with a governmental agency. As a result, we cannot interpret this disciplinary standard to presumptively prohibit the truthful use of a past governmental title in a law office name, trade name, letterhead or professional designation. Nonetheless, truthful statements may still be found improper on a case-by-case basis under rule 1-400(D)(2) or (3) if they tend to confuse, deceive or mislead the public. Depending on how a prior office held is described and how it is arranged in the firm name, trade name or on stationery or in another professional description, a member of the bar might run afoul of rule 1-400(D)(2) or (3).

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.