THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 02-0004

ISSUE: Is it professional misconduct for an attorney to use a firm trade name 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 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 or former governmental office held by the attorney in a firm resume or brochure, but may not use the title in the firm name or letterhead. Listing a governmental title on law firm letterheads misleadingly implies a direct connection between the firm and the public office held.

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

STATEMENT OF FACTS

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

DISCUSSION

Introduction

"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 Disciplinary Comm'n of Ill.* (1990) 496 US 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 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).)

[1/] All rule references are to the Rules of Professional Conduct of the State Bar of California unless otherwise noted.

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."

A. 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. (California 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. (California Practice Guide: Professional Responsibility, Chap. 2:132, p. 2-25 (The Rutter Group Rev. #1 2000); 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" violates rule 1-400 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. (Labor Code, §§ 50, 55, 56, 110.) Further, under the third test set out above, the firm name is misleading as to the type of services being offered. A prospective client could reasonably believe the office actually grants "relief" by awarding benefits, rather than merely offering legal representation in seeking benefits. Our conclusion comports with opinions from other jurisdictions. (See *Mezrano v. Alabama State Bar* 434 So. 2d 732 (Ala.1983) [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.)

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. (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].) 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.[2/]

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

B. 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.[3/] As with the first hypothetical, our analysis begins with rule 1-400(E) and Standard 6.

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. Listing her governmental title on the letterhead falsely 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 also 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, Standard 6's presumptive violation of rule 1-400 applies to Smith's use of the City Council designation.

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 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. These forms of communication provide context, delineating the public office held as only one of the lawyer's qualifications. Standard 6 instead recognizes that firm names, fictitious business names, and professional designations have a special ability to mislead the public by implying that the described honorific title constitutes the exclusive reason for retaining the lawyer, without reference to any of the lawyer's other qualifications.

Rule 1-400 (D)(2) and (3) are also applicable in Smith's situation. While it is objectively and verifiably true that Smith is a member of the city council, even true statements can be misleading. Rule 1-400(D)(2) states that a communication shall not be "arranged in 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 not to make the statement misleading." As already noted, "[m]isleading advertising may be prohibited entirely." (*Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 US 91, 100.) Smith's listing of her governmental title on her firm letterhead in the manner of a professional designation violates Rule 1-400(D)(2) and (3) for the reasons we have discussed above. 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.

[3/] 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.

Our analysis comports with ethical rules in other jurisdictions[4/] and with a Los Angeles County Bar opinion. Los Angeles County Bar Association Formal Opn. No. 260 (1959). In that opinion, the Los Angeles County 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,[5/] 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 could confuse the public.[6/]

C. Use of a Governmental Title After Completion of Service

The fact situation involves the use by Richard Jones, a former State Senator, of his government title after completion of his government service.

The first issue we address is Jones's failure to specify in some way 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 omit facts necessary to make statements not misleading. Jones has no current official status as a "Senator," so for Jones to use "Senator" in his firm's name without acknowledging that he is retired would be both false and misleading. The term "Senator" in the firm name could be interpreted to mean that he is a current office holder. It is, therefore, inherently misleading to omit the word "retired" or "former" or some similar statement in describing Jones' status. (Cf. Cal. Practice Guide Chap. 2, 2:188, p.2-

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[4/] 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.

[5/] (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).)

[6/] 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."

36.2, Description of Lawyer or Practice in Letterheads, Signs, Brochures, etc. (Rutter Group 2000) (former judge's use of term "judge," without indicating that former judge is no longer in office, is misleading).)[7/]

However, even if Jones were to use the qualifying term "retired" or "former," Jones's use of his former governmental title in the firm name might still violate Rule 1-400. 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 the public occurs where the governmental office is referred to in the firm title or letterhead when the lawyer in question no longer holds the public office. See Bar Association of San Francisco Informal Opinion 1973-11 (former judge cannot be so designated on law firm letterheads once he returns to practice.)[8/] Similarly, Standard (6)'s rebuttable presumption is triggered by Jones's use of his former governmental title because it implies a relationship between Jones and his former govemmental office.

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.

[7/] This opinion does not address situations where retired judicial officers are engaging solely in arbitration or mediation as neutral arbiters or mediators.

[8/] Although a current California Practice Guide opines that the use of designations "former judge," "retired judge,' or "Judge (Ret.)" are permitted, provided they are truthful and accurate, (Cal. Practice Guide (Rutter Group) Chap. 2, § 2:188.1, p. 2-36.3-4 (Rev. #1 2001)), they do not differentiate the honorific's usage on letterheads from its inclusion in firm brochures. However, as already discussed, Part B., supra, the Board of Governors took pains to differentiate firm names, trade names, fictitious names and professional designations from other communications in establishing the presumptive violation in Standard 6. Further, the majority of the states maintain that the use of a former judicial office in a law firm letterhead should be banned. (See discussion in Practice Guide "Firm Names, Letterhead and Cards" ABA/BNA Lawyers' Manual on Professional Conduct 81:3001(1-30-02), p.235.) The majority of the states reflect the same standards that the Committee adopts here applicable to private practitioners.