

A Note on Lawyers' Trade Names

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[Editor's Note: This article was written for NYPRR by Judge Frankel just before his death on March 3, 2002. The article was written with the assistance of Ilyssa Birnbach, an associate at the firm of Kramer Levin Naftalis & Frankel LLP.]

A recent opinion of the Utah State Bar Ethics Advisory Opinion Committee has triggered for me some reactions sufficiently general to be of interest, I think, to New York lawyers working under different rules.

The Opinion concerns a law firm's proposal to use the name "Legal Center for the Wrongfully Accused" when representing defendants accused of domestic violence. The name is inspired as a response to the use by a public or charitable legal services organization designated "Legal Center for the Victims of Domestic Violence." In Utah Ethics Advisory Opinion No. 01-07, August 29, 2001, the Utah Committee concludes that the proposed name will be acceptable under the applicable Rules of Professional Conduct. Though I do not practice regularly under those Rules, I dare to suggest that the Opinion should have been found in at least one important respect to be inconsistent with those Rules, with principles of professional responsibility broader than those the Committee examined, and specifically with what I had thought were generally accepted limits on lawyers' expressions of their own views of the merits of their clients' cases.

On the other hand, the Opinion may have thoughts useful for States like New York which take a broadly different view.

The question is easy - indeed, substantially nonexistent - in New York, where the Code of Professional Responsibility, as variously modified, is still the basic text. Disciplinary Rule 2-102(B) says very simply, before it goes on to say more detailed things, that "[a] lawyer in private practice shall not practice under a trade name...." That would appear to be that. It would end the Utah question I've chosen here to reach. Among other defects, the New York prohibition appears to be too broad and very possibly unconstitutional. In a proper case it might raise First Amendment problems. In any event, it may promote thinking relevant for us in New York to consider where Utah went in and how it came out.

Turning then to a more particular look at the Utah Opinion, there are problems with its answers to the question it treats and an even more basic problem with an important question it neglects altogether. On the positive side, the Utah Opinion points out that Rule 7.5(a) of its Rules of Professional Conduct expressly authorizes the use by a lawyer in private practice of a trade name provided "it does not imply a connection with a government agency or with a public or charitable legal services organization or is not otherwise in violation of Rule 7.1," which (stated generally) forbids false or misleading representations. In favor of its Rule, the one prevailing in a majority of the States, the Utah Committee points out that "[u]se

of trade names can assist the public in the selection of an attorney." This, in addition to more self regarding ends, is of course an ancient and honorable purpose of "trade names," whether or not we lawyers would select that label as a first choice.

New York bars trade names

New York, on the other hand, continuing in its rearguard role of resisting the Rules of Professional Conduct, carries on an ancient tradition with its flat bar against the use of trade names by private law practitioners. Disciplinary Rule 2-102(B) begins "A lawyer in private practice shall not practice under a trade name," and then goes on to detailed prohibitions of misleading representations, allowable forms of firm description, and other matters outside the scope of this paper. This blunderbuss does not appear thus far to have had dramatic significance for the bar. In the few cases where violations have been found, the gist of the prohibitions against trade names has been "to prevent the public from being deceived about the identity, responsibility and status of those who use the name." *Matter of Von Weigen*, 63 N.Y.2d 163, 175, 470 N.E.2d 838, 845 (1984).

As might be expected, the New York position disfavoring trade names has produced very little in the way of disputed proceedings. Among the few cases, *Paskowski v. DiBenedetto*, 184 Misc.2d 34, 705 N.Y.S.2d 521 (Fam. Ct. 2000), found that the term the "Domestic Violence Law Project" was appropriate for several reasons, including that the term was "not so misleading or deceptive as to render its use impermissible;" *Matter of Von Weigen*, 470 N.E.2d 838, 845 63 N.Y.2d 163, 175 (1984), held that the use of the motto "The Country Lawyer" did not deceive the public because the lawyer 's name was inserted apart from the motto; and *Matter of Shepard*, 92 A.D.2d 978, 459 N.Y.S.2d 632 (3d Dep't 1983), censured respondent for the use of the name "The People's Law Firm of Jan L. Shepard, Attorney, P.C." because the phrase "suggests or implies that the firm is controlled by the public, receives public funds for its existence, provides free legal services or is a nonprofit legal service."

As between New York and Utah, addressing only the total ban versus the regulated allowance of trade names, I'd be led, chauvinism notwithstanding, to vote with Utah. If and when an occasion arises that causes someone to care enough, New York may find its adherence to the old view has come to collide with the ongoing course of constitutional law and the freedom of lawyers under the First Amendment during the last 25 years or so (see, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)) to advertise their services in ways that would have shocked our ancestors and may still trigger a nostalgic ache now and again for some of the older folk.

Opinion has glaring omission

There is more to the Utah Opinion that NYPRR readers may find less essential to have covered here. But one omission that seems glaring to this writer may serve as a warning signal for anyone venturing further exploration of this subject and possible improvement of our New York status quo. The particular trade name addressed in the Utah Opinion, "Legal Center for the Wrongfully Accused," is examined in the Utah Opinion in the familiar and habitual context of this subject: to guard against false representations and misleading descriptions. Overlooked entirely is the striking and totally unacceptable description that trade name gives to the firm's clientele. Those clients, the trade name announces, are "Wrongfully Accused." The impropriety in that should have been seen, it is submitted, as so gross as to go far toward discrediting the entire Opinion, which ought not to happen. For profound reasons of public policy important, far beyond the concerns of lawyers, to the public interest in the sound and effective

representation of accused people - a lawyer has long been forbidden to "[a]ssert a personal opinion as to the justness of a cause... or as to the guilt or innocence of an accused." Disciplinary Rule 7-106(C)(4). See to the same effect Model Rules of Prof'l Conduct R. 3.4(e) (1999), designated as Rule 3.4(e) in Utah's Rules of Professional Conduct and the progenitor, ABA Canons of Prof'l Ethics, Canon 15 (1999). For a lawyer or law firm to entitle its clientele "the Wrongfully Accused" should be deemed ethically improper, not to mention that the generalization, grounded in ignorance, is, as an empirical matter, plain silly. Every defense lawyer, however loyal and devoted, knows as a matter of fact (consider, *e.g.*, plea bargaining) that most of his or her clients will turn out to have been rightfully accused and guilty of at least approximately what is alleged against them.

So a heavily qualified cheer for the project of the Utah Ethics Advisory Opinion. And a plea for the next time and/or for others plowing this field to make a more thorough tour of the terrain before blessing a lawyer 's proposed trade name.