

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 19 - 02

I. Question Presented

May a Nebraska law firm use a trade name or service mark which does not communicate the law firm's professional entity designation (e.g., LLC or LLP)?

II. Summary of Opinion

A law firm may use a trade name which does not specifically include the law firm's professional entity designation, so long as the law firm conforms with Nebraska Rules of Professional Conduct §§ 3-507.1 and 3-507.5 and the law firm undertakes reasonable efforts to prevent a communication that is false or misleading.

III. Statement of Facts

A Nebraska law firm has requested an advisory opinion regarding interpretation of the Nebraska Rules of Professional Conduct concerning the manner in which a Nebraska law firm must communicate its professional entity designation. The law firm is in the process of what it terms as "rebranding" and is considering utilizing a trade name or service mark to refer to the law firm's name. For purposes of the opinion, the hypothetical name of the law firm shall be A & B, LLC. The law firm intends to rebrand and utilize on the website, letterhead, and in advertising, the trade name or service mark: A|B; but has indicated that within the website, letterhead, fee agreements and other official filings and correspondence, the law firm would continue to use the law firm's legal name of A & B, LLC.

IV. Applicable Rules of Professional Conduct

A. Neb. Ct. R. of Prof. Cond. § 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 representation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

B. Neb. Ct. R. of Prof. Cond. § 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.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

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

V. Discussion

There are no rules in the Nebraska Rules of Professional Conduct that directly address the requirements regarding use of a trade name or service mark and the inclusion or exclusion of the law firm's professional entity designation on said trade name or service mark. The question posed to the Advisory Committee is whether a law firm's communication is false or misleading by utilizing a trade name which does not contain the law firm's professional entity designation.

Neb. Ct. R. of Prof. Cond. § 3-507.1 instructs that "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The Rule defines what is false or misleading as if the communication "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Comment [1] of § 3-507.1 states that the rule governs "all communications about a lawyer's services, including advertising . . . Whatever means are used to make known a lawyer's services, statements about them must be truthful." Comment [2] of § 3-507.1 further instructs as follows,

[t]ruthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

Neb. Ct. R. of Prof. Cond. § 3-507.1, Comment [2].

Neb. Ct. R. of Prof. Cond. § 3-507.5 allows the use of trade names by lawyers in private practice if certain requirements are met, which include that the trade name:

(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.

Neb. Ct. R. of Prof. Cond. § 3-507.5.

The Nebraska Rules of Professional Conduct do not provide any guidance or mention the use of a service mark, which Black's Law Dictionary specifically defines as "[a] name, phrase, or other device to identify and distinguish the services of a certain provider." *Black's Law Dictionary* 1491 (9th ed. 2009). However, the Nebraska Rules of Professional conduct do specifically provide guidance for the use of a trade name, which Black's Law Dictionary defines, in part, as, "[a] name, style or symbol used to distinguish a company, partnership, or business (as opposed to a product or service); the name under which a business operates." *Black's Law Dictionary* 1633 (9th ed. 2009). The definitions set forth in the Black's Law Dictionary indicate that service marks and trade names are not synonyms. Since the Nebraska Rules of Professional Conduct do not provide for lawyer's use of a service mark the analysis and conclusion made by the Committee within this opinion is limited in application only to the question as it relates to the use of a trade name as provided within the Nebraska Rules of Professional Conduct and the Committee does not opine

as to the use of a service mark, which is not referenced in the Nebraska Rules of Professional Conduct.

The Nebraska Supreme has set forth rules regarding permissible business organizations and name restrictions at Neb. Ct. R. § 3-201. Pertinent to this inquiry is Neb. Ct. R. § 3-201(C), which provides in part,

(C) The provisions of this rule shall apply to all foreign and domestic professional organizations (hereinafter collectively referred to as “professional organizations”) having as shareholders, officers, directors, partners, employees, members, or managers one or more attorneys who engage in the practice of law in Nebraska, whether such professional organizations are formed under Nebraska law or under laws of another state or jurisdiction. All professional organizations conducting the practice of law in Nebraska shall comply with the following requirements, and the organizing document of any domestic professional organization shall contain provisions complying with the following requirements:

(1) the name of the professional organization organized under this rule shall contain the words “professional corporation,” “limited liability company,” or “limited liability partnership,” or abbreviations thereof such as “P.C.,” “L.L.C.,” or “L.L.P.” In addition, any professional corporation organized under this rule shall have as part of its firm name the words “A Limited Liability Organization,” or an abbreviation thereof such as “L.L.O.,” following its designation as a professional corporation or P.C. The name of the professional organization shall meet the ethical standards established for the names of law firms according to the standards of professional conduct promulgated by the Supreme Court and the Nebraska Rules of Professional Conduct;

...

Neb. Ct. R. § 3-201.

There is very little guidance for this inquiry from Bar Association Ethic’s Committees across the country, as most of the opinions deal with the proposed trade name itself and not the inclusion or exclusion of the professional designation. In 2007, the Washington State Bar Association Committee on Professional Ethics was asked to address whether a law firm, registered as a professional limited liability company or PLLC, could use a trade name without the PLLC designation to identify itself to the public. In Opinion 2135, the Committee opined that, under Washington Rules of Professional Conduct, Rule 7.5(a) “a law firm may conduct business under a trade name as long as it is not misleading.” The Committee found in that instance, the

firm's trade name was not misleading on its face, and the proposed trade name and the legal name of the firm were identical, except for the legal name included the PLLC designation and the trade name did not. The Committee went on to find,

Given the fact that the trade name X&Y could be construed to suggest a partnership, the inquirer should consider either (1) adding an express disclaimer in the marketing materials that the firm is a PLLC, or (2) including the firm's legal name somewhere in those materials to avoid any misleading implication that the firm is a partnership.

A review of Washington State's Rules of Professional Conduct Rule 7.5 Firm Names and Letterheads, reveals that the language of the Washington Rule, although not exact, is substantially similar to that of the language found within Neb. Ct. R. of Prof. Cond. § 3-507.5.

In the case before the Committee, the proposed trade name is exactly the same in substance as the legal name of the law firm, utilizing the same two names, just with a different type of marking and no professional designation. In the inquiry to the Committee, the law firm makes clear that the intention of the law firm is to utilize the new trade name at the top of letterhead and other forms of advertising, but that the law firm's website, letterhead, fee agreements and other official filings and correspondence would continue to include the law firm's legal name.

The law firm's proposed trade name could be construed to show the professional designation of the law firm and is not misleading so long as the law firm continues to add a specific reference in those materials on which the trade name appears of said professional designation or includes the law firm's legal name somewhere in the documentation in order to avoid any misleading communication. The trade name and use thereof as presented by this law firm appears to meet the requirements of Neb. Ct. R. of Prof. Cond. § 3-507.5 and would not be in violation Neb. Ct. R. of Prof. Cond. § 3-507.1.

VI. Conclusion

The use of trade names by law firms is permissible so long as the trade name chosen by the law firm follows the constructs of the Nebraska Rules of Professional Conduct to utilize the trade name in a manner that is not false or misleading about the law firm or the law firm's services. In a situation where the law firm's trade name does not include the law firm's

professional designation as set forth in the law firm's legal name, a law firm could remedy any potential false or misleading communication by specifically including professional designation in the trade name, or by including the law firm's legal name within the documentation in which the trade name is used in order to avoid any misleading implication.

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