

ETHICS ADVISORY OPINION

12-12

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A group of lawyers intend to practice as law partners in a partnership known as the "XYZ Law Firm". The "XYZ Law Firm" will be a registered Limited Liability Partnership. The lawyers intend to purchase a professional liability insurance policy in the name of "XYZ" partnership which will insure the professional practice of the firm and its members. The firm will have a single location. The firm's letterhead, signage, and telephone listings will identify the practice as the "XYZ Law Firm" and list its members as partners.

While the partners of the "XYZ Law Firm" intend to share expenses, they do not intend to share profits except on a case by case basis. Because the partners will not share profits, the firm will not file a tax return. The individual partners have, or will obtain, separate employer identification numbers and will file individual tax returns for the income generated by their professional activities. The lawyers will maintain individual trust accounts and obtain individual business licenses from the City where the firm is located. Each lawyer intends to hire his or her own support staff, who will work under the employer identification number of the individual lawyer.

The owners of the building where the "XYZ Law Firm" is located operate the building as "Acme Executive Park." Some of the owners of "Acme Executive Park" will be members of the "XYZ Law Firm." "Acme Executive Park" has a separate employer identification number issued to it. "Acme Executive Park" employs a receptionist whose salary is shared by the members of the "XYZ Law Firm."

Question Presented:

Under the circumstances described above, do the lawyers practicing in "XYZ Law Firm" comply with Rule 7.5(d) of the South Carolina Rules of Professional Conduct?

Summary of Opinion:

Lawyers may state or imply that they practice in a partnership only when such statement or implication is accurate and not misleading. SCRPC 7.1, 7.5(d). Under the circumstances described by the inquirer, it would be misleading to represent to the public that he is “practicing in a partnership.”

Opinion:

The Committee believes that the inquirer’s representation that he “practices in a partnership” will be misleading to the public under the circumstances described. Rule 7.1 prohibits “misleading” or “deceptive” communications about a lawyer or lawyer’s services. Rule 7.5(d) provides that “[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact.” Comment 2 to Rule 7.5 explains that “[w]ith regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, ‘Smith and Jones,’ for that title suggests that they are practicing law together as a firm.”

The purpose of Rule 7.5(d) is not merely to require trade names to be technically accurate but to impose on counsel the obligation scrupulously to avoid misleading the public. See, e.g., Cal. Ethics Op. 1997-150 (1997) (“Attorneys sharing facilities or staff must affirmatively disclose to the public and to clients the nature of their shared arrangement when the arrangement tends to confuse, deceive, or mislead the public.”); Mich. Ethics Op. RI-45 (“In sum, the rules require that lawyers be honest and clear in the representations which they make to the public regarding the nature of their practices. . . . Consumers of legal services have a right to understand what individual or entity they can look to for the provision of legal services and who they can hold responsible for the manner in which those services are provided.”)

This Committee does not purport to render an opinion as to the legal definition of “partnership.” Nevertheless, certain background legal principles are relevant to the extent they bear on how the public will perceive an attorney’s representation in regards to practicing in a partnership or LLP.

A partnership is commonly understood to involve the sharing of profits between partners. See, e.g., S.C. CODE ANN. § 33-41-210 (“A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this State, a registered limited liability partnership.”) (emphasis added); *Commissioner v. Culbertson*, 337 U.S. 733, 740 (1949) (“[A] partnership is... an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services.”); IRS Form 1065 (“A partnership is the relationship between two or more persons who join to carry on a trade or business, with each person contributing money, property, labor, or skill and each expecting to share in the profits and losses of the business . . .”) (emphasis added).

While this Committee does not opine that a partnership cannot exist without sharing profits, such an arrangement is unusual and contrary to the common understanding of the term. Members of the public will reasonably believe that a firm designated as a partnership shares profits and is not merely an aggregation of independent law practices.

Under the arrangement described above, attorneys X, Y and Z will share very little. No indication exists that they have agreed to deal with one another's clients or to appear on one another's behalf. They will not share profits, except on designated cases, and will obtain separate business licenses, hire their own employees (other than a single shared receptionist), and maintain separate trust accounts. While they apparently intend to seek shared liability insurance coverage, their ability to obtain such coverage is uncertain, given that their practices are in every meaningful sense independent of each other.

Even assuming that attorneys X, Y and Z are "partners" in some sense (as co-tenants, insured parties, etc.) they are not "practicing in a partnership." The inquirer's trade name must reflect the reality of his law practice, not the status of his office lease or insurance arrangements. Designating three largely independent law practices as an LLP will undoubtedly mislead the public.