

ETHICS ADVISORY OPINION

16-05

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:

Lawyer S formed S Law Firm, LLC. Lawyers T and U are currently full time salaried associates of S Law Firm, LLC, and have each worked at S Law Firm, LLC, for over four years. Lawyers S, T, and U work on most cases together. Lawyers T and U work only on S Law Firm, LLC, matters and do not have independent practices.

Lawyer S intends to change the name of the Law Firm to S, T and U Law Firm, LLC. Lawyers T and U will consent in writing to the name change. S will remain the sole member, and T and U will remain full time associates.

The S, T and U Law Firm, LLC will remain a registered Limited Liability Company. A professional liability insurance policy will cover S, T and U Law Firm, LLC, to insure the professional practice of the firm. (A professional liability insurance policy currently covers "S Law Firm, LLC.") The firm will have a single location. The firm's letterhead, signage, and telephone listings will identify the practice as the S, T and U Law Firm, LLC. It will be clear on the letterhead that S is a member and T and U are associates. S, T and U Law Firm, LLC will file a tax return. S, T and U Law Firm will maintain the only trust account. S, T and U Law Firm, LLC, will obtain a business license. S, T and U Law Firm, LLC, will hire support staff, who work with or for all of the attorneys.

Question Presented:

Under the circumstances described above, does the proposed law firm name of "S, T and U Law Firm, LLC" violate the South Carolina Rules of Professional Conduct?

Summary:

Because S, T and U actually practice law together, the proposed firm name is not misleading and does not violate the South Carolina Rules of Professional Conduct.

Opinion:

The Rules of Professional Conduct determine whether the proposed S, T and U Law Firm, LLC can be regarded as a “law firm.” Rule 1.0(e) and (i), and the Comment thereto provide definitions related to law firms and membership therein.

(e) “Firm” or “law firm” denotes a lawyer or lawyers in a law professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.

(i) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

Rule 1.0, Comment [2].

Whether two or more lawyers constitute a firm within paragraph [e] can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

The Comments emphasize that the determination of whether lawyers constitute a firm for purposes of the Rules of Professional Conduct is a factual determination. There is no requirement that a firm constitute a particular type of organization, nor that the ownership of the firm be structured in any particular way. The proposed S, T and U law firm would constitute a “law firm” under this definition.

Rule 7.5 in relevant part specifically addresses the naming of law firms.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. (See discussion of Rule 7.1 below.) A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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

The Comments to this Rule also provide clarification.

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a non lawyer.

[2] With 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 in a firm.

In addition, Rule 7.1(A) prohibits a lawyer from making communications about the lawyer or the lawyer's services that contain a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. In the Comments, further clarification is offered on what constitutes a misleading statement for purposes of the rule. "Truthful 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." (Emphasis added.) Rule 7.1, Comment [2], SCRProfC.

In S.C. Bar Eth. Adv. Op. 12-12 (December 30, 2012), this Committee stated that lawyers may state or imply that they practice in a partnership only when such is accurate and not misleading. The facts underlying that opinion involved a group of lawyers who intended to practice as law

partners as the "XYZ Law Firm," register the firm as a limited liability partnership, insure themselves as a partnership, and identify themselves on signage and letterhead as partners despite the fact that they would not be sharing profits (except on a case by case basis), and each lawyer would have separate employer identification numbers, file separate individual tax returns for the income they generated, maintain separate trust accounts, obtain separate business licenses, and hire his or her own support staff who would work under the EIN of the individual lawyer). This Committee found that, under those facts, the lawyers would not actually be operating as a partnership and to indicate otherwise would violate Rules 7.1 and 7.5(d).

Here, it would appear that, although the name “S, T and U Law Firm, LLC” is a trade name, it is not an impermissible trade name under Rule 7.5. Nothing in the name suggests that S, T and U Law Firm, LLC is a partnership; indeed, the term “LLC” can reasonably be interpreted by the public as negating the existence of a partnership. Under the facts presented here, S, T, and U are practicing law together, just as the firm name suggests. The firm name is not misleading and does not violate Rule 7.1.