

From: [Sanderson, Joseph](#)
Sent: Friday, May 22, 2020 6:23 PM
To: [rulecomments](#)
Subject: Rule 7.5 Proposal

I strongly support the proposed changes to Rule 7.5, which address many of the unduly prescriptive and burdensome aspects of current law. I write to suggest one clarifying amendment to the proposed language: as drafted, the proposal states “A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.” This provision should be clarified to state that, in accordance with current practice, a law firm may include the name of a deceased or retired lawyer who had a *bona fide* connection to the firm or its predecessors or a lawyer admitted to practice in another state, district, territory, or country.

Sincerely,

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M. Bruce Volbeda, Esq.
Rochester, New York

June 1, 2020

Attn: Eileen D. Millett, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004.

[VIA EMAIL to: rulecomments@nycourts.gov]

RE: Proposed Revision of Rule 7.5 of the Rules of Professional Conduct

Dear Ms. Millett:

I'm writing in support of the "Proposed Revision of Rule 7.5 of the Rules of Professional Conduct" (hereinafter "Proposed Revision") submitted by the Administrative Board of the Courts of the State of New York.

I have read the complaint filed in LawHQ, LLC v. Dopico, No. 20-cv-616 (LAK) (S.D.N.Y., 2020), which appears to have prompted the Proposed Revision, and I agree with the plaintiff's argument. The prohibition in New York's Rules of Professional Conduct (22 NYCRR 1200.0, hereinafter "RPC") against the use of all trade names in law firm names is an overbroad, anachronistic and poorly drafted precaution that creates more problems than it solves, to the point of comedy.

It is worth noting that any name under which an entity conducts business is its trade name. (See Black's Law Dictionary, 1251 [abr. 8th ed. 2005], defining "tradename" [or trade name] as "the name under which a business operates"). Therefore, a firm name based on the names of its lawyers is a trade name, despite the blanket prohibition against the use of all trade names under RPC 7.5(b) ("A lawyer in private practice shall not practice under a trade name"). By inference, it appears the RPC employs an unstated and peculiar definition of "trade name" meaning only those law firm names that are not based on lawyers' personal names.

The alleged purpose of the prohibition "is 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, 176, cert. denied, 105 S. Ct. 2701 (1985) (citation omitted) (finding slogan "The Country Lawyer" not to be deceptive). That is a noble goal, but the RPC provides no evidence or argument that non-personal trade names inherently deceive or harm consumers in any way.

If non-personal trade names were inherently deceptive, then the vast majority of business activity in the United States, which is conducted under precisely such trade names, should be terminated immediately. Such fears are unwarranted. For several hundred years, now—from the Hudson's Bay Company in the 17th century and continuing through Amazon.com in the 21st century—American consumers have been and remain well equipped to conduct legitimate business with

entities whose names fail to contain personal names. Despite my earnest wish that it were so, there is no owner or executive at Google having a last name of "Google," and yet, miraculously, I am not deceived as to the identity of that enterprise. (It's Google.)

Additionally, the RPC violates its own professed standard by allowing law firm names to contain the names of predecessor firms (which no longer exist), the names of retired lawyers (who are no longer practicing), and the names of deceased partners (who are no longer respiring). (See RPC 7.5(b)). It is unclear how such a policy meets the requirement that firm names must not "mislead[] as to the identity of the lawyer or lawyers practicing under such name[.]" (Id., emphasis added). While it is difficult to prove a negative, it has been my experience that there are no deceased lawyers still practicing, or such practice is no longer in fashion.

And how does it actually help a consumer to see a lawyer's last name in the firm name, anyway? At Dewey, Cheatham & Howe, LLP, to which specific "Dewey," "Cheatham" or "Howe" do those illustrious last names refer? Surnames by themselves are useless in identifying any individual lawyer, be they living or dead.

Interestingly, the RPC is silent on which part of a lawyer's name must be included in the firm name. Traditionally, lawyers have emblazoned their shingles with surnames, but this does not appear to be required. I have found no RPC prohibition against naming a law firm "Peter, Paul & Mary, PC," for example. Firm names based on first or middle names would be no more obfuscatory than the typical reliance upon surnames.

To truly fulfill the RPC's stated objectives, the rules should perhaps require that firm names contain only social security numbers. The RPC does not appear to prohibit the use of government-issued ID numbers in a firm name, and why should it? The law firm of 123-45-678, 901-23-456 & 789-01-234 PLLC positively vibrates with upright, civic-minded transparency, to the great benefit and reassurance of its clients.

Lawyers having long names unfortunately suffer under the current rules. According to the *Guinness Book of World Records 1985* (Norris McWhirter, 197 (1984)), the longest surname in the world contained 988 letters! Would a solo lawyer by that name violate RPC 7.5 by practicing under a firm name lacking that most commodious of surnames? Clearly, yes. The record-shattering name must appear! The resulting cost of letterhead ink, alone, would be sufficient cause to recycle one's bar license and pursue, instead, a less surname-fetishizing profession.

And I will only note in passing the sad case of solo attorney Jacqueline Guaranteed, Esq., who, upon marrying the love of her life, Thomas J. Results, a schoolteacher, and then hyphenating her surname, became malpractice incarnate under RPC 7.1(d) (prohibiting statements creating an expectation of outcomes). If only RPC 7.5 had allowed her to practice under a non-personal trade name!

[Continued on next page.]

It is long past due for New York to join most other states in applying common sense to RPC 7.5. The RPC should only prohibit firm names that are actually false, deceptive or misleading, regardless of whether the name contains lawyers' names or non-personal trade names. I support the Proposed Revision.

Sincerely,

[MBV]

M. Bruce Volbeda, Esq.

Robert J. Olejar

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June 1, 2020

Ellen D. Millett, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed Amendment to RPC 7.5
LawHQ, LLC et al v. Dopico et al., 20-cv-616 (LAK)

Dear Ms. Millett:

I am a long-time member of the New Jersey Bar, recently admitted to the New York Bar via reciprocity in 2017. I have read the letter to the Honorable Lewis A. Kaplan, U.S.D.J., from Assistant Attorney General Elizabeth A. Figueira, dated April 22, 2020, as well as your Memorandum and Exhibits attached thereto, dated April 17, 2020.

In my opinion the proposed amendments to RPC 7.5 will not resolve the issues raised in the above entitled lawsuit; fictitious trade names should be specifically permitted. In fact, the prohibition on the use of false trade names could be read to prohibit fictitious tradenames, including the name of the LLC plaintiff in the above case. After all, what's a "LawHQ"?

This is not a hypothetical. New Jersey's RPC 7.5(e) allows the use of trade names which must include at least the surname of a lawyer and accurately describe the type of law practiced. I'm afraid that without specific allowance for fictitious trade names, some regulator or judge will read the prohibition on *false* trade names to permit only *descriptive* trade names, which would have to be resolved by a subsequent court, which could very well be a New York State court, as it would likely arise in the context of an RPC violation. We must take advantage of this opportunity to protect ourselves and future brethren at the Bar by resolving avoidable issues up front.

Accordingly, I suggest RPC 7.5 be amended to permit the practice of law under a "trade name, including a fictitious trade name, that is not misleading." The same language should apply to domain names. RPC 7.5(b)(1) may need to be written as permission rather than prohibition.

Please keep me in the loop. The plaintiffs in the above action have also filed suit in New Jersey.

Very truly yours,

ROBERT J. OLEJAR, ESQ., CPA, CFE

Via eMail attachment

MEMORANDUM

June 4, 2020

To: Eileen Millett, Counsel, New York State Office of Court Administration

From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)

Subject: Proposed Amendments to Rule 7.5 of the New York Rules of Professional Conduct

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) has reviewed and discussed the three public comments received in response to proposed amendments to Rule 7.5 that the Office of Court Administration circulated for public comment on April 17, 2020. This memorandum sets forth COSAC’s reactions to the public comments. COSAC is grateful for the opportunity to react to the public comments.

Comments by M. Bruce Volbeda

M. Bruce Volbeda, a New York lawyer, wrote a letter in support of the proposed revision of Rule 7.5. COSAC also supports the proposed revision of Rule 7.5, so no response to Mr. Volbeda is necessary.

Comments by Joseph Sanderson

A comment was submitted by Joseph Sanderson, a New York lawyer. He said:

I strongly support the proposed changes to Rule 7.5, which address many of the unduly prescriptive and burdensome aspects of current law. I write to suggest one clarifying amendment to the proposed language: as drafted, the proposal states: “A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.” This provision should be clarified to state that, in accordance with current practice, a law firm may include the name of a deceased or retired lawyer who had a *bona fide* connection to the firm or its predecessors or a lawyer admitted to practice in another state, district, territory, or country.

COSAC believes that Mr. Sanderson’s comment does not warrant any change to the proposed black letter text of Rule 7.5. COSAC will respond to the three distinct components of Mr. Sanderson’s proposal.

First, Mr. Sanderson suggests that that a law firm may include the name of a deceased or retired “lawyer who had a *bona fide* connection to” the firm or its predecessors. COSAC agrees with part of this suggestion and disagrees with part.

Specifically, COSAC agrees that a law firm may include the name of a deceased or retired *member* of the firm or of a predecessor firm in a continuing line of succession. However, this custom is so well established that it need not be treated in the text of Rule 7.5 if lawyers are permitted to practice under trade names that are not false, deceptive, or misleading. Rather, COSAC believes that the appropriate place to address this issue is in the Comments. COSAC has proposed amended Comments to Rule 7.5 that state, in pertinent part:

[2] A lawyer or law firm may not use any name that is false, deceptive, or misleading. *It is not false, deceptive, or misleading for a firm to be designated ... by the names of retired or deceased members where there has been a continuing line of succession in the firm's identity.* A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] *By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection* with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as "Legal Services," "Legal Assistance," or "Legal Aid" unless the lawyer or law firm is a bona fide legal assistance organization. [Emphasis added.]

COSAC thinks these Comments will provide sufficient guidance regarding the inclusion of the names of deceased or retired lawyers. Indeed, addressing this issue in the Comments may be preferable to addressing it in the black letter text because granting express permission to practice under one form of name may imply that practicing under a different form of name not mentioned in the text of the Rule is prohibited.

Second, Mr. Sanderson suggests that lawyers be permitted to use a trade name containing the name of any lawyer who had "a *bona fide* connection to the firm or its predecessors," COSAC thinks that formulation is too broad and too vague. A better formulation than "*bona fide* connection," in COSAC's view, is the word "members," which appears in the existing black letter text of Rule 7.5 and has appeared in the Code of Professional Responsibility in New York beginning in 1970 - see former DR 2-102(B). Lawyers have understood the term "members" for more than 50 years and COSAC sees no reason to change that language.

Third, Mr. Sanderson suggests that lawyers be permitted to use a trade name containing the name of "a lawyer admitted to practice in another state, district, territory, or country." COSAC agrees that lawyers should be permitted to use such names, but COSAC does not believe the black letter text of Rule 7.5 needs to spell this out. Hundreds of lawyers in New York practice in New York offices of law firms based in other states or in foreign countries, and no one thinks those branches will be violating Rule 7.5 by continuing to practice under the same names they are using now.

Comments by Robert J. Olejar

Robert J. Olejar, lawyer admitted to practice in New York and New Jersey, made the following observations:

In my opinion the proposed amendments to RPC 7.5 will not resolve the issues raised in the above entitled [LawHQ] lawsuit; fictitious trade names should be specifically permitted. In fact, the prohibition on the use of false trade names could be read to prohibit fictitious tradenames, including the name of the LLC plaintiff in the above case. After all, what's a "LawHQ"? ...

... I'm afraid that without specific allowance for fictitious trade names, some regulator or judge will read the prohibition on *false* trade names to permit only *descriptive* trade names

Accordingly, I suggest RPC 7.5 be amended to permit the practice of law under a "trade name, including a fictitious trade name, that is not misleading." The same language should apply to domain names. RPC 7.5(b)(1) may need to be written as permission rather than prohibition. [Emphasis by Mr. Olejar.]

COSAC does not believe that Mr. Olejar's comment requires any change to proposed Rule 7.5. All trade names are fictitious, so there is no need to clarify this point by inserting the word "fictitious" into the black letter text of Rule 7.5.

However, COSAC agrees with Mr. Olejar's implication that the prohibition on "false" trade names might lead to unintended results. COSAC believes that proposed Rule 7.5 would fully accomplish its purpose if it prohibited lawyers in private practice from practicing under a trade name, domain name, or other name that is "deceptive or misleading" (without the added word "false"), because a "false" name (such as Lawyer A practicing under Lawyer B's name) would also necessarily be "deceptive or misleading."

If the Administrative Board eliminates the word "false" - and perhaps adds the word "deceptive" to Rule 7.5(b)(1)(iii) for consistency - the resulting language will avoid Mr. Olejar's fears without changing the substance of Rule 7.5(b)(1), which would then provide (in redline style against the pending proposal):

(b)(1) A lawyer or law firm in private practice shall not practice under:

- (i) a ~~false~~, deceptive, or misleading trade name;
- (ii) a ~~false~~, deceptive, or misleading domain name; or
- (iii) a name that is deceptive or misleading as to the identity of the lawyer or lawyers practicing under such name.

COSAC greatly appreciates the opportunity to provide its reactions to the public comments submitted on proposed Rule 7.5. If COSAC can be of further assistance to the Office of Court

Administration or the Administrative Board of the Courts in considering proposed amendments to the Rules of Professional Conduct, we stand ready to help.