Naming a Business Is Never Easy in California

There is a church with thousands of members in several countries. Yet few outsiders have ever heard of it. Why? It has no name. As unusual as that may seem, the members of this church decided to remain nameless for theological reasons. For a business organization, however, anonymity is neither desirable nor possible. A nameless business can't attract customers, open a bank account, or obtain government recognition. Although a business name is absolutely essential, the naming of a business organization, like the naming of cats, is often a difficult matter. In California, it is all the more difficult because our Legislature has enacted a Rube Goldberg system for filing business names with the Secretary of State.

A large part of California's business naming problem is due to the fact that the Legislature has enacted different standards for determining whether a business name is acceptable for filing with the Secretary of State. If the business entity is a corporation or limited liability company, the Secretary of State is required to follow one set of statutory standards. If the business entity is a limited partnership, the Secretary of State must follow a different standard. Finally, if the business entity is a limited liability partnership, the Secretary of State has no statutory basis for rejecting a filing based on the name of the business.

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The General Corporation Law prohibits the Secretary of State from filing a corporation's articles of incorporation in either of two circumstances. Similarly, the law prohibits a foreign corporation from qualifying to transact business in California in either of the two same circumstances.

First, the Secretary of State may not file articles, and a foreign corporation may not qualify to do business, if the corporate name is "likely to mislead the public." This standard does not necessarily require that a proposed name be the same or similar to any existing business entity. Thus, the name "California Secretary of State Filing Agency" may mislead the public, not because it is similar to another business, but because it implies that the business is a government agency.

Other corporate names may be misleading because they don't accurately describe the business being conducted. For example, someone who isn't familiar with computers may believe that a company named "Apple, Inc." is in the fruit, and not the consumer electronics, business.

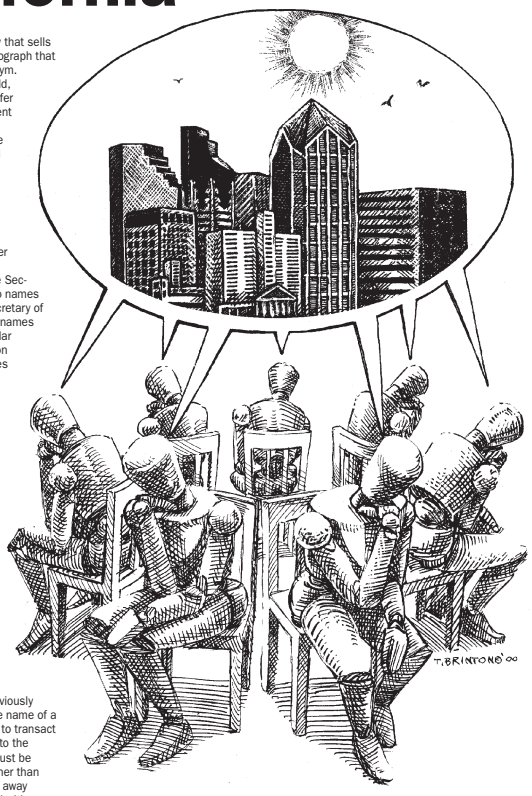
Recently, the Secretary of State has adopted a regulation that provides some guidance concerning when a name may be rejected as likely to mislead the public. Under this rule, words such as "agency," "Commission," "Department," "Bureau," "Division" and "Municipal" will likely be rejected if they are combined with the name of a state, county, city or other governmental subdivision. The regulation also identifies specific situations in which a name may give a false implication of the nature of the firm's business. For example, the use of the words, "insurance," "reinsurance," "assurance" and "surety" in aname of business that is not subject to the Insurance Code as an insurer may result in rejection unless the name is accompanied by words that indicate that the business is not an insurer, such as "agency," "agent," "services" or "broker."

The "likely to mislead" standard suffers from a significant problem. Domestic corporations aren't required to say exactly what they plan to do in their articles of incorporation. Similarly, foreign corporations aren't required to disclose the nature of their business when they qualify to transact business here. As a result, the Secretary of State in most cases has no way of assessing whether a name is likely to mislead the public. Further, the statutory standard itself is fraught with problems. Does the standard require that there is simply a possibility of misleading the public or that some threshold of probability must be satisfied? If it is the latter, is the threshold more likely than not or a greater or lesser threshold? Finally, how is the Secretary of State to determine the likelihood of deception?

Second, the General Corporation Law prohibits the Secretary of State from filing articles of incorporation of a domestic corporation or foreign corporation from qualifying to do business when the proposed name is the same as or resembles so closely another corporation, as to tend to deceive. While this standard appears to be more workable than the very general "likely to mislead" standard, it has its own set of problems.

First, the Legislature failed to say what it meant by "resembles." Names can resemble each other in different ways. Some names look the same and are either pronounced the same or differently. These names are said to be homographs. A company named "Bill's Bows, Inc.," for example, could refer to a company that sells ribbons or archery equipment. A homograph that is pronounced differently is a heteronym. For example, "Jack's Bass Shop" could, depending upon the pronunciation, refer to either a supplier of fishing equipment or a dealer in musical instruments. Other names are heterographs. These names are pronounced the same and can either be spelled the same or differently - for example, "Roe & Co." and "Rowe & Co."

The General Corporation Law, however, doesn't require that names be distinguishable from each other. Rather, they must resemble each other so closely that they tend to deceive. Thus, the Legislature has left it to the Secretary of State to determine when two names are deceptively similar. Under the Secretary of State's recently adopted regulations, names are considered to be deceptively similar when a person using that care, caution and observation, which the public uses and may be expected to use, would mistake a proposed name with an existing name. This leaves open the question whether the mistake must be visual, aural or both. The regulations do provide a number of specific examples of when two names will be considered deceptively similar. For example, if two names differ only in business entity endings (e.g., "Inc.," "Corp." or "Ltd.") they will be considered deceptively similar.



Remarkably, the California Legislature has adopted an entirely different standard for names of limited partnerships under the Uniform Limited Partnership Act of 2008. A limited partnership formed under that act must be "distinguishable in the records of the Secretary of State" from the name of a limited partnership previously organized under the 2008 act and the name of a foreign limited partnership registered to transact business in California. The reference to the records implies that the distinction must be based on the name's appearance rather than its pronunciation. This standard does away with many of the problems associated with the likely to mislead and deceptively similar standards that apply to corporate and limited liability company names. Moreover, it is consistent with the Model Business Corporation Act and the laws of other states such as Delaware and Nevada.

There is a glitch, however. The 2008 limited partnership act does not require that a limited partnership name be distinguishable from the name of a limited partnership formed under a prior California act. Although the Secretary of State's regulations would appear to authorize the rejection of a name because it is indistinguishable from the name of a limited partnership formed under a prior California act, the regulations exceed the scope of the Secretary of State's statutory authority.

The Legislature's use of different standards will inevitably result in inconsistencies based on the type of entity. The Secretary of State may reject a proposed corporate name because it is the same as an existing corporate name and yet that same name may well be perfectly acceptable as a limited liability company or limited partnership name.

Unfortunately, many existing businesses are reluctant to support statutory changes that would make California's naming regime both rational and consistent. These businesses are likely to see the existing statutory limits on corporate names as providing an inexpensive form of trade name protection. The protection of trade names, however, is more properly the realm of federal and state trademark laws. Businesses wishing incorporate or qualify to transact business in California should not be burdened with an arbitrary, inconsistent and fundamentally unworkable system.

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Letters to the Editor

Structured Settlements Offer Financial Security in Good and Bad Times

The Dec. 4, 2009 article by David Higgins (*"Recession's Effect on Settlement and Fees"*) was loose with its facts and illogical in its conclusions.

For starters, the author simplifies the very complex subject of economics. How can he know what the future holds? If he does, then that puts him above the likes of Paul Volcker and Warren Buffett. Of special note, particularly in light of Higgins' assurances that inflation will rise, was the economic community's collective failure to predict our current "Great Recession."

Second, his recommendation that people should rethink structuring their settlements and their attorney fees simply because interest rates are "at historical [sic] lows" completely misses the mark and is ingratiatingly misleading. Some things just make sense regardless of economic realities and it's doubtful that guaranteed, tax-advantaged future income tailored to an injury victim's (or an attorney's) specific living needs will ever fall out of favor.

Third, let's put today's rates in context. Long-term interest rates have been at or below 4 percent for 71 out of the last 135 years (*Irrational Exuberance*, Princeton, 2005). That means since the late 19th century, interest rates have been about where they are now for more than 50 percent of the time. The last time rates were at current levels for longer than a year was 1924. They remained there for 35 years.

Finally, Higgins neglected to reference his primary connection to the structured settlement industry these days: He sells his services to clients who, for a variety of reasons, need or wish to establish a qualified settlement fund (QSF) when settling their lawsuit. While a QSF can be a necessary and useful tool in some situations, quite often it merely adds an unnecessary (and often costly) layer to the settlement process. In nearly 20 years of providing structured settlement products and services to clients across the country, I have seen very few situations where a plaintiff would have been financially better served by choosing to establish a QSF.

There's no doubt that careful thought must be given to a client's overall situation before deciding on which settlement option is right for them. But an unbalanced article that uses fear to discount the proven and universally accepted value of a properly crafted structured settlement plan does a disservice to all attorneys and the clients who trust them to negotiate fair settlements. Structured settlements offer financial security in good times and in bad. Attorneys and their clients who reject them out of hand based solely on assumptions about the future may wish to heed Benjamin Franklin's maxim: "One today is worth two tomorrows."

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AB 590 Is Not 'Civil Gideon' Statute And Does Not Provide Right to Counsel

Julie Waterstone is surely right to call for a statute requiring counsel for children in education matters (*"Giving Kids a Fair Day in Court,"* Jan. 7). But her account of California's new statute, AB 590, overstates the aim and effect of that law. AB 590 is not a "Civil Gideon" statute, at least insofar as that term is commonly used to refer to a civil analog to the public defense required under the Supreme Court's 1963 *Gideon v. Wainwright* case. AB 590 creates a limited, six-year pilot program in a few courthouses yet to be selected. Its purpose is to evaluate the effects of expanding assistance to low-income litigants in disputes involving certain enumerated critical needs through innovative collaborations between courts and legal services providers. It does not provide a *right* to counsel for any, much less every, litigant.

Like many, I hope and believe that one day California will recognize, as has most of the developed world, that equal justice under law is impossible in many cases when one side is represented and the other is not. AB 590 is an important step in that journey. But a Civil Gideon right it is not.

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