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Carol Johnston, Esq., Secretary
Carol.Johnston@judiciary.state.nj.us
NJ Supreme Court Committee on Attorney Advertising
Hughes Justice Complex
P.O. Box 037
Trenton, N.J. 08525-0037

RE: NJAPM Comments on In Re Decision on CAA 47-2009

Dear Ms. Johnston:

I write on behalf of the New Jersey Association of Professional Mediators (“NJAPM”). Please direct NJAPM’s comments to the Committee on Attorney Advertising (“CAA”) regarding **In Re Decision on CAA 47-2009**.

I. NJAPM: Who We Are

NJAPM is a New Jersey not-for-profit corporation chartered in 1992.

NJAPM is New Jersey’s largest mediation association, with over 400 members, and the only such association with a structured accreditation process. About 100 of our members have met the rigorous standards of experience, credentials, and professionalism to qualify as Accredited Professional Mediators. NJAPM encourages the public’s use of accredited mediators, and is committed to

educating the public, government, court system, and various affiliated professions about the benefits of mediation.

Two-thirds of our members are attorneys; the balance have backgrounds in mental health (20%); business, finance, accounting (10%); and engineering and healthcare (3%).

Retired judges make up 2.5 percent of our membership.

NJAPM has a code of ethics that we rigorously enforce, to protect both the mediation profession and the public.

One-third of our members serve on the statewide Family/Divorce and Civil Court rosters and more than half our members serve on the statewide Foreclosure Mediation roster.

NJAPM was instrumental in the drafting and passage of the Uniform Mediation Act in New Jersey in 2004, and the Irreconcilable Differences Divorce Act in 2006. We were granted **amicus curiae** status in State v. Carl Williams, 184 N.J. 432 (2005); Lehr v. Afflitto, 328 N.J. Super. 376 (App. Div. 2006); and Lerner v. Laufer, 359 N.J. Super. 201 (App. Div.), certif. den. 177 N.J. 223 (2003).

NJAPM is a primary source for mediation training in New Jersey, offering introductory and advanced mediation training in both family/divorce and business/civil mediation.

II. NJAPM Comments on In Re Decision on CAA Opinion 47

A. NJAPM's Interests and Unique Perspective; New Jersey Regulatory Background

NJAPM has a strong interest in consumer protection, including clarity about what services are provided by law firms and mediation centers. NJAPM promotes excellence in the mediation field, including its members' adherence to high ethical standards. We want to protect the mediation field from improper marketplace influences, no matter who generates them.

NJAPM has a unique vantage point from which to comment on RPC 7.5's trade name limitations -- as they relate to lawyers and non-

lawyers who offer mediation services in New Jersey. Our membership includes: (A) lawyers who perform no mediation services; (B) lawyers who perform mediation services as part and parcel of their traditional law firms; (C) lawyers who have given up legal practice entirely and solely perform mediation services; (D) mediation practitioners from disciplines other than law; (E) multidisciplinary practitioners who join together to provide mediation services -- **including** the practice of law; and (F) multidisciplinary practitioners who join together to provide mediation services -- **excluding** the practice of law. NJAPM represents members in every one of those practice settings.

Alpha started in Pennsylvania, where trade names for law firms are permitted, and then moved into New Jersey. NJAPM favors the right decision for New Jersey, not simply the importation of another State's regulatory approach that could be wrong for our State.

The Alpha challenge raises complicated and interconnected regulatory, legal, ethical, public protection, economic, and practical issues, and NJAPM is uniquely positioned -- and qualified -- to inform and educate the Supreme Court on these matters.

New Jersey has been a strict "no-trade-names" jurisdiction for lawyers since at least 1982. Lawyers may use a no-longer-practicing or even deceased former partner's name, or an out-of-state law firm name (listing a "New Jersey managing partner"), but must provide the public with law firm name, location address, and phone number, so the public knows how and where to locate an actual law firm. It is a "confusion avoidance" regulation.

In its remand Order of February 26, 2009, our Supreme Court referenced its longstanding concerns about possible public confusion and risk of harm created by law firm trade names. See On Petition for Review of Op. 475, 89 N.J. 74, 87, appeal dismissed, sub nom. Jacoby & Meyers v. Supreme Court of New Jersey, 459 U.S. 962 (1982). The Court's remand Order also cited the CAA's 1983 Report that use of law firm trade names "poses 'the serious possibility of practices that will mislead or otherwise disserve the public.'"

In Opinion 711, 189 N.J.L.J. 253, issued July 11, 2007, the Advisory Committee on Professional Ethics (“ACPE”) determined that Alpha Center was “in the practice of law”, as a commercial center for divorce mediation – run by a New Jersey attorney from an out-of-state office – under a trade name. The ACPE determined that Alpha Center “is plainly offering the services of attorneys to provide legal services.”

ACPE’s and CAA’s Joint Opinion 676/18, 136 N.J.L.J. 1928 (April 4, 1994), actually has much more to say to the Supreme Court on the instant issue than Opinion 711 or any other published Supreme Court Committee Opinions. Opinion 676/18 is a “sleeper” Opinion that “got it right” about 15 years ago: lawyers could perform Dispute Resolution (“DR”) services within traditional law practice settings – whether mediation or arbitration -- but so could non-lawyers who steer clear of the unauthorized practice of law (as most do). The Joint Opinion says that lawyers may offer DR services within a traditional law firm, but that DR services are **NOT** defined as “the practice of law”. DR practitioners should have wide latitude, which gives New Jersey citizens the benefits of multi-disciplinary DR, including but not limited to greater competition and the consequent reduction of marketplace fees.

Joint Opinion 676/18 determined that lawyers could provide DR services (mediation or arbitration) as “part and parcel of the practice of law.” DR services were deemed “tool[s] of equal rank with litigation to achieve . . . prompt and cost effective dispute resolution.” For this reason, the Committees declared that DR “services may be rendered in the same location as and jointly marketed or advertised with an attorney’s legal practice.”

Importantly, the Committees also recognized that mediators and arbitrators with primary training in fields **other than law** could be bona fide DR providers, not engaged in the practice of law, and could do so “as long as they do not hold themselves out as lawyers and do not engage in any activities . . . that might constitute the unauthorized practice of law.” **Id.**

B. Major Issue: Cross-Over Legal and Dispute Resolution Services

From NJAPM's perspective, the major issue facing our Supreme Court regarding **Decision on CAA 47-2009** is how to deal with law firms (including, by definition, Alpha) that offer mediation or other DR services: should these firms be treated differently from traditional law firms on the issue of trade name prohibition?

NJAPM strongly believes that similarly situated groups should be treated identically. A law firm, including lawyers who provide DR services, should be treated just like law firms whose lawyers do **NOT** provide DR services. The first group cannot call itself "Omega: We're the Final Word in ADR Services" and the second forced to go by the name "Smith & Jones, Attorneys at Law". Such a distinction would put "Omega" in an unfairly competitive marketing position and "Smith & Jones" in an unfairly uncompetitive one.

On the other hand, if Smith & Jones are a non-practicing lawyer and a therapist who want to advertise themselves as "Beta Mediation Group: We're Number Two and We Try Harder", then there should be no trade name prohibitions on them. If there is no legal cross-over, then there should be no trade name prohibition.

If the Supreme Court is ready to remove **ALL** trade name barriers to the legal profession, whether offering DR services or not, then we want **ALL** of our lawyer members to get the benefit of that change.

C. Related Issues of Concern to NJAPM

Another issue of concern to NJAPM's membership is Alpha's use of the name "Alpha", which implies "the first" or "the best". Even if trade names for law firms are allowed, should a group be permitted to use the name "Alpha"?

If law firm trade names are to be used, will anyone monitor the use of acceptable trade names, and advise as to trade names that are not acceptable?

If the Supreme Court yields to Alpha's argument, and whether a law firm conducted a single mediation a year or 100, that law firm could use a trade name. As long as one attorney in the firm mediates, under Alpha's argument, that firm would be able to use a trade name. This would open the floodgates, and encourage law firms to create DR departments, just to permit the firm to use a trade name. It also could lead to wide misuse, which could confuse and hurt the public.

NJAPM's view is that the public does best when it is not confused, not only regarding trade names but also the services that are provided. When a client walks into a law firm, s/he should know what to expect. When a client walks into a mediation office that is **NOT** part and parcel of a law firm, s/he also should know what to expect.

NJAPM is **NOT** troubled by the thought that non-law-providing mediation centers will be permitted to use a trade name, even though law-providing mediation groups may not. The public's protection is paramount to the competitive disadvantage suffered by the law firm mediators in that example.

CONCLUSION

Here is NJAPM's position on **In Re Decision on CAA 47-2009**, in brief:

1. DR providers (arbitrators and mediators) who are **NOT** engaged in the practice of law should face no prohibitions at all on their use of a trade name. However, lawyers or law firms offering mediation services (or other types of DR) **DO** face such restrictions under current Supreme Court rules. **See** ACPE and CAA Joint Opinion 676/18, ACPE Opinion 711, RPC 7.5, and **On Petition for Review of Op. 475, 89 N.J. 74, 87, appeal dismissed, sub nom. Jacoby & Meyers v. Supreme Court of New Jersey, 459 U.S. 962 (1982).**

2. We believe trade name restrictions should continue to apply to law firms, to (A) protect the public's interest in easily identifying the owners and operators of the legal business in which mediation or other DR services are provided, and (B) meet clients' legitimate

expectations when they walk into a law office as contrasted with a mediation center that is not connected with the practice of law.

3. NJAPM takes no position on whether Alpha is engaged in legal services. ACPE has already made that determination in Opinion 711. If Alpha is acting as a provider of legal services, then our lawyer mediator members certainly want Alpha to be held to the same rules that apply to the rest of the legal-mediation community.

4. On the other hand, if Alpha prevails in its trade name dispute, and the ban on attorney trade names is repealed, then our attorney members should be permitted to create, use, and market themselves under trade names as well.

Thank you for transmitting NJAPM's comments and concerns to the Committee on Attorney Advertising and, following the Comment Period, to the New Jersey Supreme Court.

If you require additional information, please do not hesitate to so advise me.

Respectfully yours,

Hanan M. Isaacs, Esq., A.P.M.
Attorney for NJAPM