



## NEW JERSEY LAW REVISION COMMISSION

### **Draft Tentative Report Relating to the Criminal Penalties Set Forth in the Partnership Statute for Failing to File Certain Documents (N.J.S. 56:1-4).**

**December 11, 2017**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8.*

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **February 11, 2018.**

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary

Originally enacted to protect persons from extending “credit” to fictitious entities the New Jersey Partnership Trade Name statutes are no longer in step with the State’s view of corporate entities. Enacted in the early 20<sup>th</sup> century, the statute currently makes it a “misdemeanor” for a partnership to conduct or transact business in New Jersey if it has not filed the appropriate paperwork with the County Clerk’s Office.<sup>1</sup> With some modifications, the partnership trade name statute could be updated to reflect the State’s current philosophy regarding business associations while preserving the original purpose of the statute.

## Discussion

### *Origin and Historical Treatment*

The foundation for New Jersey’s partnership trade name statute can be traced back to the New York statute entitled, “[a]n act to prevent persons from transacting business under fictitious names.”<sup>2</sup> Enacted in 1833, this statute prohibited partnerships from transacting business in the name of a non-existent partner. The statute required the designation “and Company,” or “& Co.,” when referring to partners whose names did not appear on the partnership masthead.<sup>3</sup> As a punishment, those found guilty of violating this act were deemed to be guilty of a misdemeanor and could be punished by a fine not to exceed \$1,000.<sup>4</sup> This statute underwent judicial construction in December of 1884.

In *Gay et al. v. Seibold*<sup>5</sup> the New York Court of Appeals reviewed the statute entitled, an “Act to prevent persons from transacting business under fictitious names.” The plaintiffs, booksellers, sought to enforce their contractual obligation with the defendant.<sup>6</sup> As an affirmative defense to his bonded obligation, the defendant contended that the plaintiffs were carrying on their business in an illegal manner.<sup>7</sup> The illegality relied upon by the defendant was that Gay Brothers & Co. was only operated by two brothers – John Gay and Charles Gay, Jr. According to the defendant, the brother’s designation of their partnership, “& Co.,” was no more than a corporate fiction. This fiction served as the defendant’s basis to avoid his contractual obligation to repay the brothers for books he received, and sold, on consignment. He contended that use of the moniker, “& Co.” violated the “fictitious name statute” and therefore voided his contractual obligation to the brothers. The Court, however, disagreed.

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<sup>1</sup> See *N.J.S. 56:1-1, N.J.S. 56:1-2 and N.J.S. 56:1-4.*

<sup>2</sup> *Chapter 281 of the Laws of 1833.*

<sup>3</sup> *Chapter 281 of the Laws of 1833 §1.*

<sup>4</sup> *Chapter 281 of the Laws of 1833 §2.* A \$1,000 fine in 1883, adjusted for inflation, is presently equal to a fine of \$23,140.17. See [www.in2013dollars.com/1883-dollars-in2017?amount=1000](http://www.in2013dollars.com/1883-dollars-in2017?amount=1000) (last visited Nov. 16, 2017).

<sup>5</sup> 97 *N.Y. 472* (Ct. App. 1884).

<sup>6</sup> *Id.* at 474.

<sup>7</sup> *Id.*

In rendering its decision, the Court of Appeals identified the purpose of the statute. The Court noted, “[t]he purpose of the statute was obviously to **protect persons giving credit** to the fictitious firm on the faith of the fictitious designation. It could have had no other purpose.”<sup>8</sup> In reversing the decision of the trial court, the Court of Appeals found, “...although the transaction should be held to be within the letter of the statute, it is clearly not within the purpose and intention of the statute, and hence is outside of the statute.”<sup>9</sup> The decision of the trial court was reversed and a new trial granted to the plaintiffs.<sup>10</sup>

The litigants in *Gay v. Seibold* were not the only parties interested in the outcome of this case. Across the Hudson, the New Jersey Legislature awaited the judicial interpretation of New York’s statute before adopting a similar statute.<sup>11</sup> On May 17, 1906, New Jersey enacted “[a]n act to regulate the use of business names.”<sup>12</sup> The statute made it, “...a misdemeanor for any person or persons to carry on or transact business under an assumed name without filing in the office of the clerk of the county or counties in which such person or persons transact such business a certificate, setting forth the name under which it is transacted and the ‘true and real full name or names’ of the person or persons conducting or transacting the same, with the post-office address or addresses of the said person or persons.”<sup>13</sup> It would be another three years before the New Jersey judiciary would be called upon to examine and interpret this newly adopted partnership statute.

In June of 1909, the New Jersey Court of Errors and Appeals decided the matter of *Rutkowski v. Bozza*.<sup>14</sup> Stephen Rutkowski, doing business as Stephen Kelly, filed suit to recover the value of items sold to Michael Bozza.<sup>15</sup> Mr. Rutkowski did not deny that he transacted business with the defendant under the name of “Stephen Kelly.”<sup>16</sup> Furthermore, he did not deny that he failed to file the trade name certificate required by the Act.<sup>17</sup> At the close of the plaintiff’s case, the defendant moved to dismiss plaintiff’s cause of action. This application was predicated upon plaintiff’s failure to file a trade name certificate.<sup>18</sup> The defendant’s motion was denied.<sup>19</sup> The defendant appealed the trial court’s decision.

The decision of the New Jersey Court of Errors and Appeals echoed the holding in *Gay v. Seibold*, decided a quarter of a century earlier. In passing upon the purpose of the New Jersey

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<sup>8</sup> *Id.* at 476, (emphasis added).

<sup>9</sup> *Id.* at 477.

<sup>10</sup> *Id.* at 478.

<sup>11</sup> *Rutkowski v. Bozza*, 77 N.J. Eq. 724, 725 (E. & A. 1909).

<sup>12</sup> P.L. p. 513 (1909)

<sup>13</sup> *Rutkowski v. Bozza*, 77 N.J. Eq. at 725. In 1951, the Legislature amended both *N.J.S.* 56:1-1 and 1-2.

<sup>14</sup> 77 N.J. Eq. 724, 725 (E. & A. 1909).

<sup>15</sup> *Id.* at 725.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

statute, the Court of Errors held, “[i]ts manifest intention is to protect persons giving credit to one doing business under a fictitious name....”<sup>20</sup> The Court went on to find that the New Jersey statute, “...follows in substance a similar statute of the State of New York, adopted in this state after it had received judicial construction in New York, which it will be presumed was accepted by the Legislature of this state to be the true interpretation of the act so adopted.”<sup>21</sup> The Court went on to hold that a debtor “cannot escape payment because the creditor has rendered himself liable to *indictment*.”<sup>22</sup> It would be another 61 years before the judiciary would publish a decision concerning partnership trade names.

A rare case involving partnership trade names was decided by the Chancery Division of the Superior Court on June 10, 1970.<sup>23</sup> In *Kugler v. Romain*, proceedings were brought against the defendant by the Attorney General for violations of the Consumer Fraud Act. As part of this action, the Attorney General sought to enjoin the defendant from conducting business in New Jersey until registration of his trade name was filed in accordance with N.J.S. 56:1-2.<sup>24</sup> The defendant admitted that he had not complied with the filing requirements set forth in the statute.<sup>25</sup> The Court refused to grant injunctive relief based upon a violation of the trade name statute.

In addressing the defendant’s failure to file a trade name certificate, the Court recognized that a violation of this statute is a misdemeanor.<sup>26</sup> As a matter of law equity courts will not enjoin violations of a criminal statute.<sup>27</sup> The Court stated, “[s]uch violations are left to agencies charged with the enforcement of the criminal law.”<sup>28</sup> Where a grievance is subject to indictment, equity courts will interfere only to prevent a very serious public injury.<sup>29</sup> The court reasoned, “[t]he remedy by indictment, if invoked, appears to be sufficient to rectify the situation.<sup>30</sup> Thus, it is the penal provisions of the current New Jersey partnership statute that require attention.

### *Punitive Aspects of Title 56*

The name of a domestic, or foreign, partnership may not always include the names of every partner. Often times the name may include the designation “and company” or “& Co.” in its title. In either event, the partnership **must** file a “trade name certificate” in duplicate with the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 725.

<sup>22</sup> *Id.* at 726 (emphasis added).

<sup>23</sup> *Kugler v. Romain*, 110 N.J. Super. 470 (Ch. Div. 1970).

<sup>24</sup> *Kugler v. Romain*, 110 N.J. Super. 470, 478 (Ch. Div. 1970).

<sup>25</sup> *Id.* at 488.

<sup>26</sup> *Id.* at 488.

<sup>27</sup> *Id.* at 488, citing *Baird v. Board of Recreation Comm’rs, South Orange*, 110 N.J. Eq. 603, 605 (E. & A. 1932).

<sup>28</sup> *Id.* at 488, citing *Trisolini v. Meltsner*, 23 N.J. Super. 204, 92 A.2d 832 (App.Div.1952).

<sup>29</sup> *Id.* at 488.

<sup>30</sup> *Id.* at 488.

county clerk in each county in which the partnership does business.<sup>31</sup> A “trade name certificate” is also referred to as a “true name certificate” or an “assumed name certificate.”<sup>32</sup> Whether it is called a “trade name,” “true name,” or an “assumed name” certificate Title 56 mandates that the certificate contain certain information.

The New Jersey statutes set forth the compulsory information that must be contained in a “trade name certificate.” The certificate must set forth the nature of the business<sup>33</sup> and the full names and residences of all persons who are members of such firm or partnership.<sup>34</sup> If a partner is not a New Jersey resident the certificate must include a power of attorney appointing and authorizing the county clerk to accept service of process on behalf of that partner.<sup>35</sup> Finally, the certificate must be sworn to before some person authorized by the laws of New Jersey to administer oaths.<sup>36</sup> Once received, the County Clerk will file the duplicate copy of this certificate with the Secretary of State.<sup>37</sup>

The failure of any person to file a “trade name certificate” before conducting or transacting business in New Jersey is not without its consequences. Title 56:1-4 provides that “[a]ny person conducting or transacting business contrary to the provisions of either section 56:1-1 or 56:1-2 of this title shall be guilty of a **misdemeanor**. (Emphasis added).” Regardless of whether there failure to file the “certificate of trade name” or to include all of the compulsory information was knowing, or accidental, those responsible are subject to criminal punishment.

The classification of an offense, for sentencing purposes, as a misdemeanor is anachronistic. In New Jersey “crimes” are set forth in Title 2C. In its current incarnation, crimes are classified, for the purpose of sentence, into four degrees.<sup>38</sup> The statute, N.J.S. 2C:43-1(a) refers to crimes of the first degree, second degree, third degree, and fourth degree.<sup>39</sup> The New Jersey Criminal Code does recognize that other statutes may define criminal activity and that the designation of these crimes may not follow the schema of N.J.S. 2C:43-1(a).<sup>40</sup>

Misdemeanors are addressed in the criminal code in Subtitle 3, Chapter 43, Section 1, subsection b. Regarding misdemeanors, subsection b. provides that “...notwithstanding any other provision of law, a crime defined by any statute of this State other than this code and designated

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<sup>31</sup> *Id.* See also, 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2] (MATTHEW BENDER & CO. 2016).

<sup>32</sup> 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2] , FOOTNOTE 3 (MATTHEW BENDER & CO. 2016).

<sup>33</sup> N.J.S. 56-1-1 and N.J.S. 56:1-2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> N.J.S. 2C:43-1(a).

<sup>39</sup> *Id.*

<sup>40</sup> N.J.S. 2C:43-1(b).

as a misdemeanor shall constitute for purpose of sentence, a crime of the fourth degree.”<sup>41</sup>

Presently, Title 56:1-4 provides that a violation of the statute is a misdemeanor and there is no sentence stated in the statute. Thus, a violation of the statute is a fourth degree offense.<sup>42</sup> Those found in violation of this section are subject to eighteen months incarceration<sup>43</sup> and up to a \$10,000 fine.<sup>44</sup>

The statutes that set forth the requirements of a “trade name certificate” were last amended the 1950s.<sup>45</sup> The statutes reflect the “aggregate theory” of partnership. This theory maintains that a partnership is a collection of the individual partners.<sup>46</sup> In 2000, New Jersey rejected the “aggregate theory” of partnerships in favor of the “entity theory” of partnerships. In New Jersey a partnership is now viewed as an entity distinct from its partners.<sup>47</sup> The statute is disconnected from the current view of partnerships and that may explain the lack of enforcement.

### *Outreach*

To ascertain the efficacy of the present statute, Staff had the opportunity to speak with a representative from a County Clerk’s Office, a representative from the Division of Commercial Recording, and an attorney who concentrates in corporations and other business entities.<sup>48</sup> Each one of these individuals confirmed that they have never seen the criminal provisions of N.J.S. 56:1-4 enforced by a court of competent jurisdiction. Each noted that the failure to properly register a partnership tradename could, however, have collateral consequences.

### *County Clerk*

If a partnership trade name certificate is not filed with a County Clerk’s Office there is no way that the Clerk’s Office would know of this defalcation. According to the representative from the County Clerk’s office, they would only know of a partnership’s existence if it *filed* a trade name certificate. Presumably, a partnership could operate without ever filing a trade name certificate with the County Clerk’s Office. Despite having the ability to clandestinely operate a partnership in New Jersey, there is an important reason for registering a partnership trade name.

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<sup>41</sup> *Id.*

<sup>42</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment N.J.S. 2C:43-1(b)*, (Gann 2017).

<sup>43</sup> N.J.S. 2C:43-6.

<sup>44</sup> N.J.S. 2C:43-3(b)(2).

<sup>45</sup> N.J.S. 56-1-1 and N.J.S. 56:1-2 were last amended in 1951.

<sup>46</sup> 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.04[2] (MATTHEW BENDER & CO. 2016).

<sup>47</sup> N.J.S. 42:1A-9(a).

<sup>48</sup> Jeffrey Shapiro, Esq. is the Chairman and Member of the Board of Directors of the Business Law Section of the New Jersey Bar Association; a member of the American Bar Association and Co-Chair of the Governance of Private and Family-Controlled Entities Subcommittee, Committee on Corporate Governance, Committee on Mergers and Acquisitions; Counsel to the New Jersey Corporation and Business Law Study Commission; and, co-author of New Jersey Corporations and other Business Entities.

In New Jersey, most financial institutions require a certified copy of a firm name registration before they will allow a partnership to open a business bank account.<sup>49</sup> Once filed, the County Clerk must forward the duplicate copy of the certificate to the Division of Commercial Recording.

### *Department of the Treasury*

The New Jersey Department of Treasury (“Treasury”) recognizes that partnerships are not required to file organizational documents with the State of New Jersey.<sup>50</sup> The Treasury also recognizes that partnerships must register the business name with the County Clerk’s Office.<sup>51</sup> Partnerships, like all other businesses, are also subject to registration for tax and employer responsibilities.<sup>52</sup> According to Treasury, a partnership that does not comply with the statutory requirements may receive a visit from an investigator. A warning will be given to a partnership that has not complied with its statutory requirements. In addition, the non-compliant entity is given time within which to cure these violations. Failure to heed the first warning is typically met with a second warning and additional time within which to remedy the violation. Staff was advised that if a partnership is thoroughly recalcitrant, the Treasury may seek to shutter the business and seize its assets. Treasury, however, has never sought to prosecute a partnership for failure to file a trade name certificate with the County Clerk’s Office.

### *Stakeholders*

It does not appear that the penal aspect of the statute has been enforced either at the State or County level. During a conversation with Jeffrey Shapiro, Esq., he commented that he has no knowledge of anyone ever being criminally prosecuted for their failure to file a partnership trade name certificate with a County Clerk’s Office. According to Mr. Shapiro, the penalty set forth in this statute is anachronistic.<sup>53</sup> Historically, there have been several attempts to modernize this statute.<sup>54</sup> The statute, however, has remained unchanged since the 1950s. The fact that the statute has not been enforced, in recent history, does not mean that the proper confluence of circumstances could not lead to its enforcement.

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<sup>49</sup> See generally <http://www.co.burlington.nj.us/577/Business-Trade-Name-Registration>; and, <http://www.mercercounty.org/government/county-clerk-/office-services/business-trade-name> (last visited November 25, 2017).

<sup>50</sup> <http://www.state.nj.us/treasury/revenue/taxreg.shtml> (last visited November 25, 2017).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05 (MATTHEW BENDER & CO. 2016).

<sup>54</sup> *Id.*

## Recommendation

The enforcement provision contained in New Jersey's trade name registration statute is outdated. First, it is predicated upon a theory of partnerships, the aggregate theory, that is no longer followed in the State of New Jersey. Second, the failure to register a trade name with a County Clerk is classified as a misdemeanor – a term no longer used in the criminal parlance of this state. Finally, there is no published, or unpublished case, of anyone ever being prosecuted under this statutory code section. Nevertheless, the foundation of this statute is based is sound. The statute seeks to protect persons from extending credit to fictitious entities. This laudatory goal may be accomplished without the threat of criminal prosecution.

A business may originate as a partnership. In New Jersey “all partners are liable jointly and severally for all obligations of the partnership.”<sup>55</sup> This business may evolve into a more sophisticated, more complex operation and wish to limit partnership liability. In the year 2000, New Jersey adopted the Uniform Partnership Act (UPA).<sup>56</sup> These laws include provisions for limited liability partnerships (LLPs). The UPA provides complete, limited liability for partners. By filing a one page *statement of qualification* with the Division of Commercial Recording, a New Jersey partnership can become a limited liability partnership.<sup>57</sup> All partnership obligations arising *after* the “conversion” of a partnership to an LLP would be solely those of the partnership.<sup>58</sup>

It would be inconsistent with the language and the underlying goals of the statutory scheme to allow a partnership to become an LLP if it has not complied with the partnership statutes. To allow a partnership that has not complied with the partnership trade name statute to convert into an LLP would render meaningless the protections in the statute currently provided to lenders and financiers. Further, it would provide nefarious partnerships with a method of limiting future liability while simultaneously allowing them to conceal from the public records the names of liable partners who were responsible for past transactions.

## Conclusion

Modifying N.J.S. 56:1-4 would serve three purposes. First, the amended language would prohibit non-compliant partnerships from becoming an LLP until they have properly registered their trade name. Next, the new language would permit a partnership to easily become an LLP by filing the required statutory trade name certificate with the County Clerk's Office and thereafter refiling a *statement of qualification* with the Division of Commercial Recording. Finally, the

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<sup>55</sup> N.J.S. 42:1A-18(a).

<sup>56</sup> 200 N.J. LAWS ch.161.

<sup>57</sup> N.J.S. 42:1A-47.

<sup>58</sup> N.J.S. 42:1A-18(c).

revised statute would honor the original intent of the statute by protecting the rights of partnership creditors.

The Appendix on the following page proposes changes to the statute consistent with the original statutory goal of protecting partnership creditors. The proposed modifications are based on the language contained in N.J.S. 42:1A-49 which set forth the penalties and remedies of an LLP that has failed to file an annual report.

## Appendix

The full text of N.J.S. 56:1-4, including proposed modifications (shown with underline), is as follows:

(a) Any person, or partnership, conducting or transacting business contrary to the provisions of either section 56:1-1 or 56:1-2 of this title shall be ~~guilty of a misdemeanor~~, ineligible to become a limited liability partnership as set forth in N.J.S. 42:1A-47.

(b) The State Treasurer may reject the statement of qualification submitted by a partnership that has failed to file a certificate required by either 56:1-1 or 56:1-2.

(c) A rejection under subsection b. of this section only affects a partnership's status and is not an event of dissolution of the partnership.

(d) A partnership whose statement of qualification has been rejected may immediately apply to the Division of Commercial Recording in the Department of the Treasury for qualification. The application must state:

(1) the name of the partnership and the effective date of the rejection; and,

(2) that the ground for rejection either did not exist or has been corrected.

(e) Acceptance of the statement of qualification under subsection d. of this section relates back to and takes effect as of the effective date of the rejection, and the partnership's status as a limited liability partnership continues as if the rejection had never occurred.