



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

April 20, 2009

*via facsimile (808-539-4801) and first-class mail*  
Judiciary Public Affairs Office  
417 South King Street  
Honolulu, HI 96813

Re: Comments on Revised Proposed Rule Concerning Unauthorized Practice of Law

Dear Sir or Madam:

The Justice Department and the Federal Trade Commission (“FTC”) are pleased to provide comments on the revised version of the rule proposed by the Hawai’i State Bar Association (“HSBA”) concerning the unauthorized practice of law (“UPL”).

The Department and the FTC commented on the original version of the proposed rule in a letter to this Court dated January 25, 2008. In our letter, we expressed concern that the broad, general definition of the practice of law proposed by the HSBA likely would unduly restrict non-lawyers from competing with lawyers to the detriment of consumers. We recommended that the Court adopt language similar to that found in Rule 49 of the District of Columbia Court of Appeals, which limits the definition of the practice of law to the provision of professional legal advice or services where there is a client relationship of trust or reliance.

We are pleased that, in the revised version of the proposed UPL rule, the HSBA has limited the definition of the practice of law to instances where there is a client relationship of trust or reliance.<sup>1</sup> However, we are concerned that the definition creates an un rebuttable presumption that the identified activities are the practice of law.<sup>2</sup> We recognize that the revised

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<sup>1</sup> The HSBA further limited the proposed definition by deleting “performing legal research” from the list of activities that are the practice of law, and by adding numerous exceptions and exclusions.

<sup>2</sup> For example, the proposed rule would bar non-lawyers from “negotiating legal rights or obligations on behalf of another person.” Proposed UPL Rule \_\_ (c)(5) (revised as of 10/23/08 HSBA meeting). This prohibition could prevent non-lawyers from performing a wide range of activities that involve relationships of trust and reliance

proposed rule contains many exceptions and exclusions which allow for non-lawyers to compete with lawyers to provide many services. But exceptions cannot capture every instance where consumers would benefit from lawyer/non-lawyer competition. Accordingly, we recommend that the Court modify the proposed rule to provide that the enumerated activities are *presumed* to be the practice of law and make clear, perhaps in commentary to the rule, that the presumption may be rebutted. Our recommendation is consistent with the District of Columbia Court of Appeals' Commentary to Rule 49 and the HSBA's intent in drafting the revisions to the proposed rule.

The District of Columbia Court of Appeals stated in its Commentary to Rule 49 that the provision of legal advice or services is the practice of law if (1) a relationship of trust or reliance exists *and* (2) specialized legal skills are required such that there is an implicit representation of authority or competence to practice law. The Commentary explains:

[There are] two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. . . . The presumption that one's engagement in [an activity] is the 'practice of law' may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.<sup>3</sup>

In keeping with its discussion in the Commentary, the District of Columbia Court of Appeals identifies certain activities that are *presumed* to be the practice of law but does not identify any activities that *are* the practice of law. By contrast, the HSBA has identified activities that *are* the practice of law rather than allowing for analysis to determine whether, in a specific instance, the provision of legal advice or services by a non-lawyer was permissible because there was no expectation of a professional legal opinion.

In his December 17, 2008, letter to the Court, Jeffrey H.K. Sia, President of the HSBA, stated that the revisions were intended to "better clarify that certain types of [lawful] activity conducted by non-lawyers . . . would not be subject to prosecution or otherwise infringed upon . . . . It was not the HSBA's intent to take away the lawful livelihood of non-lawyers or hinder

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but traditionally have not been considered the practice of law and are not licensed or regulated by the state. Accordingly, under the proposed rule, lay persons could be barred from fulfilling duties common to many employer/employee relationships, such as ordering merchandise or entering into license agreements on behalf of a business or supervisor.

<sup>3</sup> D.C. Court of Appeals Commentary to Rule 49(b)(2) (2008) (citations omitted).

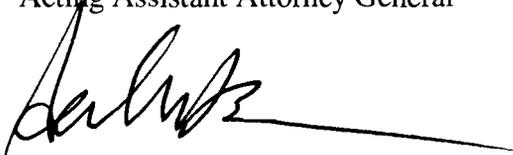
the public's access to legal services."<sup>4</sup> Our suggested modifications would further illuminate under what circumstances non-lawyers may compete with lawyers to provide services, to the benefit of consumers.<sup>5</sup>

The Justice Department and the FTC thank you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

Sincerely yours,

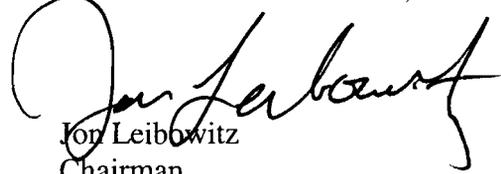


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<sup>4</sup> Letter from Jeffrey H.K. Sia, President, Hawai'i State Bar Ass'n, to James Branham, Supreme Court, State of Hawai'i (Dec. 17, 2008).

<sup>5</sup> The revised proposed rule defines "holding oneself out in any manner as a lawyer . . . entitled and able to engage in the practice of law in this state" as the practice of law. Proposed UPL Rule \_\_ (c)(2) (revised as of 10/23/08 HSBA Meeting). We recommend deleting that provision. Holding oneself out as a lawyer already is barred by the Prohibition, and it would be potentially confusing to include the activity in a list of activities that are *presumed* to be the practice of law. *See id.* at (b).