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BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSION APPROVED

March 30, 1987

Honorable Herman Lum
Chief Justice
Supreme Court of Hawaii
Aliiolani Hale
P.O. Box 2560
Honolulu, Hawaii 96804

Dear Chief Justice Lum:

The Federal Trade Commission staff is pleased to submit these comments regarding the proposed amendment to Disciplinary Rule 2-102(B) of the Rules of the Supreme Court of Hawaii.[1]

The proposal before the Court would permit the use of names of retired or deceased partners in law firm names. We support this relaxation of current restrictions. The proposed rule, however, would prohibit the use of trade names that include any information in addition to an attorney's name. This prohibition may limit the efficient dissemination of truthful, nondeceptive information to consumers. We therefore suggest that the proposed rule be amended to remove this restriction.

The proposed amendment to Rule 2-102(B) provides that "the name under which a lawyer practices shall be limited to the full or last name of the lawyer, the name or names of another lawyer or lawyers in the firm, the name of a lawyer that appears in the name of a professional law corporation that is a partner in the firm, or the name or names of one or more deceased or retired partners of the firm, or of a predecessor firm in a continuing line of succession."

By allowing firm names that include the names of deceased or retired members, the proposed rule would facilitate consumers' search for a lawyer. Consumers' association of a firm name with a particular level of quality or service would be lost if the firm name had to be changed each time a name partner died or retired, and consumers might thereafter be confused as to the identity of the law firm. We therefore support the proposal to permit a law firm to use the names of deceased or retired firm members in its name.

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1 This letter represents the views of the FTC's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission. The Commission has, however, voted to authorize the staff to submit these comments to you.

We see no justification, however, for the prohibition on more descriptive names. The comment accompanying the proposed amendment states that names such as "'The Jones Law Clinic', 'Smith's Bankruptcy Law Center', or 'Nanakuli Legal Services' would not be permissible," and suggests that trade names mislead consumers.[2]

We agree that deception should be prohibited. Trade names, however, are not inherently misleading as to the identity of or services provided by a law firm. Like any other trade name, a law firm name identifies the firm and comes to be associated with the services that the firm offers. The drafters of the proposed amendment recognized this fact when they allowed the use of such names by nonprofit legal aid organizations, public interest law firms, and firms organized under the laws of jurisdictions other than Hawaii. Further, trade names convey no less information to consumers about the identity of the attorney who will actually provide the legal services than do the firm names authorized by the proposed rule. Neither the proposed rule nor the existing rules require that the names of all the lawyers in the firm be included in the firm name, and a consumer who knows the name of the firm will not, thereby, necessarily learn the identity of the lawyers who will actually provide the legal service. Indeed, a firm name that includes information or words other than an attorney's name may provide more information to consumers about the firm's services than would the firm names permitted by the proposed rule.

The use of a trade name by a law firm can convey useful information about the firm, including the location, fields of practice, and other characteristics of its practice. For example, the use of a name such as "The Bankruptcy Law Center" would inform consumers that the firm offers services in bankruptcy law. Trade names may also be easier for consumers to distinguish and remember than names consisting only of proper names. By precluding these efficiencies the proposed rule would inhibit the communication of useful information to the public.

The United States Supreme Court has ruled that regulation of advertising is permissible if the advertising is inherently misleading or the record indicates that the advertising has, in fact, been misleading. See In re R.M.J., 455 U.S. 191, 202-203 (1982). On the other hand, the Court has also made clear that states may not absolutely prohibit the dissemination of

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2 Comment on Proposed Amended DR 2-102, Hawaii Code of Professional Responsibility at 3 (1986).

information merely because it has the potential to be misleading, if it could also be presented in nonmisleading ways, and that advertising restrictions "may be no broader than reasonably necessary to prevent deception." Id. at 203. The Supreme Court observed that it had allowed Texas to prohibit optometrists' trade names in Friedman v. Rogers, 440 U.S. 1 (1979), because the record contained evidence of a "considerable history in Texas of deception and abuse" by Texas optometrists through the use of trade names. 455 U.S. at 202. However, in Friedman, the Court did not hold that trade names are inherently misleading. The Court simply addressed the constitutionality of the Texas law, not whether it was the best means of protecting consumers. The comment to the proposed rule cites no evidence indicating that Hawaii lawyers have used or would be likely to use deceptive trade names.

In short, the proposed rule's broad prohibition of trade names restricts the communication of useful information and does not appear necessary to prevent deception. Therefore, we recommend that the Court modify Rule 2-102(B) to remove the remaining restrictions on the use of nondeceptive trade names.

We appreciate the opportunity to present these views.

Respectfully submitted,

Jeffrey I. Zuckerman
Director
Bureau of Competition