

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

December 20, 2002

Task Force on the Model Definition
of the Practice of Law
American Bar Association
750 N Lake Shore Drive
Chicago, IL 60611

Re: Comments on the American Bar Association's Proposed Model Definition
of the Practice of Law

Dear Members of the Task Force:

The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") submit this letter in response to the Task Force's solicitation for public comments regarding its proposed Model Definition of the Practice of Law. The DOJ and the FTC understand the definition to be a proposed statute, regulation, or court rule, and submit these comments pursuant to that understanding.¹

In recent testimony before the FTC, the President of the American Bar Association stated that "a threshold problem with the delivery of legal services [is] [w]hat constitutes legal information as opposed to legal advice?"² This issue hindered the efforts of other committees established by the American Bar Association, including those looking at multi-disciplinary practice, multi-jurisdictional practice, and the unauthorized practice of law.³ Defining the practice of law has been a difficult question for the legal profession for many years. The emergence of new technologies such as the Internet has expanded the number of ways in which legal advice and information can be disseminated, which has increased the complexity of the task.

¹Art Gavin, counsel to the Task Force, has represented to agency staff that the Model Definition is intended ultimately as a proposal for state agencies, State Bar regulations, or Supreme Court rules.

² *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002) (statement of Alfred P. Carlton, American Bar Association President) at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/carlton.pdf>.

³ *Id.*

The boundaries of the practice of law are unclear and have been prone to vary over time and geography.⁴ While almost all states (with the exception of Arizona) currently have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers. For example, the Texas UPL statute states that “the definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.”⁵ These types of open-ended statutory definitions give courts and bar agencies scant guidance when they attempt to apply UPL statutes to specific facts.

Courts and bar agencies struggling to define the somewhat amorphous concept of the practice of law have come up with several different tests. For example, the “commonly understood” test defines the practice of law as composed of activities that lawyers have traditionally performed.⁶ There are a number of exceptions to this test, such as permitting nonlawyers to perform activities usually performed by lawyers if those activities are incidental to the profession or business of the nonlawyer.⁷ Another exception to the “commonly understood” test allows lay people to provide services that are commonly understood to be the practice of law as long as those services do not involve difficult or complex questions of law. For example, a California court ruled that the preparation of simple income tax forms was not the practice of law.⁸ Another test used to define the practice of law focuses on the existence of an attorney-client relationship. An example of this test is the Unauthorized Practice Rules of the Supreme Court of Virginia, which states, “[I]t is from the relation of attorney and client that any practice of law must be derived.”⁹ Other tests are based upon the client’s belief as to whether he or she is receiving legal services, whether the activity involves the application of legal knowledge to the specific situation of an individual, and whether the services provided affect the recipient’s legal rights.¹⁰

⁴See, e.g., *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d 1, 5-11 (Ariz. 1961) (en banc) (describing history of the regulation of the practice of law).

⁵TEX. GOV’T CODE ANN. § 81.101 (b).

⁶*State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d at 9 (“We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute ‘the practice of law.’” (citation omitted)).

⁷*Virginia v. Jones & Robins, Inc.*, 41 S.E.2d 720, 727 (Va. 1947) (“As a practical solution of the question, it was deemed advisable to permit a real estate broker to prepare simple contracts of sale, options, leases, etc., and to prohibit him from preparing legal instruments whereby the legal title to property passes from the seller to the purchaser.”).

⁸*Agran v. Shapiro*, 273 P.2d 619 (Cal. Ct. App. 1954).

⁹VA. SUP. CT. UNAUTHORIZED PRACTICE RULES, Section B, Definition of the Practice of Law (“Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.”).

¹⁰See *Guidelines on Mediation and the Unauthorized Practice of Law*, Department of Dispute Resolution Services of the Supreme Court of Virginia, (2001), at <http://www.courts.state.va.us/drs/upl/preface.html>.

In addition, as Professor Catherine Lanctot has noted, “Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.”¹¹ Such concerns bespeak caution for any party seeking to define the practice of law. Accordingly, we urge the ABA not to adopt the current proposed Definition, which, in our judgment, is overbroad and could restrain competition between lawyers and nonlawyers to provide similar services to American consumers. If adopted by state governments, the proposed Definition is likely to raise costs for consumers and limit their competitive choices. There is no evidence before the ABA of which we are aware that consumers are hurt by this competition and there is substantial evidence that they benefit from it. Consequently, we recommend that the proposed Model Definition be substantially narrowed or rejected.

In doing so, we urge the Task Force to consider carefully what specific harms the Model Definition is designed to address, whether the Definition is appropriately tailored to addressing those harms, and whether the elimination of any such harms would outweigh the reduction in lawyer-nonlawyer competition that could occur if any state adopted the proposed Model Definition. Neither the proposed Model Definition nor the President’s Challenge Statement that accompanies the proposed Model Definition provides a clear articulation of the harms the Definition seeks to address. Comment 1 of the proposed Model Definition notes only in general terms that “The primary consideration in defining the practice of law is the protection of the public.” The Challenge Statement, in turn, indicates that:

[T]here are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and **arguably** (emphasis added) an increasing number of attendant problems related to the delivery of services by nonlawyers.

The DOJ and the FTC recognize that there are circumstances requiring the knowledge and skill of a person trained in the law, and acknowledge the legitimacy of the Task Force's efforts to protect consumers in such situations. Nonetheless, while there may be legitimate problems related to the delivery of certain legal services by nonlawyers, the DOJ and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services. This comment will address the agencies’ interest in the proposed Definition by illustrating its potential deleterious effect in the areas of real estate closing services and e-commerce. We also note a wide variety of other areas in which the proposed definition may harm consumers. We conclude that the proposed definition is not in the public interest because the harms it imposes on consumers by limiting competition are likely much greater than any consumer harm that it prevents.

¹¹*Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002)(statement of Catherine J. Lanctot), at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/lanctot.pdf>.

The Interest and Experience of the U.S. Department
of Justice and the Federal Trade Commission

The DOJ and the FTC are entrusted with enforcing the federal antitrust laws. Both agencies work to promote free and unfettered competition in all sectors of the American economy. The United States Supreme Court has observed that, “ultimately, competition will produce not only lower prices but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”¹² Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions.¹³ Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

Together, the DOJ and the FTC have become increasingly concerned about efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of Unauthorized Practice of Law opinions and laws by state bar agencies, courts, and legislatures. In addressing these concerns, the DOJ and the FTC encourage competition through advocacy letters such as this one. The DOJ and the FTC have been concerned particularly about attempts to restrict nonlawyer competition in real estate closings, and have urged the states of Kentucky, Virginia, Rhode Island, and North Carolina to reject such restrictions, through letters to their State Bars (state agencies) and legislatures, and through an *amicus curiae* brief filed with the Kentucky Supreme Court in 2000.¹⁴ In addition, the DOJ has challenged in court attempts by bar associations to restrain competition from nonlawyers,¹⁵ and

¹² *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)); *accord* *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).

¹³ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689; *see also* *United States v. American Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

¹⁴ Letter from DOJ and FTC to Speaker of the Rhode Island House of Representatives, et al. (March 29, 2002); Letter from DOJ and FTC to President of the North Carolina State Bar (July 11, 2002); Letter from DOJ and FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n, et al., *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000); Letters from DOJ to Board of Governors of the Kentucky Bar Association (June 10, 1999 and September 10, 1997); Letter from DOJ and FTC to Supreme Court of Virginia (Jan. 3, 1997); Letter from DOJ and FTC to Virginia State Bar (September 20, 1996). The Rhode Island, North Carolina, and Virginia letters may be found on the Justice Departments' web site at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the FTC's web site, <http://www.ftc.gov>. The Department of Justice letter to the Kentucky Bar Association is at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the Brief to the Kentucky Supreme Court at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>.

¹⁵ In *United States v. Allen County Indiana Bar Ass'n*, the DOJ sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers'

the FTC has challenged anticompetitive restrictions on certain business practices of lawyers.¹⁶ Our ongoing concern has led us to submit these comments.

The Proposed Model Definition

The proposed Model Definition would define “the practice of law” as:

[T]he application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.¹⁷

Under subsection (c) of the Definition, “a person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:”

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights or responsibilities on behalf of a person.¹⁸

“Whether or not they constitute the practice of law,” the proposed subsection (d) of the Model Definition would permit as an exception:

- (1) Practicing law authorized by a limited license to practice;
- (2) *Pro se* representation;¹⁹

examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). *See also* United States v. New York County Lawyers' Ass'n, No. 80 Civ. 6129 (S.D.N.Y. 1981) (DOJ obtains a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with other attorneys).

¹⁶ Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990). In addition, the FTC staff has conducted studies of the effects of occupational regulation and submitted comments about these issues to state legislatures, administrative agencies, and others. *See, e.g.,* Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, The Federal Trade Commission, October 1990.

¹⁷ Task Force on the Model Definition of the Practice of Law, Proposed Model Definition of the Practice of Law, § (b)(1), (Sept. 18, 2002).

¹⁸ *Id.* at § (c).

- (3) Serving as a mediator, arbitrator, conciliator or facilitator; and
- (4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.²⁰

A separate comment states that “for a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. . . . The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.”²¹ The Definition further notes that nonlawyers engaged in the practice of law could be subject to civil and criminal penalties.

The Proposed Model Definition Would Prohibit Competition Between Lawyers and Nonlawyers for Many Services

The proposed Model Definition is overly broad because it would prohibit nonlawyers from offering a number of services that they currently provide in competition with lawyers to the benefit of consumers. These services arguably would include those that relate to real estate closing and related matters; wills, trusts and estates; and numerous other areas. Many of these services, while not “requir[ing] the knowledge and skill of a person trained in the law,” appear nonetheless to fall within the Model Definition’s list of four types of conduct that are presumed to be “the practice of law.”

Lay real estate closings are an area with which the DOJ and the FTC have much recent experience, and they provide a specific and fertile example of how the proposed Model Definition would result in significant consumer harm. The proposed Model Definition has the potential to prohibit or to limit the lay provision of real estate closing services. Under section (c)(2) of the Definition, lay persons apparently would be practicing law if they selected, drafted, or completed certain closing documents. Likewise, Section (c)(1) does not clearly define what is meant by “Giving advice or counsel” as opposed, for example, to providing information. Under the proposed Model Definition, lay persons may not be permitted to answer certain questions about a purchaser’s mortgage obligations and other related matters (or simply may be chilled from doing so, when faced with the possibility of civil or criminal sanctions).

Similarly, realtors routinely fill out and explain purchase and sale agreements, the basic agreements into which buyers enter as the first steps toward buying a home. They may explain to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and other portions of the agreement. They may also

¹⁹A separate comment provides that pro se representation may mean representation “by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.” *Id.* at Comment 2.

²⁰ *Id.* at § (d).

²¹ *Id.* at Comment 1.

negotiate these clauses during the purchase process. Realtors often explain what is required by state law to obtain a smoke detector certificate, a termite certificate, and other certificates required by law for the purchase and sale of a home. Under Section (c) of the proposed Model Definition, all of these activities could be considered giving people advice about their legal rights and responsibilities (Section (c)(1)), negotiating legal rights on behalf of people (Section (c)(4)), or “selecting, drafting or completing” legal documents or agreements affecting people’s rights (Section (c)(2)).

Other forms of lawyer-nonlawyer competition outside of the real estate context also could be eliminated or reduced by the proposed Model Definition. In the area of wills, trusts and estates, consumers use inexpensive electronic software to complete wills, trusts, and other legal documents. This software might be considered the practice of law under the proposed Model Definition because these applications assist in the “selection” and “drafting” of certain documents, and provide legal information and/or advice. Even though the software is produced for a mass audience and the proposed Model Definition indicates that conduct “must be targeted toward the circumstances or objectives of a specific person” in order to be the practice of law, we are concerned that a state agency or court could conceivably view the interactive nature of these programs as rising to the level of legal practice.

Consumers also obtain information or assistance regarding wills and trusts from other lay sources. Hospitals and other organizations essentially compete with lawyers by providing living will forms that prospective patients may complete. In some cases, these forms might be “selected” and “drafted” by the hospital and given to the patient by their physician. This practice arguably would be considered “the practice of law” under the proposed Model Definition.

While it is impossible to develop an exhaustive list of all of the instances of lawyer-nonlawyer competition that might be eliminated as a result of the proposed Model Definition, other examples include:

- C Tenants’ associations informing renters of landlords’ and tenants’ legal rights and responsibilities, often in the context of a particular landlord-tenant problem;
- C Experienced lay employees advising their employer about what their firm must do to comply with state labor laws or safety regulations;
- C Income tax preparers and accountants interpreting federal and state tax codes, family law code, and general partnership laws, and providing advice to their clients that incorporates this legal information; and
- C Investment bankers and other business planners providing advice to their clients that includes information about various laws.

The proposed Model Definition arguably would cover each of these practices, and thus could preclude or inhibit nonlawyers from continuing to provide such services if the proposed Model Definition were to be adopted by any state. Moreover, to the extent the Model Definition is vague and ambiguous, the possibility exists that state agencies or courts will prohibit

procompetitive conduct that the Task Force did not intend to include within the scope of the Model Definition of the practice of law.

The Public Interest Warrants a Balance of the Harms the Proposed Model Definition is Likely to Cause Against the Harms the Model Definition Seeks to Reduce or Eliminate

As the Task Force has recognized in Comment 1 to the proposed Model Definition, “[t]he primary consideration in defining the practice of law is the protection of the public.”²² The rules regarding the unauthorized practice of law should protect the public interest and should not be construed in a manner inconsistent with that purpose. The Task Force should weigh the harm that would be caused by the adoption of the proposed Model Definition against the harm that might result if this proposed Model Definition were not implemented and lay persons otherwise affected by the Definition could continue to compete with lawyers in determining how best to protect the public interest. As explained below, the DOJ and the FTC are unconvinced that the adoption of such a broad definition of the practice of law would serve the public interest.

By Prohibiting Nonlawyer Competition For Many Services,
the Proposed Statutory Definition Would Likely Adversely
Affect the Public by Eliminating Competition and Raising Prices

When nonlawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. The use of lay services also can reduce costs to consumers. Evidence suggests that the use of lay real estate closers provides a lower cost alternative for consumers.²³ Additionally, although accountants and tax preparers do not typically itemize the legal-related services included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants’ associations and other advocacy organizations is often free. Will writing and other

²² See also *In re* Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995) (in making unauthorized practice of law determinations, courts must examine “whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law”); *Unauthorized Practice of Law Committee v. State of Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988) (public interest must guide unauthorized practice of law decisions); Va. S. Ct. R. Pt. 6, § I (Introduction) (unauthorized practice of law statute designed to protect the public interest).

²³ In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. See *infra* note 43 and accompanying text. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than \$150 less than attorney closings. See *supra* note 14.

legal form fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document.²⁴ These services plainly benefit consumers.

By limiting the ability of lay persons to provide such services in competition with lawyers, the proposed Model Definition would eliminate or reduce many of these benefits, potentially harming consumers in several ways. First, the proposed Model Definition would force consumers who would not otherwise choose to hire a lawyer to do so. For example, in the real estate context, under the proposed Model Definition, home buyers could be required to retain attorneys to write and interpret real estate purchase and sale agreements and provide other information and advice normally provided by real estate agents. Likewise, borrowers would have to employ lawyers to provide certain real estate closing services that nonlawyers currently provide without charge. These additional costs would be incurred by home purchasers, as well as consumers refinancing their existing loans or obtaining home equity loans or second mortgages.

In the area of wills, trusts, and estates, consumers who prefer legal document software arguably would have to hire lawyers under the proposed Model Definition.²⁵ In other areas, businesses and individuals that rely on accountants and bankers who provide legal information along with other services arguably would be required to hire attorneys to provide that information. Hence, the proposal could increase costs for all consumers who might prefer the combination of price, quality, and service that a lay service provider offers.

Second, the proposed Model Definition, by eliminating competition from lay persons, would likely increase the price of lawyers' services, because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay service would likely pay higher prices. That was the conclusion that the New Jersey Supreme Court reached before ultimately rejecting an opinion that would have had the effect of eliminating lay real estate closings. Evidence gathered in that proceeding indicated that in parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid on average \$350 less for closings and sellers represented by counsel paid \$400 less.²⁶

Third, the proposed Model Definition may hurt consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. For example, consumers may choose to use willmaking software because it is relatively easy and convenient to use. Consumers who cannot afford lawyers may instead seek out the assistance of tenants' associations or other advocacy

²⁴ While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software is available that permits the consumer to draft a will for less than \$100.

²⁵ The official comment to the proposal contains an exclusion for conduct that is not "targeted toward the circumstances or objectives of a specific person," and observes that publishing legal self-help books is not the practice of law. Despite the growing presence of electronic commerce in our economy, the statute makes no exception for such software, which is often more interactive than a book.

²⁶ See *In re Opinion No. 26*, 654 A.2d at 1348-49.

organizations for legal information. In real estate closings, some non-lawyer services also compete with attorneys on the basis of convenience to close loans at nontraditional times (such as evenings or weekends) and locations (such as the consumer's home). Moreover, closing loans by mail or the Internet utilizing lay services is a common practice for consumers buying property or refinancing loans in some states. For these consumers, an overly broad definition of the practice of law, prohibiting lay closings, could raise costs and erect significant barriers to electronic commerce if enacted in these states.

Fourth, the Model Definition could reduce competition from out-of-state service providers. In the real estate mortgage market, for example, out-of-state lenders may compete by offering lower interest rates or more attractive loan packages than similar in-state institutions. These lenders may not have a significant in-state presence and may instead contract with in-state lay providers to close loans. Some of these lenders conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The Model Definition, if it requires attorneys (or their lay employees) to close loans, has the potential to impair substantially this competition between lenders.

Impact on E-Commerce

In addition to the significant restrictions on consumer choice and increases in consumer costs that flow from an overly broad definition of the practice of law in the non-electronic realm, such restrictions are also likely to impede substantially the growth of e-commerce and software-based solutions. The Internet is changing how many goods and services are delivered, and consumers benefit from the increased choices and convenience and decreased costs that the Internet can deliver. Yet over-broad restrictions on the practice of law can impair the growth of e-commerce by (1) prohibiting or increasing the costs of electronic provision of forms or other legal self-help computer programs, (2) negatively impacting Internet mortgage lenders who rely on lay real estate closers, and (3) restricting the ability of providers to experiment and develop new forms of Internet services touching on legal matters that could benefit consumers directly.

Many consumers, for example, use inexpensive electronic software to complete wills, trusts, and other legal documents. The forms and choices contained in the software are selected and programmed by the software companies. The consumer answers basic questions posed by the application, which then automatically completes a will or other basic legal document using standardized provisions that are based on the consumer's answers. The consumer essentially fills in electronic "blanks;" however, the application sometimes offers advice based on information provided by the consumer. Consumers may be advised to designate two trustees, in the event that one trustee dies. The Task Force's comment to the Definition does not appear to address this issue of interactive software or the issue of similar electronic or automated services.

With respect to software such as this, the case of *Unauthorized Practice of Law Comm. v. Parsons Technology, Inc.*²⁷ is instructive. Parsons Technology, the publisher of a popular legal software program, was enjoined from selling its product in Texas because the district court concluded that the software constituted the unauthorized practice of law. The Texas legislature

²⁷179 F.3d 956 (5th Cir. 1999).

subsequently enacted an amendment to the statutory UPL definition providing that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale ... [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."²⁸

The FTC recently held a three-day public workshop examining potential new barriers to e-commerce in ten different industries.²⁹ That public workshop considered whether states have enacted regulations that may have the effect of aiding existing bricks-and-mortar businesses at the expense of new Internet competitors and whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics. Two panels, concerning real estate/mortgages/financial services and online legal services, dealt specifically with matters implicated by the proposed uniform Definition. Congress, as well, has recently begun examining these same issues, and has indicated it will continue to examine how legal restrictions may work to impede e-commerce.³⁰ George W. Jones, Jr., the President of the District of Columbia Bar, remarked that "the tremendous uncertainty as to the line between providing legal advice and providing information about the law is a major impediment to development of Internet services."³¹ While the FTC is still evaluating the testimony and evidence from the workshop, one thing is clear already: when restrictions may foreclose potential new Internet competitors, one should proceed cautiously, mindful of the unintended consequences that may unduly limit the choices of consumers.

²⁸*Id.*

²⁹*See Possible Anticompetitive Efforts to Restrict Competition on the Internet, Federal Trade Commission, Public Workshop (2002), at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.*

³⁰*See State Impediments to E-Commerce: Hearing Before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection (2002) (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission), available at <http://www.ftc.gov/os/2002/09/020926testimony.htm>.*

³¹*Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop (Oct. 9, 2002)(statement of George W. Jones, Jr., President of the District of Columbia Bar), at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/jones.pdf>.*

There Is No Indication That The Proposed
Model Definition is Needed to Prevent Significant Consumer Harm

According to antitrust authorities, restrictions on competition are generally considered harmful to consumers and, accordingly, are justified only by a showing the restriction is necessary to prevent significant consumer harm and is narrowly drawn to minimize its anticompetitive impact.³² A showing of likely harm is particularly important when, as here, the proposed restraint could prevent consumers from using entire classes of providers. Without a showing of likely harm, restraining competition in a way that is likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted. The DOJ and the FTC are unaware of any showing of likely harm that would justify a broad definition of “the practice of law” that would effectively preclude many nonlawyers from providing efficient services that are beneficial to consumers and serve the public interest.³³ The agencies have not seen any factual evidence demonstrating that consumers are actually hurt by the availability of lay services.³⁴ Many of the proposed state bar agency unauthorized practice of law opinions that our agencies have reviewed set forth no factual evidence and little evaluation of how the ability of lay services had actually hurt consumers.³⁵

The Task Force provides no evidence of consumer harm to be remedied. Neither the proposed Model Definition nor the statements that accompany it articulate or substantiate any harm to the public interest against which the Definition is designed to protect. The Challenge statement accompanying the proposed Model Definition notes simply that there is “arguably an increasing number of attendant problems related to the delivery of services by nonlawyers.”

Even if the Task Force were, notwithstanding the lack of stated evidence, to conclude that consumers are being harmed by the lay provision of certain services, any proposed Model Definition ought to be appropriately tailored so as not to prohibit lay participation that is beneficial to consumers and in the public interest. As drafted, the proposed Model Definition does not appear tailored to address any harms that might conceivably occur.

Furthermore, the proposed Model Definition will not guarantee that consumers will have the benefit of independent counsel or the ability to stop transactions that are not in their best interest. For example, in many states that require an attorney to close real estate loans, the attorney can be the lender’s lawyer. These lawyers do not represent the consumers. While they

³² Cf. *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

³³ See DOJ and FTC Letter to Rhode Island House of Representatives (Mar. 29, 2002); DOJ and FTC Letter to North Carolina Bar (Dec. 14, 2001); DOJ letter to Kentucky Bar (June 10, 1999); DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁴ To the contrary, the greatest frauds involving Virginia real estate settlements in Virginia in the 1990s were perpetrated by two attorneys, one of whose schemes cost home sellers and lenders nearly \$5 million. See DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁵ Moreover, a 1999 study by Professor Joyce Palomar found that the public did not suffer significantly greater losses from title defects in states where lay persons examined title, drafted mortgage documents, and supervised closings. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!"* 31 CONN. L. REV. 423 (1999).

might provide some legal explanations to consumers, they could not advise buyers about whether a particular deed or loan term was in their best interests. Nor do they advise consumers about all of their legal rights.³⁶ Similarly, if an attorney employed by the seller completed a purchase and sale agreement and performed other services normally provided by real estate agents, this attorney would represent the seller, not the buyer.

Likewise, Section (d) (4) of the proposed Model Definition would allow a lawyer's lay employee to provide certain services so long as that employee is acting "under the supervision of a lawyer in compliance with the Rules of Professional Conduct." "Supervision" is a vague term and presents the risk that no lawyer necessarily would be present while the "services" were being performed. If it is the practiced eye of the lawyer that protects consumers, then this eye might be absent. Moreover, the Model Definition would not assure that lawyers who perform tasks will be experienced or have specialized knowledge of the field in which they are performing the tasks. Any attorney could perform the services.

For consumers, the services of a licensed lawyer may well be desirable in many situations. A consumer might choose to hire an attorney to answer legal questions, provide legal advice, research the case law, negotiate disputes, or offer various protections. Consumers who hire attorneys may get better service and representation than those who do not. This is, however, no reason to eliminate lay service providers as an alternative.³⁷ Rather, the choice of hiring a lawyer or a nonlawyer should rest with the consumer.³⁸

Less Restrictive Measures May Protect Consumers

Costs that the proposed Model Definition likely would impose on consumers should not be imposed without a convincing showing that lay services have not only injured consumers, but also that less drastic measures cannot remedy the perceived problem.

We believe that this is an issue that the Task Force should address and examine in much greater detail before opining on the optimum definition of the practice of law. If less drastic alternatives are available, they should be incorporated into any proposed statute. It is important to consider all of the facts, to "know all of the implications of the prohibition and its impact on the public" before foreclosing activity as the unauthorized practice of law.³⁹ The purpose of the power to declare activities to be the unauthorized practice of law is "to serve the public's right to protection against unlearned and unskilled advice in matters relating to the science of the law. . . in these cases we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."⁴⁰

³⁶ See DOJ and FTC Letter to North Carolina Bar (Dec. 14, 2001); DOJ Letter to Kentucky Bar (June 10, 1999); DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁷ See *In re Opinion No. 26*, 654 A.2d at 1360.

³⁸ *Id.*

³⁹ See *In re Opinion No. 26*, 654 A.2d at 1357.

⁴⁰ *Id.*, citing *In re Applications of New Jersey Society of Certified Public Accountants*, 507 A.2d 711 (N.J. 1986).

Thus, until demonstrated otherwise, accountants, bankers, real estate brokers and others skilled in business should remain able to provide advice and legal information related to their particular practices without harming the public. This already occurs every day in multiple jurisdictions with little or no evidence that consumers would benefit by the same advice instead being provided by an attorney.⁴¹

Less restrictive alternatives are available to protect consumers. In real estate closings, for example, the New Jersey Supreme Court required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney.⁴² This measure permits consumers to make an informed choice about whether to use lay closing services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997.⁴³ This statute permits consumers to choose lay closers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds. Though more regulatory than the New Jersey approach, the Virginia approach is clearly a more procompetitive approach than an outright ban on lay closings.⁴⁴

Conclusion

By including overly broad presumptions of conduct considered to be the practice of law, the proposed Model Definition likely will reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition. As the New Jersey Supreme Court has concluded:

Not every such intrusion by lay persons into legal matters disserves the public: this Court does not wear public interest blinders when passing on unauthorized practice of law questions. We have often found, despite the clear involvement of the practice of law, that nonlawyers may participate in these activities, basing our decisions on the public interest.⁴⁵

Likewise, the Task Force, in recommending a proposed Model Definition of the practice of law, should allow lay competition that is in the public interest, and craft an appropriate definition of

⁴¹We also note that there is no explicit guidance provided governing the application of criminal penalties to the unauthorized practice of law. It would seem reasonable that criminal penalties would be reserved for the most egregious of offenses so as to avoid a chilling effect on otherwise legal lay service providers who do not have the expertise to define adequately for themselves the exact contours of the practice of law.

⁴² *In re Opinion No. 26*, 654 A.2d at 1363.

⁴³ VA. CODE ANN. §§ 6.1-2.19 - 6.1-2.29 (West 2001).

⁴⁴ The Virginia approach carries some risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See Cox and Foster, supra* note 16.

⁴⁵ *In re Opinion No. 26*, 654 A.2d at 1352.

the practice of law that is based upon a careful review of the harms and benefits of lay participation in any service that the Definition would cover.

The Justice Department and the Federal Trade Commission appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

R. Hewitt Pate
Acting Assistant Attorney General

Jessica N. Butler-Arkow
Attorney
United States Department of Justice
Antitrust Division

By Order of the
Federal Trade Commission,

Timothy J. Muris
Chairman

Ted Cruz, Director
Office of Policy Planning