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

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

nonlawyers,(15) and 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;

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 [illegible] 72n 12.3 b1(n)13o)13pn(h)13(e(i)-1(3(")g 72 587.88-3(d)13(f1(3(")gi)-1[(t)2(o

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 Lik ely 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 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 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-

According to antitrust authorities, restrictions on competition are generally considered harmful to consumers an

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

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.

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.

27. 179 F.3d 956 (5th Cir. 1999).

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 Planing, 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.
32. 2 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).

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).

41. We 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.