



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

Federal Trade Commission
Washington, DC 20580

Department Of Justice
Washington, DC 20530

March 20, 2003

Standing Committee on the Unlicensed Practice of Law
UPL Advisory Opinions
State Bar of Georgia
104 Marietta Street, NW
Suite 100
Atlanta, Georgia 30303

Comments On Potential Unlicensed Practice Of Law Opinion Regarding Real Estate Closing Activity
Re:

Dear Committee Members:

The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") submit this letter in response to the solicitation for comments regarding the potential unlicensed practice of law in real estate closing-related activities by nonlawyers. At the public hearing, DOJ and FTC will address the question:

example, lenders outside Georgia may compete by offering lower interest rates or more attractive loan packages than similar in-state institutions. These lenders may lack facilities in Georgia. They may hire out-of-state providers to prepare deeds and may contract with Georgia lay providers to facilitate the execution of those deeds.⁽¹⁸⁾ Some of these lenders may conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience.⁽¹⁹⁾ A ban on competition from anyone other than a licensed Georgia attorney has the potential to impair this competition between lenders, and also to impair the ability of lenders and others to compete via the Internet.

Fourth, a ban on lay competition could 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, some lay closing services 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). In addition, out-of-state consumers buying property in Georgia may wish to use mail-in or Internet services for obtaining their loans. Consumers may execute their deeds and other papers before a notary they have paid in the state where they currently reside, before mailing the documents back to the lender. They may conduct the execution in the office of a lawyer in their current state. This activity would by definition involve the facilitation of deed execution by someone other than a licensed Georgia attorney. If consumers could not do this, their costs could substantially increase because they would have to pay for travel to Georgia to execute their deeds.

An Overly Broad Opinion Could Have an Adverse 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, these potential restrictions are likely to impede

little evaluation of how the availability of lay services had actually hurt consumers.⁽²⁴⁾ Some evidence tends to indicate that lay closings do not result in significant harm consumers. A 1999 study by Professor Joyce Palomar of the University of Oklahoma 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.⁽²⁵⁾ At a minimum, the Standing Committee should not adopt a ban on lay providers without strong factual evidence demonstrating that Georgians are actually hurt by the availability of nonlawyer service providers and a strong showing that this is not outweighed by the harm to consumers of foreclosing competition. Even in that case, any opinion should be narrowly tailored so as not to prohibit lay participation that is beneficial to consumers and in the public interest.

The proposed ban on "facilitat[ing] the execution" of deeds has the potential to be overly broad and unlimited, sweeping in much activity by lay people. All kinds of activities could be considered facilitating the execution of a deed. Is it "facilitation" to clear title exceptions? Is it "fac

3. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975);

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 Comm. v. 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, § 1 (Introduction) (unauthorized practice of law statute designed to protect the public interest).

14. See letters to the Rhode Island House of Representatives, North Carolina State Bar, Kentucky Bar Association, Supreme Court of Virginia, and Virginia State Bar and the amicus curiae brief filed with the Kentucky Supreme Court, *supra* note 5.

15. To the extent that there are a limited number of lay competitors currently operating in Georgia, a ban on nonlawyer competition would not only affect these current competitors but would prevent future lay competitors from entering the Georgia market. In other states, lay competition has grown first in the larger cities and then spread to more rural areas. For example, in Kentucky, lay real estate closers entered the market in the Cincinnati suburbs, spread to Lexington and Louisville, and then to other parts of the state. As lay competition grew in that state, prices for real estate closings fell, according to information that the DOJ received from industry representatives. See letters from the DOJ to Board of Governors of the Kentucky Bar Association, *supra* note 5.

16. See *In re Opinion No. 26*, 654 A.2d at 1348-49. A special master was appointed in New Jersey to hold a thorough 16-day evidentiary hearing before making an initial recommendation. *Id.* Likewise, in 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. Va. Code Ann. §§ 6.1-2.19 - 6.1-2.29 (West 2001). 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 letters cited *supra* note 5.

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

18. For example, an out-of-state lender could hire a Georgia nonlawyer to examine title and clear the exceptions to that title.

19. Under Georgia law, a lender or other party can draw up legal instruments for another party provided that it is done at no fee and at the request and under the direction of the person desiring to execute the instrument. Ga. Code Ann. § 15-19-52. Presumably, this would allow Internet lenders to continue to close their own loans, including drawing up the deed so long as no additional charges were levied. If, however, the Internet lender sought to impose an additional charge, as lawyers currently do, it would be unable to provide this service. Likewise, if it relied on consumers to get their own notaries for witnessing the deed execution, the Internet lender may have facilitated the execution of a deed without using a licensed Georgia attorney and could run afoul of the proposed ban.

20. As explained above, these Internet providers may use mail-in closings rather than requiring consumers to close their loans and execute their deeds in the office of a Georgia lawyer. These providers may have used attorneys outside Georgia to draw up deeds or lay people to facilitate the execution of those deeds.

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

22. 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>.

23. See generally *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Antitrust laws are themselves a very important form of consumer protection and consumers benefit immensely from competition between different types of service providers. See *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 695; accord, *Superior Court Trial Lawyers Association*, 493 U.S. at 423.

24. See *supra* note 5 (and letters and briefs cited therein).
25. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423 (1999).
26. 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), *supra* note 5.
27. See Ga. Code Ann. §15-19-54 (permitting the provision of clerical and information services by laypersons to attorneys).
28. See *In re Opinion No. 26*, 654 A.2d at 1360.
29. See *In re Opinion No. 26*, 654 A.2d at 1357.
30. *Id.*
31. *In re Opinion No. 26*, 654 A.2d at 1363.
32. Va. Code Ann. §§ 6.1-2.19 - 6.1-2.29 (West 2001).
33. The Virginia approach carries some risk of consumer harm, because licensing regulation itself can be used to thwart competition. See Cox and Foster, *supra* note 7.