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

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Federal Trade Commission
Washington, DC 20580

Department Of Justice
Washington, DC 20530

October 1, 2003

Unauthorized Practice of Law Committee
Indiana State Bar Association
c/o John A. Conlon, Esquire
500 N. Meridian Street
P. O. Box 441651
Indianapolis, Indiana 46244

Re: Comments On Draft Proposed Amendment To Indiana Supreme Court Admissions & Discipline Rule 24 Regarding Unauthorized Practice Of Law

Dear Mr. Conlon and Members of the Committee:

The Indiana State Bar Association's ("ISBA") Unauthorized Practice of Law Committee has drafted a proposed amendment to Indiana Supreme Court Admissions & Discipline Rule 24 in contemplation of submitting its proposal to the Indiana Supreme Court. On July 14, 2003, you asked the United States Department of Justice and the Federal Trade Commission ("FTC") for comments on the draft. This letter is submitted in response to your request.

The proposed draft amendment would, for the first time in Indiana, impose rules defining the practice of law. Our agencies are concerned that consumers could be adversely impacted by the proposed draft, because it is overbroad and likely to prevent nonlawyers from providing, in competition with lawyers, services that Indiana law currently permits. If implemented as written, the draft proposed rule would likely raise costs for consumers and limit their competitive choices. Antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury. Because the proposed rule is likely to restrain competition while likely providing little benefit to consumers, we recommend that Rule 24 be left in its current form, or alternatively, that the proposed revision be narrowed substantially.

The Interest And Experience Of The U.S. Department Of Justice And The Federal Trade Commission

The Justice Department 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.'"[(1)] Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions.[(2)] Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

The Justice Department and the FTC have become concerned about increasing efforts to prevent nonlawyers from competing with attorneys in providing certain services through the adoption of unauthorized practice of law rules and opinions by state courts and legislatures. 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."[(3)]

In addition, Section 2(b)(8) provides that an employee may perform activity "for the exclusive benefit of the employer" provided that he/she "(i) does not engage in the 'practice of law' as defined in this rule," (ii) works permanently only for the employer, "(iii) does not select, prepare, or complete a legal document for the employer" except as provided in the proposed rule, and "(iv) does not represent the employer in a legal proceeding except as provided" in the proposed rule or by rule of a court. Finally, the draft rule would permit nonlawyers to engage in activity that the Indiana Supreme Court determines is permissible.

Restrictions On Lawyer -Nonlawyer Competition Should Be Examined To De termine Whether They Are In The Public Interest

The Justice Department and the FTC recognize that there are circumstances requiring the knowledge and skill of a person trained in the law. Nonetheless, while there may be legitimate problems related to the delivery of certain legal services by nonlawyers, the Justice Department and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services.

Prohibitions on the unauthorized practice of law should serve the public interest.[(11)] In considering questions of the unauthorized practice of law, the Supreme Court of New Jersey explained,

The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.

. . .

We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.[(12)]

The proposed ISBA definition is not in the public interest because it is overly broad and, by limiting competition, will likely cause more harm to consumers than it may prevent. Indiana has a tradition of allowing laypeople to compete with lawyers to provide services when doing so would benefit the public. The Indiana Supreme Court has held that it is not proper to "provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged according to its own specific circumstances."[(13)] "The law itself is by no means an absolute science, the practice of which can be accurately and unequivocally defined."[(14)]Indeed, in Miller v. Vance, the Indiana Supreme Court observed that it should not place an "unreasonable burden on the public" by determining that lay bank employees who fill out mortgage forms are practicing law.[(15)] Likewise, in Indiana Real Estate Ass'n, Inc., the Court held that "it cannot be urged with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent acting for one of the parties. Such restrictions would so paralyze business activities that very few transactions could be expeditiously consummated."[(16)]

The Draft Proposed Rule Would Likely Hurt Indiana Consumers By Restraining Competition Between Lawyers And Nonlawyers

The Justice Department and the FTC believe that adopting the proposed draft rule declaring certain actions to be the practice of law would restrict competition, harm consumers, and not serve the public interest. The ISBA's proposed draft rule is likely to eliminate many forms of lawyer-nonlawyer competition. While developing an exhaustive list of all possibly affected lay activities may be difficult, some examples include:

- real estate agents explaining to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and also explaining such things as the meaning of an easement and the possible need to lower the price of a home because of an unusually

restrictive easement, or the requirements for lead, smoke detector, and other inspections imposed by state law;

- tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of a particular landlord-tenant problem;
- other lay advocacy organizations and consumer associations providing citizens with information about legal rights and issues;
- independent contractors advising a client about what must be done to comply with local zoning laws, state labor laws, or safety regulations;
- 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;
- investment bankers and other business planners providing advice to their clients that includes information about various laws; and
- inexpensive electronic software to complete wills, trusts, tax forms, and other legal documents, since the applications are somewhat interactive and select certain clauses for the documents based on answers that consumers give, as well as providing some legal information and/or advice about those clauses.

Moreover, the draft rule forbids laypeople from "directly or indirectly" engaging in the acts it defines as the practice of law. This language creates such vagueness and ambiguity that it is likely to greatly inhibit nonlawyers from competing with lawyers to provide services. This proposed language is likely to eliminate competition between nonlawyers and lawyers that Indiana currently permits. Indeed, the ambiguity could lead to lawyers suing to prohibit procompetitive conduct that was not intended to be forbidden as the unauthorized practice of law.

The ambiguity of this broad and vague prohibition on non-attorneys "directly or indirectly" engaging in the practice of law is particularly a problem with regard to giving "advice on a legal right." Read literally, the language could prevent any nonlawyer from giving any form of advice that could relate to a legal right, or even from providing information about those rights. Thus, nonlawyer competition that the Indiana Supreme Court has permitted could be prohibited by the ISBA's draft. For example, in State ex rel. Indiana State Bar Ass'n v. Miller, the Indiana Supreme Court observed that many nonlawyers were "as qualified if not more so than most lawyers" to explain such tax law terms as obsolescence and depreciation, and that it would not be the practice of law to do so, even by turning to court opinions to elucidate those terms.[17] Yet, under the Committee's proposed draft rule, doing so could be forbidden if it is deemed indirectly giving advice on a legal right.[18] Likewise, many of the examples of competition listed in the bullet points above could be construed as the direct or indirect giving of advice on a legal right and thus prohibited. While the Committee cites three cases for its assertion that laypeople should not be allowed to compete with lawyers by directly or indirectly giving advice on a legal right, none provides a basis for the expansive, anticompetitive "directly or indirectly" language or prohibit any giving "advice on a legal right."[19]

Similarly, the ISBA draft would prohibit laypeople not only from negotiating settlements of legal rights on behalf of clients, but also, more broadly, from any direct or indirect negotiation of any legal right. The provision's breadth and ambiguity is likely to impede competition between laypeople and attorneys in this area. For example, arguably, employees could not negotiate contracts on behalf of their employers or volunteers on behalf of their volunteer organizations. The two cases cited by the ISBA in support of this limitation were much narrower, dealing only with negotiating settlements on behalf of clients.[20]

Moreover, the draft rule carves out a very limited exception for nonlawyer employees performing services "for the exclusive benefit of their employers." At the same time, it also specifically prohibits them from "engag[ing] in the 'practice of law' as defined in this rule." See Section (2)(b)(8)(I). This prohibition effectively renders any special exception for employees meaningless because it limits them to the same activities that Section 2(b)(2) already allows all laypeople to do. Hence, an experienced lay employee could not give advice to an employer about what state labor

There Is No Indication That The Proposed Definition Is Needed To Prevent Significant Consumer Harm

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.[(25)] 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 Indiana consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted.

The Justice Department 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 Indiana consumers and serve the public interest.[(26)] The agencies have not seen any factual evidence in Indiana or elsewhere demonstrating that consumers are actually hurt by the availability of lay services.[(27)] 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.[(28)] Likewise, the ISBA's draft rule provides no evidence of consumer harm to be remedied.

Even if the ISBA had concluded that consumers are being harmed by the provision of lay services, the draft rule does

defines the practice of law as "the provision of professional legal advice or services where there is a client relationship of trust or reliance." The Code presumes laypeople to be practicing law when engaging in any of the following conduct on behalf of another: preparing any legal document; "preparing or expressing legal opinions; preparing any claims, demands or pleadings . . . for filing in any court, administrative agency or other tribunal; [or] providing advice or counsel as to how any of the activities" described in the section "might be done, or whether they were done in accordance with applicable law."[(33)] The Commentary to the rule makes clear that the rule

is not intended to cover conduct which lacks the essential features of an attorney-client relationship. . . . An experienced industrial relations supervisor is not engaged in the practice of law when he advises his employer what he thinks the firm must do to comply with state or federal labor laws, because the employer does not reasonably expect it is receiving a professional legal opinion. . . . Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law, are not engaged in the practice of law, because their relationship with the customer is not based on the reasonable expectation that learned and authorized professional legal advice is being given. Nor is it the practice of law under the Rule for a person to draft an agreement or resolve a controversy in a business context, where there is no reasonable expectation that she is acting as a qualified or authorized attorney.[(34)]

Likewise, the Indiana Supreme Court has held that at the heart of the practice of law is "the very sensitive relationship" where the client's confidence and the management of his/her affairs "is left totally in the hands of the attorney."[(35)]

In addition, the ISBA should omit the prohibition on "indirectly" engaging in the forbidden activities as this has the potential to make the proposed rule ambiguous and prohibit permissible, procompetitive conduct. The expansion created by this term appears to go beyond the scope of existing Indiana restraints on lay competition. Similarly, as proposed above, the ability to sell legal document forms approved by a lawyer should be broadened, for example, as Texas has done. Texas permits the creation, design, sale, or distribution of such software or similar products so long as they clearly and conspicuously state that the products are not a substitute for the advice of an attorney.[(36)]

Finally, the new proposal would allow any "duly organized local bar association" to bring suit for unauthorized practice of law in any Indiana Circuit Court, in addition to permitting the Indiana Attorney General, Indiana Supreme Court Disciplinary Commission, Indiana State Bar Association (or committee thereof) to bring suit in the Supreme Court. By contrast, the current Rule 24 requires that all actions be brought before the Indiana Supreme Court, and permits local bar associations to bring actions only by leave of court. Because local bar associations may seek to bring such actions to foreclose lay competition, we recommend that the Committee not change the current rule in this regard.

Conclusion

The proposed draft definition, which has ambiguous definitions of the practice of law that go beyond existing Indiana restrictions on the unauthorized practice of law, would likely reduce competition from nonlawyers. Indiana consumers, in turn, would likely pay higher prices and face a smaller range of service options. The proposed amendment contains no showing of harm to consumers from lay service providers that would justify these reductions in competition, and the Department of Justice and the Federal Trade Commission are aware of no such evidence. Without a showing of likely harm, restraining competition in a way that is likely to harm Indiana consumers by eliminating their ability to choose among competing providers is unwarranted. We therefore recommend that Rule 24 be left in its current form, or alternatively, that the proposed revision be narrowed substantially.

Thank you for requesting the opinion of the Justice Department and the Federal Trade Commission. We appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

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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

Todd J. Zywicki, Director
Office of Policy Planning

Endnotes:

1. Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (citing Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1950)); accord FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

2. See, e.g., Goldfarb v. Virginia State Bar, 45 Tm [(2)(4)13(5 T1cn 70ua8.507 .S1 cs ET 1 sc s ET 1 J75scnuCS0 cs 0 a;S1 cs)11(c)-

modified its proposal in light of comments from us and many other organizations and individuals, and North Carolina modified its proposal, as well.

6. In United States v. Allen County Indiana Bar Ass'n, the Justice Department 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' 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). In United States v. New York County Lawyers Ass'n, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. No. 80 Civ. 6129 (S.D.N.Y. 1981). See also United States v. Coffee County Bar Ass'n, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations' ethical codes and against other anticompetitive activities by associations of lawyers. E.g., United States v. American Bar Ass'n, 934 F. Supp. 435 (D.D.C. 1996), modified, 135 F. Supp. 2d 28 (D.D.C. 2001); National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978); United States v. American Ass'n of Architects, 1990-2 Trade Cases ¶ 69,256 (D.D.C. 1990); United States v. Soc'y of Authors Representatives, 1982-83 Trade Cases ¶ 65,210 (S.D.N.Y. 1982).

7. FTC 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 & Susan Foster, The Costs and Benefits of Occupational Regulation, Bureau of Economics, The Federal Trade Commission, October 1990.

8. Miller v. Vance, 463 N.E.2d 250, 253 (Ind. 1984); State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, Inc., 191 N.E.2d 711 (1963).

9. See, e.g., Miller v. Vance, 463 N.E.2d at 251; Indiana Real Estate Ass'n, Inc., 191 N.E.2d at 714.

10. The Indiana State Bar Association is a private organization of lawyers and is not a state agency. John Conlon, Chair of the Unauthorized Practice of Law Committee, has represented to our agencies that the draft is a proposed amendment to Ind. Adm. & Disc. Rule 24. This letter should not be construed as offering any opinion about whether the Justice Department and the FTC consider it legal under the Sherman Act, 15 U.S.C. § 1, for the Committee or Association to declare that activities are the unauthorized practice of law for any other purpose.

11. See Indiana Real Estate Ass'n, Inc., 191 N.E. 2d at 713.

12. In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

13. Miller v. Vance, 463 N.E.2d at 251.

14. Indiana Real Estate Ass'n, Inc., 191 N.E.2d at 714.

15. 463 N.E.2d at 253

16. 191 N.E.2d at 715.

17. 770 N.E.2d 328 (Ind. 2002).

18. The proposed rule would provide that nonlawyers can engage in activities the Indiana Supreme Court finds permissible. Oddly, however, the rule makes no effort to make clear that laypeople can compete by giving out legal information or offer the types of opinions permitted by the ISBA v. Miller decision-

19. One of the cited cases, Miller v. Vance, held that "the core element of practicing law is the giving of legal advice to a client and the placing of onself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." 463 N.E.2d at 251. Yet, the sensitive attorney-client relationship as part of the act of practicing law is absent from the draft rule. It expands "giving of legal advice to a client" to the much broader "directly or indirectly" giving "advice on a legal right," thereby increasing the restrictions on lay competition. Another, Fink v. Peden, 17 N.E.2d 95 (Ind. 1938), is a case decided decades before Miller v. Vance (1984), Indiana Real Estate Ass'n, Inc. (1963), and other cases in Indiana permitting laypeople to compete with lawyers for business. Fink held that a layperson could not represent a widow in negotiating the settlement of a claim against a railroad for the death of her husband. 17 N.E.2d 95. The third, Pearson v. Gould, held that a union representative could represent union members before the State Employees Appeals Commission. 437 N.E.2d 41 (Ind. 1982). The Pearson Court observed in dicta that giving "legal advice to clients" is the practice of law, as is the preparation of a will and giving advice as to its contents and legal effect. Giving legal advice is not the same as any "directly or indirectly" giving of advice on a legal right. Thus, the draft proposal appears to stifle competition in ways that current Indiana law does not.

20. Furthermore, the draft cites a series of cases for the proposition that it is the practice of law to select, prepare, or complete legal documents. But, the draft relies almost entirely on dicta in those opinions or goes beyond the holdings of the courts. It, thus, could impose greater restraints on lay competition than Indiana law currently does. For example, one of the cases cited, Gary Bar Ass'n v. Dudak, 127 N.E.2d 522 (Ind. 1955), is a 50-year-old case about a nonlawyer judge representing parties before his own court, and writing pleadings for them. This has little bearing on the layperson who drafts a contract for his employer or volunteer organization in competition with a lawyer. The other cases, likewise, are either outdated or not on point. Three of the cases cited in the draft rule asserted in dicta that the preparation of legal instruments and contracts which legal rights are secured could be the practice of law, "although such matters may or may not be depending in a court." Stern v. State Board of Law Examiners, 199 N.E.2d 850, 854 (Ind. 1964); Fink v. Peden, 17 N.E.2d 95-96; Eley v. Miller, 34 N.E. 836-38 (Ind. 1893).

21. Although Section 2(a) states that the practice of law is ministering to the legal needs of another person "for consideration," which may be intended to exempt lay advocacy and consumer organizations, such as tenants' associations, the additional qualifier of "either directly or indirectly" makes it uncertain whether some other fee, such as association dues, might be construed as indirect consideration.

22. 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.

23. See In re Opinion No. 26, 654 A.2d at 1348-49. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. 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 to the Virginia Supreme Court and Virginia State Bar, supra n. 4.

24. Countrywide Home Loans, Inc. v. Kentucky Bar Association, No. 2000-SC-0206-KB at 24 (Ky. Aug. 21, 2003).

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

26. See Countrywide Home Loans, Inc. v. Kentucky Bar Association, No. 2000-SC-0206-KB at 33 (Ky. Aug. 21, 2003); Justice Department and FTC letter to Rhode Island House of Representatives (Mar. 29, 2002); Justice Department and FTC letter to North Carolina Bar (Dec. 14, 2001); Justice Department letter to Kentucky Bar (June 10, 1999); Justice Department and FTC Letter to Virginia Supreme Court (Jan. 3, 1997), supra n. 4.

27. 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 Justice Department and FTC letter to Virginia Supreme Court (Ja n . 4 .

28. Moreover, a 1999 study by Professor Joyce Palomar of the University of Oklahoma College of Law 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).

29. See Countrywide Home Loans, Inc. v. Kentucky Bar Association, No. 2000-SC-0206-KB at 30 (Ky. Aug. 21, 2003).

30. Miller v. Vance, 463 N.E.2d at 251; see also Indiana Real Estate Ass'n, Inc., 191 N.E.2d at 714.

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

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

33. D.C. Court of Appeals Rule 49(b)(2) (2003) (outline letters omitted).

34. Id. Commentary on Rule 49(b)(2).

35. Miller v. Vance, 463 N.E. 2d at 251.

36. Unauthorized Practice of Law Comm. v. Parsons Technology, Inc., 179 F.3d 956 (5th Cir. 1999).