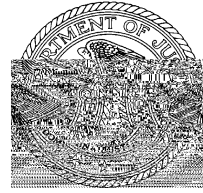




UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

January 25, 2008

via facsimile (808-539-4801) and first-class mail
Judiciary Public Affairs Office
417 South King Street
Honolulu, HI 96813

Re: Comments on Proposed Definition of the Practice of Law

Dear Sir or Madam:

The Justice Department and the Federal Trade Commission (“FTC”) are pleased to provide comments on the proposed addition to the rules of the Supreme Court of Hawai’i (“the

¹ This letter focuses on the effects of the proposed rule on consumer welfare, and does not address whether the proposed rule and potential competitive restraints arising from enforcement under it would be immunized from the federal antitrust laws under the state action doctrine.

² Proposed Rule __ (b).

See Proposed Rule __ (c). The exceptions include situations when a

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

⁵ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); accord *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

⁶ See, e.g., *Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); see also *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), modified, 135 F. Supp. 2d 28 (D.D.C. 2001).

⁷ See letter from the Justice Department to the Wisconsin Supreme Court (December 10, 2007); letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (April 27, 2007 and June 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Ma

¹⁰(...continued)

consumers of such nonlawyer services.” Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000).

¹¹ *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423.

¹² *Cf. FTC. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (“Absent some countervailing procompetitive virtue,” an impediment to “the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.”) (internal quotations and citations omitted).

¹³ *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

¹⁴ The letter from the HSBA to the Court that accompanied the proposal states that the HSBA has “examined the various issues, complaints and concerns regarding the unauthorized practice of law.” Letter from Jeffrey S. Portnoy, President, Hawai'i State Bar Association, to The Honorable Ronald T.Y. Moon, Chief Justice, Supreme Court of Hawai'i (July 23, 2007), at <http://64.29.92.27/>. Yet the letter provides no information on the content of those issues, complaints and concerns, nor data showing that any such harm occurs to a meaningful extent. *See*

¹⁵ Significantly, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *Geo. J. Legal Ethics* 369, 407-08 (2004).

¹⁶ Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *Geo. J. Legal Ethics* 369, 407-08 (2004). *See also* Herbert M. Kritzer, *Legal Advocacy: Lawyers and Non Lawyers at Work* 50-51 (1998) (finding that in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, “[t]he overall pattern does not show any clear differences between the success of lawyers and agents”).

¹⁷ Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 *CONN. L. REV.* 423, 520 (1999).

¹⁸ Am. Bar Ass’n Fund for Justice & Ed., *Legal Needs & Civil Justice: A Survey of Americans* (1996). The most common legal needs reported by respondents were related to personal finances, consumer issues, and

New Jersey communities where lay closings were not prevalent.¹⁹ Likewise, the Kentucky Supreme Court concluded that prices for real estate closings by lawyers dropped substantially—by as much as one percent of the loan amount plus fees—as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."²⁰ And, in Virginia, where the legislature passed a law upholding the right of consumers to continue using lay closing services, proponents of lay competition presented survey evidence suggesting that lay closings in Virginia cost on average \$150 less than lawyer closings.²¹

Restrictions on Lawyer/Non-Lawyer

Restrictions on Lawyer/Non-Lawyer

¹⁹ See *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995).

²⁰ See, e.g., *Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003) ("before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher").

²¹ See letters to the Virginia Supreme Court and Virginia State Bar, *supra* n.7.

²² D.C. Court of Appeals Rule 49(b)(2) (2004) (outline letters omitted) (emphasis added).

²³ *Id.* Commentary on Rule 49(b)(2).

Aaron Comenetz
Trial Attorney
United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,

Deborah Platt Majoras
Chairman

Maureen K. Ohlhausen
Director
Office of Policy Planning