



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

December 16, 2004

Denise Squillante, Esquire, Co-Chair
Lee J. Gartenberg, Esquire, Co-Chair
Task Force To Define The Practice
Of Law In Massachusetts
Massachusetts Bar Association
20 West Street
Boston, Massachusetts 02111-1204

Re: Comments on Draft Proposed Definition
of the Practice of Law in Massachusetts

Dear Ms. Squillante, Mr. Gartenberg, and Members of the Task Force:

We are writing about your recent proposal to define the practice of law and enumerate some exceptions. The proposed definition has been formulated by the Massachusetts Bar Association's ("MBA") Task Force to Define the Practice of Law in Massachusetts. The Department of Justice and Federal Trade Commission ("FTC") are concerned that the proposal is not in the best interest of consumers, as it would prevent non-lawyers from providing services in competition with lawyers in situations where there is no clear demonstration that non-lawyer services would actually harm consumers. For example, the definition has the potential to discourage lay activities such as real estate agents explaining certain aspects of a home purchase to consumers, accountants providing advice regarding tax filings, and the use of interactive self-help legal software to produce simple legal documents. This would likely raise costs for consumers and limit their choices. Because the proposed rule is likely to restrain competition without providing any benefits to consumers, we recommend against adopting such a definition of the practice of law. 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.

⁴(...continued)
<http://www.usdoj.gov/atr/public/comments/comments.htm>

- (1) Giving advice or counsel to a person as to his or her legal rights or responsibilities or those of others;
- (2) Selecting, drafting, reviewing, recording, or completing legal documents or agreements that affect the legal rights or responsibilities of a person;
- (3) Creating, conveying, evaluating, or terminating a person's legal interest in real property;
- (4) Representing a person before a tribunal, including, but not limited to, preparing or filing documents or conducting discovery, or appearing before such body; or
- (5) Negotiating legal rights or responsibilities on behalf of a person.

Section (d) of the draft lists certain exceptions to the presumption:

limiting competition between attorneys and non-attorneys, it will likely cause more harm to consumers than it may prevent. Indeed, one senior member of the MBA Task Force who helped introduce the proposal to the MBA's House of Delegates said, "Business and government is [sic] seeking to level the playing field on the theory that consumers will have more choice and this will drive prices down for legal services," adding that "we are going to be marginalized out of practice."¹⁰ This statement suggests that the purpose of the definition is to protect lawyers from competition, not to serve the interests of the public.¹¹

The Proposed Rule Would Likely Hurt Massachusetts Consumers by Restraining Competition Between Lawyers and Non-lawyers

The Justice Department and the FTC believe that adopting the proposed definition would harm consumers and fail to serve the public interest. The broad restrictions on lay practice found in the draft definition – and the narrow exceptions found in subsection (d) – could restrict and eliminate many forms of lawyer/non-lawyer competition. While developing an exhaustive list of all possibly affected lay activities may be difficult, some examples include:

- C real estate agents explaining to consumers such things as (i) the ramifications of failing to have the home inspection done on time, (ii) the meaning of the mortgage contingency clause, (iii) the meaning of an easement, (iv) the possible need to lower the price of a home because of an unusually restrictive easement, or (v) the requirements for lead, smoke detector, and other inspections imposed by state law;

- C tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant problem;¹²

¹⁰ Massachusetts Bar Association, *Delegates Debate Law Practice Definition, Other Issues At May Meeting* (June 9, 2004), available at http://www.massbar.org/article.php?c_id=6650.

¹¹ See *Lowell*, 52 N.E.2d at 31 (excluding non-attorneys from performing certain tasks cannot be justified on the grounds of "protection of the bar from competition").

¹² This activity would be exempted under Section (d)(2) of the proposed definition only if (1) the tenant receiving advice is deemed to be "a person who has obstacles to access to justice;" and (2) the tenants' association does not charge a fee and is a government entity, a not-for-profit entity, or a "qualified legal assistance organization," defined as:

a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe on the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

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- 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;
- C investment bankers and other business planners providing advice to their clients that includes information about various laws;
- C lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues in competition with attorneys and help them negotiate solutions to problems;¹³
- C employees and independent contractors who advise a client or employer about what must be done to comply with local zoning laws, state labor laws, or safety regulations, and who may negotiate contracts on behalf of their employers; and
- C inexpensive electronic software to complete wills, trusts, tax forms, and other legal documents, because the applications can be 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.¹⁴

By Prohibiting Non-lawyer Competition for Many Services,
the Proposed Rule Would Likely Hurt the Massachusetts
Public by Raising Prices and Reducing Consumer Choice

When non-lawyers compete with lawyers to provide services that do not require formal legal training, Massachusetts 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.

¹²(...continued)

See Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law* and Proposed Rule 9.1(i) in Ex. B to *Report of the Task Force to Define the Practice of Law*.

¹³ Section d(2) of the proposed definition would exempt lay organizations, advocates, and consumer associations only if these entities provided advice to institutionalized persons, or to “a person who has obstacles to access to justice.” *See* Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law*. Further, to qualify for the exception under Section d(2), these entities cannot charge a fee and must be either a government entity, a not-for-profit entity, or a “qualified legal assistance organization.”

¹⁴ *See* Section c(2) of the proposed definition, which would define “selecting, drafting . . . or completing legal documents” as the practice of law.

By limiting the ability of lay persons to provide such services in competition with lawyers, the proposed rule would eliminate or reduce many of these benefits, potentially harming Massachusetts consumers in several ways. First, the proposal would force consumers who would not otherwise hire a lawyer to do so. Businesses and individuals that rely on accountants, bankers, advocacy organizations, or other lay people for advice and information related to the services that these professionals provide arguably would be required to hire attorneys instead.

Hence, the proposal could increase costs for all consumers who might prefer to hire attorneys instead. Hence, the proposal could increase costs for all consumers who might prefer to hire attorneys instead. Hence, the proposal could increase costs for all consumers who might prefer to hire attorneys instead.

¹⁵ See, e.g., *Countrywide Home Loans, Inc. v. Kentucky 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”). 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.

¹⁶ While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software that permits the consumer to draft a simple will is available for less than \$100.

¹⁷ 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
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²⁷ Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 520 (1999).

²⁸ Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J.

legal advice to a consumer or protect him or her.³¹ Nor would their presence likely give a consumer the leverage to halt a transaction that is against his or her best interest. The same is true of a lawyer who represents both lender and buyer. Under Massachusetts law, moreover, absent such an attorney-client relationship, a party cannot assert a malpractice claim against an attorney.³² In addition, the only requirement in the Task Force definition is that it be a lawyer

³¹ See *Countrywide Home Loans, Inc.*, 113 S.W.3d at 122.

³² See, e.g., *McCormack v. Galego*, 1996 WL 131209, at *3 (Mass. Super. Mar. 4, 1996).

³³ 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 housing. For low- and middle-income households, the most common response to a legal problem was "handling the situation on their own." For low-income households, the second most common response was to take no action at all. The second most common response for middle-income households was to use the legal system, including contacts with lawyers, mediators, arbitrators, or official hearing bodies.

³⁴ *Id.*

³⁵ See notes 12-13, *supra*.

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 if the same advice were provided solely by an attorney.

Less Restrictive Measures May Protect Consumers

Absent a clear demonstration not only that lay services have injured Massachusetts consumers, but also that less drastic measures cannot remedy any perceived problem, the proposed definition should not be adopted. Indeed, as a threshold matter, less restrictive alternatives to protect consumers are already in place. First, through reputation, the marketplace is likely to limit the ability of non-attorneys to provide shoddy service or otherwise take advantage of consumers. As the Kentucky Supreme Court has recognized, lay providers earn their livelihoods from providing these services; they risk those livelihoods if they commit acts that hurt consumers.³⁶ Consequently, they have great incentives to act ethically and professionally. Further, just as attorneys are subject to statutory, male jurisdictionsdictl.

³⁶ *Countrywide Home Loans, Inc.*, 113 S.W.3d at 121.

³⁷ *Id.*

³⁸ G.L.c. 93A § 2. G.L.c. 93A § 9 provides a cause of action for consumers, and G.L.c. 93A § 11 provides a cause of action for businesses. A consumer may have additional leverage over an attorney who provides shoddy or dishonest service because the consumer can refer the attorney to the bar association for misconduct, and an attorney also may be less likely to be “judgment proof” to the extent that he or she is more likely than a non-attorney to carry malpractice insurance against negligence claims. Further, in a negligence case, an attorney likely is subject to a higher standard of care than is a lay provider. *See Fishman v. Brooks*, 487 N.E.2d 1377, 1379 (Mass. 1986) (standard of care for non-specialist in a legal malpractice suit is “the degree of care and skill of the average qualified practitioner”). Nevertheless, there is no reason to believe that the standard of care the law requires of a lay person is below what is necessary to perform correctly a legal task entrusted to him or her, especially in view of the generally simple legal tasks most often performed by non-attorneys. Further, it is likely to be more costly for a consumer to bring a legal malpractice case against an attorney than to bring a negligence case against a lay person. Under Massachusetts law, a lawyer’s breach of the duty of care must be proven by expert testimony, unless “the alleged malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence.” *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 515 N.E.2d 891, 894 (Mass. App. Ct. 1987) (internal quotations omitted).

Sincerely yours,

R. Hewitt Pate
Assistant Attorney General

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

By direction of the
Federal Trade Commission,

Deborah Platt Majoras
Chairman

Maureen K. Ohlhausen
Acting Director
Office of Policy Planning