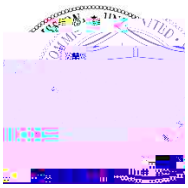

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

May 17, 2007

By email and first class mail
Rules Committee of the Superior Court
Attn: Carl E. Testo, Counsel
P.O. Box 150474
Hartford, CT 06115-0474

Re: Proposed Section 2-44A of the Rules of the Superior Court entitled "Definition of the Practice of Law"

Dear Mr. Testo:

The Staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] is pleased to submit these comments on Proposed Section 2-44A of the Rules of the Superior Court entitled "Definition of the Practice of Law" ("§ 2-44A" or "proposed rules").[2] rneys

in areas where no specialized legal knowledge and training is demonstrably necessary

The Interest and Experience of the Federal Trade Commission

The FTC is entrusted with enforcing, among other things, the federal antitrust laws. The FTC works 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.'"[3] Consumers of professional services, like all consumers, benefit from competition.[4] If competition to provide such services is restrained, consumers may be forced to pay higher prices or accept lower quality services.

The FTC Staff is concerned about efforts across the country to prevent non-attorneys from competing with attorneys through the adoption of excessively broad restrictions by state courts, state bars and legislatures. The FTC and its Staff encourage competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these letters and filings, the FTC has urged several states, the American Bar Association, and many state bar associations to reject or narrow such restrictions on competition between attorneys and non-attorneys.[5] Many of these advocacy efforts have been successful in preserving attorney/non-

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[3] *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).

[4] *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).

[5] *See, e.g.* joint letter from the FTC and Justice Department to the Committee on the Judiciary of the New York State Assembly (June 21, 2006) *available at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf; joint letter from the FTC and Justice Department to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) *available at* http://www.ftc.gov/be/v050002.pdf; joint letter from the FTC and Justice Department to Executive Directo

attorney competition.[6] These comments are part of our ongoing efforts in this area.

The Proposed Rules

By statute non-attorneys are prohibited from practicing law in Connecticut.[7] The statute, however, leaves defining what constitutes the practice of law to the Connecticut Judiciary.[8] The Proposed Rules would codify the definition of the practice of law, which historically has been defined in Connecticut through court decisions.

The Proposed Rules would expressly forbid non-attorneys from holding themselves out as being qualified to practice law,[9] from representing parties in court and other identified tribunals,[10] and from engaging in other conduct that may indicate the occurrence of the authorized practice of law as defined by statute, ruling or other authority.[11] The Proposed Rules would also allow non-attorneys to perform several tasks that otherwise may be considered the practice of law.[12] For example, they would allow non-attorneys to sell legal documents or forms approved by a Connecticut lawyer,[13] serve as neutral mediators in dispute resolution,[14] and allow non-attorneys to participate in labor negotiations under collective bargaining agreements.[15] Also, the Proposed

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at http://www.usdoj.gov/atr/cases/f201100/201197.htm.

[6] For example, the bill that was the subject of recent joint FTC and Justice Department comments to the New York State Assembly on April 27, 2007 was rejected by the Committee on the Judiciary. Similarly, in Kansas, following

ability of non-attorneys to perform certain tasks related to the closing of real estate transactions. There is empirical evidence, however, that consumers benefit from this competition. Not only are lay services cheaper, but evidence suggests that the availability of lay service providers puts competitive pressure on the fees attorneys charge.[19] Evidence gathered in a New Jersey Supreme Court proceeding that allowed lay closings 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 than in parts where lay closings were not prevalent.[20] Likewise, the Kentucky Supreme Court concluded that prices for real estate closings for lawyers dropped substantially as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[21]

Given the benefits of competition, any restrictions on competition should be justified by a valid need for the restriction, such as the need to protect the public from harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.[22] The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-attorneys to perform certain tasks, but also consideration of the benefits that accrue to consumers when attorneys and non-attorneys compete.[23] As the Restatement (Third) of Law Governing Lawyers

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> persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.[24]

We are not aware of evidence of consumer harm arising from non-attorneys providing services which may fall within the scope for the proposed rules that would justify foreclosing competition. Further, empirical studies have compared attorney and non-attorney provisions of certain services and have found that consumers likely face little risk of harm from non-attorney competition in many areas. For example, a study of lay specialists who provide bankruptcy and administrative agency hearing representation found that they perform as well as or better than attorneys.[25] The 1999 survey found that complaints about the unauthorized practice of law in most states did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury.[26] Another study compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibit lay provision of these settlement services. The author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[27]

We recommend that the Committee revisit the rules and provide additional comments and guidance to avoid unnecessary restraints on attorney/non-attorney competition. For example, the District of Columbia defines the practice of law as, "the provision of professional legal advice or services where there is a client relationship of trust or reliance.[28] The District of Columbia rule sets forth several provisions similar to those delineated in § 2-44A, but the District of Columbia

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[24] AMERICAN LAW INSTITUTE RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

[25] 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").

[26] Rhode, supra n.22, at 407-08.

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

[28] D.C. Court of Appeals Rules 49(b)(2) (2004) (outline letters omitted)

in a real estate transaction without an attorney.[30] This type of disclosure in a specified area of commerce permits consumers to make an informed choice about whether to use non-attorney closing services.

Conclusion

The Proposed Rules risk unnecessarily reducing competition between attorneys and non-attorneys for many services that do not require the skill and knowledge of an attorney, including closing services related to real estate transactions. We urge the Committee to modify the rules to insure that competition is not constrained in service areas for which the knowledge and skill of a lawyer is not required. We also encourage the Committee to consider the competitive impact of the Proposed Rules, whether areas that will curtail competition will be outweighed by countervailing benefits to consumers, and whether the Proposed Rules may be more narrowly drawn to correct for specific and identified market failures.

Respectfully submitted,

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Office of Policy Planning

Jeffrey Schmidt, Director
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Bureau of Economics

[30] *In re Opinion No. 26*, 654 A.2d at 1363.