

FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

June 10, 2016

The Honorable Bill Cook  
North Carolina Senate, 1<sup>st</sup> District  
300 N. Salisbury Street, Room 525  
Raleigh, NC 27603-5925

Re: North Carolina HB 436

Dear Senator Cook:

The staff of the Federal Trade Commission (the "FTC" or the "Commission")<sup>1</sup> and the Antitrust Division of the U.S. Department of Justice (the "Division") (together, the "Agencies") welcome the opportunity to share our views on the definition of the practice of law

comply with several conditions, including disclosing that the forms do not substitute for attorney advice or service.

The Division and FTC staff believe that "the practice of law" should mean activities for which specialized legal knowledge and training is demonstrably

The Honorable Bill Cook  
June 10, 2016

necessary to protect consumers and an attorney-client relationship is present.  
Overbroad scope-

and consumer welfare via comments on legislation, court filings, and discussions with regulators, among other means.

Because of the importance of legal services to consumers and the economy, the Agencies have long sought to foster competition in the legal services marketplace. The Agencies and their staff have provided comments to policymakers and stakeholders on the scope of the practice of law, the unauthorized practice of law, attorney advertising, and other aspects of the regulation of legal services.<sup>5</sup> They have engaged in various activities relating specifically to innovation in the area of legal services.<sup>6</sup> In particular, the Agencies have previously provided comments on the definition of the practice of law as it relates to interactive software for generating legal forms.<sup>7</sup> The Agencies have also submitted amicus briefs to courts regarding the application of competition principles to the provision of legal services.<sup>8</sup>

The Agencies have generally encouraged legislatures, courts, and state bars to avoid restrictions on the performance of legal-related services that are not necessary to address legitimate and substantiated harms to consumers, and recommended that any such restrictions be narrowly drawn to minimize their anticompetitive impact.<sup>9</sup> The Agencies recognize the important role of state legislatures, courts, and bar associations in protecting consumers of legal services

---

<sup>5</sup> The Agencies' joint letters regarding the practice of law are available at FTC, ADVOCACY FILINGS, <https://www.ftc.gov/policy/advocacy/advocacy-filings> (Topic Filter: Attorneys); U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, COMMENTS TO STATES AND OTHER ORGANIZATIONS, <https://www.justice.gov/atr/comments-states-and-other-organizations>.

<sup>6</sup> See generally Submission of the United States to the Organisation for Economic Co-operation and Development Regarding Disruptive Innovations in Legal Services (May 30, 2016), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD(2016)4&docLanguage=En) (summarizing DOJ and FTC activities).

<sup>7</sup> DOJ-FTC Comments on the American Bar Association's Proposed Model Definition of the Practice of Law 10-12 (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> (hereinafter "DOJ-FTC 2002 ABA Comments").

<sup>8</sup> See, e.g., Brief Amici Curiae of the FTC and United States of America, *McMahon v. Advanced Title Servs. Co. of W. Va.*, 216 W. Va. 413 (2004), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/05/ftc-amicus-curiae-brief-lorrie-mcmahon-et-al-v> (real estate

from harm. The Agencies have previously noted, however, that unnecessarily broad definitions of the practice of law or the unauthorized practice of law can impose significant competitive costs on consumers of legal services, restrict access to legal services, and inhibit the development of innovative ways to deliver legal services to consumers.<sup>10</sup>

The Agencies believe the definition of the practice of law should be limited to activities where: (1) specialized legal skills are required, such that there is an implicit representation of authority or competence to practice law, and (2) a client relationship of trust or reliance exists.<sup>11</sup> The Agencies have recognized District of Columbia Court of Appeals Rule 49 Commentary as instructive.<sup>12</sup>

In addition to its shared authority to enforce the antitrust laws, the FTC also combats fraud and promotes truthful and non-deceptive information in the marketplace.<sup>13</sup> It has expertise in various other aspects of consumer protection that are relevant to interactive software for generating legal forms.<sup>14</sup> The Commission has extensive expertise in the advertising and marketing of products and services, including disclosure issues.<sup>15</sup> For instance, the FTC has

---

<sup>10</sup> *E.g., id.* at 9-12.

<sup>11</sup> *E.g.,* DOJ-FTC Comments Before the Supreme Court of Hawaii on Revised Proposed Rule Concerning Unauthorized Practice of Law (Apr. 20, 2009), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2009/04/ftc-and-department-justice-comment-supreme-court>.

<sup>12</sup> *E.g., id.* at 2; *see also* D.C. Court of Appeals Commentary to Rule 49(b)(2) (Mar. 1, 2016), [http://www.dccourts.gov/internet/documents/DCCA\\_Rules\\_02-04-2016.pdf](http://www.dccourts.gov/internet/documents/DCCA_Rules_02-04-2016.pdf) (" [There are] two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. . . . The presumption that one's engagement in [an activity] is the 'practice of law' may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent." ) (internal citations omitted).





The Honorable Bill Cook  
June 10, 2016

legal documents, based on answers to questions presented by the software. Such programs have included physical software products (e.g., CD-ROMs), as well as web-based internet applications and non-web-based internet applications (e.g., smartphone-type "native" applications). A number of courts<sup>24</sup> and government agencies<sup>25</sup>

III. HB 436

HB 436, in its current version, would amend North Carolina General Statutes Section 84-2.1 to exclude from the statutory definition of the practice of law the operation of interactive websites that generate legal documents based on a consumer's answers to questions presented by the software.<sup>27</sup> A website would have to satisfy several conditions in order to be excluded from the definition of the practice of law, and thus for its provider not to be subject to prosecution for the unauthorized practice of law.



consumers generally benefit from competition between lawyers and non-lawyers in the provision of legal-related services. Consumer demand should determine the range of choices in the marketplace, unless it is clear that specialized legal training is required to perform a legal-related service. Overbroad scope-of-practice and unauthorized-practice-of-law policies can increase prices, impede innovation, and otherwise harm competition and consumers.

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services.

Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations. They may especially benefit low- and middle-income consumers, those who live in rural areas where a lawyer is unavailable, and others who may not have convenient access to a traditional law office during typical working hours.<sup>30</sup>

The Agencies recommend that the North Carolina General Assembly not adopt restrictions on such software products unless there is credible evidence that they harm consumers, any restriction is narrowly tailored to address that harm, and the benefits of the restriction will outweigh the harm that will likely result to competition. Should the General Assembly receive any claims of consumer harm from interactive websites or similar products, the Agencies urge the legislature to consider whether the evidence substantiates any such actual or predicted harm.

This analysis should also examine whether any harm from these products is materially greater than comparable harms posed by traditional attorney-client relationships or government provision of legal services or information, such as legal forms or other information available at the website of a government court or agency. As a matter of sound competition policy, a regulatory framework should not in purpose or effect favor one type of similarly situated competitor over others in addressing any identical or similar harms from these products.

---

Based on this legislation, the Fifth Circuit Court of Appeals vacated the injunction against the software.

<sup>30</sup> See *generally* NORTH CAROLINA EQUAL ACCESS TO JUSTICE COMMISSION, A COMMISSION OF THE NORTH CAROLINA SUPREME COURT, <http://ncequalaccesstojustice.org/about/> (collecting Commission reports finding that the number of low-income people in North Carolina needing legal assistance has continued to increase in recent years).

The Honorable Bill

consumer harm from interactive software, or similar products, any restrictions on their sale, distribution, or use should be tailored to address those harms.<sup>34</sup>

HB 436 would require certain disclosures by providers of interactive websites. These appear designed to promote the dissemination of truthful and non-deceptive information to consumers. Requiring certain disclosures may be an efficient way to protect consumers from possible misunderstandings about the nature of these products.<sup>35</sup> But the existence of a disclosure should not serve as a safe harbor for making false or deceptive express or implied claims. The General Assembly may wish to consider the principles and examples for mobile and other online advertising disclosures provided in FTC staff's guidance document, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*.<sup>36</sup> Among other things, it emphasizes that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use. Any disclosures should be made in the same language as the predominant language in which advertisements about the forms are communicated.<sup>37</sup> As discussed above, any such disclosure requirements should be reasonably tailored to avoid unnecessarily inhibiting the entry, operation, and expansion of new and innovative ways to serve consumers' legal needs.

The Honorable Bill Cook  
June 10, 2016

V. Conclusion

The Agencies recommend that the North Carolina General Assembly consider the benefits of interactive websites for consumers and competition in evaluating HB 436. The Agencies also recognize that such products may raise legitimate consumer protection issues, and recommend that any necessary consumer protections be narrowly tailored to avoid unnecessarily restricting new forms of competition that may benefit consumers.

We appreciate this opportunity to present our views.

Marina Lao, Director  
Office of Policy Planning  
Federal Trade Commission

Robert Potter, Chief  
Legal Policy Section  
Antitrust Division  
U.S. Department of Justice