UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

February 4, 2005

via email and first-class mail
Jeffery Alderman, Esq.
Executive Director
Kansas Bar Association
1200 S.W. Harrison Street
P.O. Box 1037
Topeka, KS 66601-1037

Re: Comments on Kansas Bar Association's
Proposed Definition of the Practice of Law

Dear Mr. Alderman:

Thank you for the opportunity to comment on the Kansas Bar Association's proposed definition of the practice of law. We understand that the proposed definition will be presented to Chief Justice McFarland of the Kansas Supreme Court on February 9, 2005, and that revisions may be made after that date. We would appreciate the opportunity to review and comment on revised versions of the proposed definition.

The Justice Department and the Federal Trade Commission (FTC) believe that the definition of the practice of law should be limited to those activities where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers. Otherwise, consumers benefit from preserving competition between lawyers and non-lawyers. The proposed definition in Kansas reflects this concern by seeking to preserve competition through exceptions to the definition. We support the proposal in this regard. However, we still are concerned that the proposed definition will unduly restrain competition. We believe that it should be modified in several respects to better protect consumers. After providing some brief background information, we explain our concerns and suggest modifications to the proposed definition.

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. We 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 professional services.[2] Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of lower quality.

The Justice Department and the FTC are concerned about increasing efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts and legislatures. In addressing these concerns, the Justice Department and the FTC encourage competition through advocacy letters such as this one and *amicus curiae* briefs filed with state supreme courts. Through these filings, the Justice Department and the FTC have urged the American Bar Association and the states of Georgia, Kentucky, Indiana, Massachusetts, North Carolina, Rhode Island, Virginia, and West Virginia to reject or narrow such restrictions on competition between lawyers and non-lawyers.[3] Separately, the Department of Justice has

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[1] *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).

[2] *See, e.g., Nat'l Soc'y of 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).

[3] 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 Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. The letters

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obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-lawyers, since this conduct violates the antitrust laws.[4] Our ongoing efforts in this area have led us to submit these comments.[5]

The Proposed Definition of the Practice of Law in Kansas

The Unauthorized Practice of Law Committee of the Kansas Bar Association (KBA) has recommended that the KBA propose the adoption of a definition of the "practice of law" to the Kansas Supreme Court.[6] Section A of the proposed definition provides the following General Definition of the practice of law:

> ministering to the legal needs of another person and the application of legal principles and judgment with regard to the circumstances or objectives of another person which require knowledge of legal principles or the use of legal skill or knowledge. This includes, but is not limited to:
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> (1) Holding one's self out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents, or creates any

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[3](...continued)
to the American Bar Association, Indiana, Rhode Island, Massachusetts, North Carolina, Georgia, and Virginia may be found on the Department of Justice's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[4] In *United States v. Allen County Bar Association,* 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 Association*, 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 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 Institute of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Representatives*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

[5] The KBA is a private organization of lawyers and is not a state agency. 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, or the Federal Trade Commission Act, 15 U.S.C. § 45, for the KBA or its Unauthorized Practice of Law Committee to define certain activities as the practice of law for any other purpose. Nor does the letter address whether the KBA has adopted adequate safeguards to ensure that its discussions on this issue do not violate the antitrust laws.

[6] Unauthorized Practice of Law Committee Presents Report, 73 Sep J. Kan. B.A. 16 (2004).

perception, that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined[.]

(2) Giving advice, counseling or rendering services to any person concerning or with respect to their legal rights or any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(3) Selecting, drafting, or completing any legal document or agreement involving or affecting the legal rights of a person.

(4) Representing of another person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(5) Negotiating or settling of a claim, legal right or responsibility on behalf of another person.

(6) Engaging in an activity which has traditionally been performed exclusively by persons authorized to practice law, and

(7) Engaging in any other act which may indicate an occurrence of the unauthorized practice of law in the State of Kansas as established by case law, statute, ruling, or other authority.

Section B of the proposed definition contains thirteen exceptions for services that non-lawyers may perform, regardless of whether they fall within the definition in Section A, including: (i) acting as a neutral mediator or arbitrator; (ii) acting as a lay representative before administrative agencies; (iii) selling legal forms; (iv) preparing forms previously approved by a Kansas lawyer directly related to the sale of real estate and personal property; and (v) issuing real estate title opinions and title reports and preparing deeds.

Restrictions on Lawyer/Non-Lawyer Competition Should Be Examined to Determine Whether They Are in the Public Interest

The Justice Department and the FTC recognize that there are services requiring the knowledge and skill of a person trained in the law that should be defined as the practice of law. However, the Justice Department and the FTC also believe that consumers benefit from lawyer/non-lawyer competition in the provision of many other services. Accordingly, prohibitions on the unauthorized practice of law should be narrowly tailored and based on a clear showing of actual consumer harm. The inquiry into the public interest involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks,

but also considering the benefits that accrue to consumers when lawyers and non-lawyers compete.[7]

The Justice Department and the FTC believe that the definition of the practice of law proposed by the KBA is not in the public interest in some respects because it is overly restrictive. We are concerned that the proposed definition will harm Kansas consumers by depriving them of beneficial competition.

The Ambiguous Language of Section A Threatens to Stifle Competition Unnecessarily for Many Services

Section A of the proposed definition defines the practice of law as "ministering to the legal needs of another person and the application of legal principles and judgment . . . which require knowledge of legal principles or the use of legal skill or knowledge," including "giving advice, counseling, or rendering services or counsel to any person concerning or with respect to their legal rights or any matter involving the application of legal principles to rights, duties, obligations, or liabilities." It also prohibits non-lawyers from "negotiating or settling . . . a claim, legal right or responsibility on behalf of another person."

Barring laypeople from "giving advice" on "legal rights"or "negotiating or settling" a "claim, legal right or responsibility" – as proposed in clauses two and five of Section A – is ambiguous enough that it likely will deter non-lawyers from competing to provide services that do not require a lawyer. Read literally, the language could prohibit a non-lawyer from giving any advice that could relate to a legal right, or even from providing information about those rights. Allowing non-lawyers to provide this kind of information is beneficial in many instances. For example, individual non-lawyer advocates and advocacy organizations regularly compete with lawyers to provide legal information to consumers and also help consumers negotiate solutions to problems. Specific examples include:

- 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;[8]

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[7] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb*, 421 U.S. at 787. *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).

[8] Section B proposes two exceptions for non-lawyers involved in real estate transactions. Neither is adequate to protect lawyer/non-lawyer competition. Clause seven allows real estate agents or brokers only to

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

- 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;[9]

- investment bankers and other business planners providing advice to their clients that includes information about various laws;[10]

- 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; and

- 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.

The proposed definition contains limited exceptions for select non-lawyer service providers (*e.g.,* CPAs, financial institutions and securities brokers and dealers, and real estate, health care, and insurance professionals) but there is no general exception for non-lawyer advocates who provide legal information and assistance.

It would be very difficult, if not impossible, to draft an exception for every activity where clauses two and five of Section A will deter lawyer/non-lawyer competition. To better protect consumers, the KBA should consider language that encourages competition between lawyers and non-lawyers. One example is that used by the District of Columbia, which defines the practice of law as "the provision of professional legal advice or services where there is a client

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[8](...continued)
"complete forms previously approved by a Kansas lawyer . . . directly related to the sale of real estate and personal property for their customers." Clause eight permits an abstractor or title insurance agent only to issue real estate title opinions and prepare deeds for customers.

[9] Clause twelve of Section B permits non-lawyers only to prepare tax returns. Non-lawyers could not compete to provide advice related to tax codes, family law codes, and general partnership laws because those services likely are the practice of law under the proposed definition.

[10] Clause nine of Section B proposes an exception only for financial institutions and securities brokers and dealers. Apparently, advice from other investment and business advisors would constitute the practice of law.

relationship of trust or reliance."[11] 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." 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.[12]

Adding limiting language of this type to the KBA's proposed definition would serve the public interest in Kansas by protecting lawyer/non-lawyer competition.

Section A Further Discourages Beneficial Competition By Classifying Services "Traditionally" Performed "Exclusively" By Lawyers As the Practice of Law

Clause six of Section A, which bars non-lawyers from "engaging in an activity which has traditionally been performed exclusively by persons authorized to practice law" could unnecessarily chill lawyer/non-lawyer competition for many services. Clause six provides no guidance as to what types of services may "traditionally" have been "exclusively" a lawyers' activity. The safest course of action for a layperson will be to offer only the services listed in the Exceptions section of the proposed definition. Clause six thus may diminish or discourage competition anywhere that laypeople see lawyer providers, even if lawyers have not "traditionally" been the exclusive providers of a service and even if there is no demonstrable harm from non-lawyer providers.

To preserve and enhance lawyer/non-lawyer competition, the KBA should consider eliminating clause six. Marketplace changes (*e.g.*, advances in information technology) may

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

[12] *Id.* Commentary on Rule 49(b)(2).

allow non-lawyers in the future to provide services that today are considered to be "traditionally" performed by lawyers.[13] At the very least, the KBA should revise clause six to lessen its anticompetitive effect. A less restrictive version would give examples of what services traditionally have been performed exclusively by lawyers in Kansas. It also would state that it applies only to activities that "require knowledge of legal principles or the use of legal skills or knowledge" and "where there is a client relationship of trust or reliance."

Clause Eleven in Section B Unnecessarily Deters Competition By Allowing Non-lawyers to Provide a Service Only if They Do Not Charge a Fee

Section B provides exceptions for services that non-lawyers may perform regardless of whether an activity falls within the definition in Section A. We are concerned that clause eleven does not protect lawyer/non-lawyer competition among persons who assist medical patients in completing powers of attorney and natural death declarations.

Clause eleven allows non-lawyer health care providers to assist patients in completing powers of attorney for health care and natural death declarations if the non-lawyer is not compensated. Non-lawyers *should* be able to charge a fee and thus compete on price with lawyers. Kansans should be able to choose to hire non-lawyers on this or any other basis. If non-lawyer representation is restricted to "free" representation, fewer non-lawyers may choose to provide this service, thereby limiting the choices of consumers. Also, allowing non-lawyers to charge should improve the quality of non-lawyer services from which consumers can choose.

Modifying The Proposed Definition Should Benefit Kansas Consumers

When non-lawyers compete with lawyers to provide services that do not require formal legal training, Kansans can 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 proposed definition may force consumers to hire lawyers where they otherwise would not. The use of lay services also can reduce costs to consumers. Advice and information about the laws, and assistance in resolving controversies, often is provided by individual and organizational advocates, such as tenants' associations, at substantially lower cost than a lawyer would charge.

The proposed definition, by restraining competition from non-lawyers, likely will increase the price of lawyers' services to Kansans because the availability of alternative, lower-

[13] For example, self-help books–and more recently, computer programs and Web sites–allow consumers to produce legal documents for themselves such as simple wills, contracts, powers of attorney, and papers for non-contested divorces. The production of such documents before the advent of self-help books or computer programs may have been considered "an activity which has traditionally been performed exclusively by persons authorized to practice law."

cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even Kansans who otherwise would choose a lawyer over a lay service provider likely will pay higher prices if the proposed rules are adopted. The benefit has been quantified in the example of non-lawyers competing with lawyers to close real estate transactions (which the proposed rules appear to allow to some extent). 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.[14] Likewise, in August 2003, 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."[15] For the same reasons, the KBA should revise the proposed definition to promote competition and thus keep prices for consumers down.

There Is No Indication that the Proposed Limitations Discussed Above Are Needed to Prevent Significant Consumer Harm

The promotion of competition generally benefits consumers. Accordingly, restrictions on competition are justified only when necessary to prevent significant consumer harm and when narrowly drawn to minimize their anticompetitive impact.[16] A showing of likely harm is particularly important when, as here, the proposed definition could prevent consumers from using entire classes of providers.

The exceptions in the current proposed definition reflect recognition of the importance of preserving beneficial competition. This effort is consistent with scholarship indicating that consumers likely face little risk of harm from non-lawyer competition in many areas. For example, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find that they perform as well as or better than lawyers.[17] Likewise, a systematic survey found that complaints about unauthorized practice of law in most states did not come

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[14] *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 lawyer closings. See letters to the Virginia Supreme Court and Virginia State Bar, supra n.3.

[15] *Countrywide Home Loans, Inc.*, 113 S.W.3d at 120.

[16] *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the marketplace cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[17] 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").

from consumers (who would be the victims of such conduct) but from lawyers, who did not allege any claims of specific injury.[18] As the Restatement (Third) of Law Governing Lawyers has explained:

> Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that 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.[19]

Although the intent of the proposed definition may be to ensure that consumers receive certain advice only from highly-trained lawyers, consumers who otherwise would receive assistance from individual advocates and advocacy organizations might be unable to hire a lawyer and might have to go without assistance altogether. A 1996 ABA task force survey, for example, concluded that low income and middle-income households were underserved by the legal system.[20] Both low- and middle-income households listed cost as a major reason for avoiding the legal system.[21]

The services of a licensed lawyer may be desirable in certain situations. A Kansas consumer might choose to hire a lawyer to answer legal questions, provide legal advice, research the case law, negotiate settlements, or offer various protections. Consumers who hire lawyers may get better service and representation than those who do not. Nevertheless, as the current draft already reflects in many respects, non-lawyers should remain able to provide advice and legal information unless there is clear evidence that this option is likely to harm the public. For the services described above, non-lawyers serve customers every day in multiple jurisdictions,

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[18] Rhode, supra n.17, at 407-08.

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

[20] 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.

[21] *Id*.

with little or no evidence that consumers face any greater risk than when such services are provided by a lawyer.

Conclusion

The proposed definition likely will unnecessarily and unreasonably reduce competition between lawyers and non-lawyers as described above. We urge the Kansas Bar Association to tailor further the proposed rules to address demonstrated harms and not to prohibit non-lawyer competition that is beneficial to consumers and in the public interest. Specifically, clauses two and six of Section A and clause eleven of Section B should be revised as indicated above to allow more competition between lawyers and non-lawyers.

The Justice Department and the FTC thank you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

Sincerely yours,

/s/
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/s/
Aaron Comenetz
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United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,

/s/
Deborah Platt Majoras
Chairman

/s/
Maureen K. Ohlhausen
Acting Director
Office of Policy Planning