U.S. DEPARTMENT OF JUSTICE
Washington, DC 20530

September 10, 1997

Board of Governors
Kentucky Bar Association
514 West Main Street
Frankfort, Kentucky 40601

Re: Proposed Kentucky Bar Association Opinion
Prohibiting Real Estate Closings By Non-Attorneys

Dear Members of the Board:

The United States Department of Justice is concerned about a proposed Kentucky Bar Association ("KBA") Opinion that would declare real estate closings by non-attorneys to be the unauthorized practice of law. The proposed Opinion would generally ban anyone except lawyers from conducting closings for both real estate purchases and loans secured by real estate. The proposed Opinion will deprive Kentucky consumers of the choice to use a lay settlement service, a choice the KBA affirmed in 1981. Ending competition from these services is likely to hurt Kentuckians by raising their closing costs and has not been justified as necessary to protect consumers. We understand that the Board of Governors will consider the Opinion at its September 12, 1997 meeting, and we offer these comments. The Justice Department does not generally comment on proposed unauthorized practice of law rule-makings, but submits these comments to prevent harm to competition and consumers.

The Interest and Experience of the Department of Justice

The United States Department of Justice is entrusted with enforcing this nation's antitrust laws. For more than 100 years, since the passage of the Sherman Antitrust Act, the Department has worked to promote free and unfettered competition in all sectors of the American economy. Restraining competition can force consumers to pay increased prices or accept goods and services of poorer quality.

Consequently, anticompetitive restraints are of significant concern, whether they are imposed by a "smokestack" industry or by a profession. Restraining competition in any market has the potential to injure consumers. For this reason, the Justice Department's civil and criminal enforcement programs are directed at eliminating such restraints. As part of those efforts, the Justice Department encourages competition through advocacy letters such as this one.[1]

The Proposed KBA Opinion

On August 27, the KBA's Unauthorized Practice of Law ("UPL") Committee forwarded the proposed Opinion to the Board of Governors for consideration at its September 12 meeting. The proposed KBA Opinion would bar lay settlement agents from conducting closings for real estate sales and for any loans secured by real estate. The Opinion would not require the attorneys to be present at closing or even to provide legal advice to the consumer-buyer and seller. Instead, the attorney's lay employees could conduct the closing. The proposed Opinion would require a consumer who otherwise might use a real estate agent, bank, credit union, mortgage lender, title company, title insurance underwriter or other lay settlement service for closing to hire a lawyer instead. In doing so, the proposed Opinion would directly overturn KBA Opinion U-31 (1981), which had ruled that lay closings were not the unauthorized practice of law.

The Public Interest Standard Should Guide the KBA's Decisions About the Proposed Opinion

In ascertaining whether a service is the practice of law in Kentucky, the Board of Governors should consider the public interest. The rules against the unauthorized practice of law are intended to protect the public interest and should not be construed in a manner inconsistent with that purpose. "The basic consideration in suits involving unauthorized practice of law is the public interest." Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964). As the Supreme Court of New Jersey wrote when considering a UPL opinion similar to the one proposed here:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
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[1] Recently, the Justice Department submitted comments urging Virginia to reject a similar proposed opinion that would have banned lay closings (letters from U.S. Department of Justice and Federal Trade Commission to Supreme Court of Virginia, January 3, 1997, and to Virginia State Bar, September 20, 1997).

> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

In determining how best to protect the public interest, the Board should balance the harm that would be caused by banning lay settlements against the harm that might be caused by continuing to permit them. As explained below, this balancing supports the conclusion that the public interest would not be served by ending competition from lay settlement services.

The Proposed Opinion Would Likely Hurt the Public

Free and unfettered competition is at the heart of the American economy. The United States Supreme Court has observed, "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.'" National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); accord Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411, 423 (1990). Competition benefits consumers of both traditional manufacturing industries and of services offered by the learned professions. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); National Society of Professional Engineers, 435 U.S. at 689.

In many States, lay services and attorneys compete in providing real estate closings. The proposed Opinion would erect an insurmountable barrier against competition from lay settlement services, thereby depriving Kentucky consumers of the choice of closing real estate transactions without the services of an attorney. The proposed Opinion is likely to increase costs for consumers in two ways. First, it would force Kentuckians who would not otherwise hire a lawyer for closing to do so. Hence, the proposed Opinion would injure all consumers who might prefer the combination of price, quality, and service that a lay settlement service offers. Besides hurting consumers who are buying and selling homes and commercial properties, it would damage those obtaining home equity loans or refinancing existing real estate loans. Many banks currently handle these closings without additional charge. Second, the proposed Opinion, by eliminating competition from lay providers, would likely increase the price of lawyers' settlement services, since the availability of alternative, lower-cost lay settlement services restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

This has been the case elsewhere. In 1995, the New Jersey Supreme Court rejected a proposed opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey (where lay settlements were commonplace), even for consumers who chose attorney closings,

than in the northern part of the State, where lawyers conducted almost all settlements. South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid on average, $650, while sellers paid $350. North Jersey buyers, represented by counsel, paid on average, $1,000 and sellers, $750. In re Opinion No. 26, 654 A.2d at 1348-49.[2]

The experience in Virginia was similar. Virginia recently passed a law upholding the right of consumers to continue using lay settlement services. Va. Code Ann. §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). At the time, the state Supreme Court had been considering a proposed Opinion similar to this one. Proposed Virginia UPL Opinion No. 183. Lay settlement services had operated in Virginia for the previous 15 years. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

Virginia Closing Costs			
	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, Residential Real Estate Closing Cost Survey, September 1996 at 5.[3]

Moreover, Virginia had previously rejected a proposed opinion declaring lay settlements to be the unauthorized practice of law in 1981 -- at about the same time that Kentucky came to that conclusion. These decisions occurred almost six years after the U.S. Supreme Court had ruled that county bar associations' fixing of a minimum fee schedule for real estate closings violated the antitrust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The bar associations had fixed attorneys' fees for real estate closings at 1% of the selling price. 421 U.S. 776. Since Goldfarb and since competition from lay closing services began 16 years ago, Virginia closing costs have fallen significantly.

[2] In South Jersey, about 60% of buyers and 65% of sellers were not represented by counsel at closing. In North Jersey, 95.5% of buyers and 86% of sellers were represented by counsel. Note that before rendering its opinion, the New Jersey Supreme Court had referred the matter to a Special Master who had conducted 16 days of evidentiary hearing on this issue and others.

[3] There were 425 law firms and 64 lay providers reporting closing costs without title examinations and 165 law firms and 41 lay providers reporting costs including examinations.

There is no reason to expect Kentucky's experience to be any different. The use of lay settlement services has grown since Opinion KBA U-31 was rendered almost 16 years ago. Lay closings of real estate purchases and sales are now common in northern Kentucky, and growing in Louisville, Lexington, and other areas of Kentucky. As competition from lay settlement services has grown, prices have fallen, according to information we have gathered from industry representatives. Moreover, banks all over Kentucky continue to close their home equity loans and second mortgages themselves -- often at no additional cost to consumers.

Attempts by county bar associations to adopt restraints similar to the proposed KBA Opinion have been challenged by the Justice Department as anticompetitive. For example, the Justice Department sued and obtained a judgment against a county 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 in their real estate transactions. United States v. Allen County Indiana Bar Association, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. United States v. New York County Lawyers' Association, No. 80 Civ. 6129 (S.D.N.Y. 1981).[4]

The Basis of the KBA Opinion Is Flawed

The proposed KBA Opinion is premised on two arguments: (1) increasing consumer protection warrants requiring attorneys at closing, and (2) real estate closings in 1997 differ from those in 1981, and therefore, attorneys must conduct them.

The Goal of Increasing Consumer Protection Does Not Warrant Adopting the Opinion

The proposed Opinion makes two arguments about consumer protection. First, the concern of "federal regulators" with "protecting the consuming public in real estate transactions" warrants adoption of the Opinion. Second, the belief that lawyers are needed to answer consumers' questions and interpret deeds and other documents at closing militates in favor of adopting it. These two arguments overlap in part.

[4] If the Supreme Court of Kentucky approves the proposed Opinion, the state action doctrine would likely exempt it from federal antitrust challenge. Parker v. Brown, 317 U.S. 341 (1943); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). This doctrine immunizes some state government actions that, if taken by private parties, could violate the antitrust laws.

Because the United States Department of Justice is concerned with protecting the consuming public in real estate transactions, we urge the KBA to reject the proposed opinion. There are several reasons that the Opinion's consumer protection analysis does not support the draconian measure of eliminating lay settlements. Antitrust law and policy are important forms of consumer protection. Consumers benefit immensely from competition among different types of service providers. As the United States Supreme Court has explained:

> The assumption that competition is the best method of allocating resources in a free market recognizes that **all elements of a bargain - quality, service, safety, and durability** - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); accord Superior Court Trial Lawyers' Association, 493 U.S. at 423. Permitting competition by lay agents allows consumers to consider more relevant factors in selecting a provider of settlement services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In general, the antitrust laws and competition policy require that a sweeping restriction on competition be justified by a credible showing of need for the restriction and require that the restriction be narrowly drawn to minimize its anticompetitive impact. This is required to protect the public interest in competition. See generally F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986).

The UPL Committee has made no such showing here. It has provided no statistics showing that the proportion of lay settlements that are problematic is greater than the proportion of problematic attorney settlements. Nor has it cited any instances of actual consumer injury from lay closings. A showing of harm is particularly important where, as here, the proposed restraint eliminates entirely consumers' opportunity to use an entire class of providers. Instead of making this showing, the Opinion relies on hypotheticals and general assertions. Without a showing of actual harm, there is not a sufficient basis to restrain competition by prohibiting lay settlements. Such prohibitions are likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers based on cost, convenience, and quality of services.

Moreover, in making its assertion that federal regulations somehow support abolishing lay settlements, the proposed Opinion relies on the Truth in Lending Act ("TILA") and the Real Estate Procedures Act ("RESPA"). These laws were enacted to provide consumers with financial information. They do not require that attorneys conduct closings and do not suggest that lay closings should be eliminated. Moreover, Truth in Lending disclosures like those required in real estate closings are required in other consumer loan transactions, such as credit card agreements and automobile loans, for which layers are rarely, if ever consulted.

In addition, the Opinion is premised on the assertion that lawyers are needed at closing to answer the questions of consumers and interpret deeds and other documents. The assistance of a licensed lawyer

at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is no reason to eliminate lay closing services as an alternative for consumers. In re Opinion No. 26, 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. Id. Moreover, at the time Kentucky issued KBA Opinion U-31 (1981), consumers likely had similar questions about the meaning of terms in the deed and other forms. Yet, the Opinion stated that real estate closings were not the practice of law.

Furthermore, the Opinion would not require consumers to hire their own lawyers to represent their interests, and thus does not assure the result envisioned. A lawyer representing the lender could close the loan. This is the usual practice in Kentucky when a lawyer does the closing. The presence (or availability) of a lender's lawyer at closing does not necessarily advance the goal of consumer protection. While the lawyer may be able to provide some legal explanations to the consumers, he/she does not represent them. So, an attorney could not advise consumers about whether particular deeds or loan terms were in their best interest. A consumer who needs legal advice at closing should hire his/her own lawyer, regardless of whether the closing is performed by a lawyer or layperson.

Indeed, under the proposed Opinion, the lawyer need not even conduct the actual closing. Rather, the closing could be handled by a paralegal or other layperson employed by the attorney. Hence, if it is the practiced legal eye of the lawyer that protects consumers at closing, this eye would not witness the actual closing. No lawyer would be there to recognize special problems that only a lawyer could understand. Instead, the consumer would receive protection equivalent to what he/she receives from a lay settlement agent. In both situations, the layperson conducting the closing would have to determine whether to call a lawyer because a question was outside his/her expertise.[5]

Even if counsel conducts the closing, counsel cannot change the terms of the standard loan forms at the consumer's request, as a lawyer might change a contract in another setting. Most mortgages involve standardized loan forms required for reselling the mortgage in the secondary market, as the Appendix to the Opinion recognizes. In fact, the increasing use of standardized loan forms reduces the likelihood of error and the need for legal counsel.

Moreover, a substantial number of closings involve home equity loans or the refinancing of existing loans. Because a related transaction has already gone through the closing process once, legal questions are less likely to arise. These closings are relatively simple. In addition, buyers and sellers involved in commercial real estate purchases may already be represented by counsel, but may wish to use an

[5] The Opinion argues that attorneys are held to a higher standard of practice than lay services, and that the attorney bears the ultimate responsibility for the work of his/her lay employees. Both attorneys and laypeople conducting closings are required by the lenders for whom they work to carry Error & Omission insurance.

independent lay settlement agent for the services involved in closing. Yet, the proposed Opinion would apply to commercial and home equity closings, in addition to transactions involving first-time home purchasers.

Differences Between Closings in 1997 and 1981 Do Not Warrant Adopting the Proposed Opinion

The Opinion claims that attorneys must conduct all closings because closings in 1997 are different from those conducted in 1981, when Kentucky held that they were not the practice of law. The Opinion asserts that, in 1981, loans were made by local lenders. Consequently, buyers and lenders knew whom to contact if a problem arose. The proposal goes on to state that in 1997, lenders may be interstate banks, or out-of-state firms, and the buyer may not have previously been familiar with the lender's name. A secondary market investor often buys the loans, and therefore, the loan is closed using uniform forms approved by Fannie Mae, Ginnie Mae, and Freddie Mac. Federal regulations require certain disclosure forms, and consumers may have questions about those forms that only attorneys can answer, the Appendix to the Opinion declares.

The involvement of interstate banks and the use of uniform forms does not magically turn the act of closing into the practice of law. Either closings were the practice of law in 1981 or they are not today. While a consumer may not be familiar with the name of a bank, certainly before the consumer closes the loan, the consumer is informed about whom to contact at the bank if there is a problem. Likewise, the lender obtains information about how to contact the consumer. The issues of federal disclosure forms and the questions consumers may ask has been addressed above. The use of standard forms should reduce, not increase, the chance that a legal question will arise during a closing. And, home equity and refinancing loans remain relatively simple, even if the lender is no longer the bank down the street.

Less Restrictive Meaures May Protect Consumers

Approving the proposed Opinion may impose substantial additional closing costs on Kentucky consumers, who would no longer be able to reap the benefits of competition from lay settlement providers. These costs should not be imposed without a convincing showing that lay closings have not only injured consumers but that less drastic measures cannot remedy the problem. Indeed, Kentucky consumers can be protected by measures that restrain competition less than a complete ban on lay settlement. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997. Va. Code Ann. §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). This statute permits consumers to choose lay settlement providers, while regulating them. Hence, Virginia consumers continue to have the benefits of competition, including lower-cost settlements. Likewise, the New Jersey Supreme Court, in permitting lay settlements, has required written notice of the risks involved in proceeding with a real estate transaction without an attorney. In re Opinion No. 26, 654 A.2d at 1363. These measures permit consumers to make an informed choice about whether to use lay settlement services.

One final issue should be mentioned. Some attorneys have argued that the Board should approve the proposed Opinion to "force the issue" and cause Kentucky to adopt a statute or Supreme Court order that permits lay settlements under certain regulated conditions. The Board should not approve the Opinion for this reason. Whether lay settlements should be regulated, and if so, what type of regulations should be imposed, are questions that should be resolved based on a thorough factual inquiry concerning both the need for such regulation and the most effective methods for meeting this need. In addition, if the Opinion is approved, there is no guarantee that the Supreme Court would enter an order or that the General Assembly would enact a statute permitting lay settlements. Nor is there any guarantee of what that order or statute would contain. An order or statute could so restrict lay settlements as to effectively ban them. Moreover, if Kentucky adopts the proposed Opinion, lay settlements would be forbidden until the unknown and hypothetical time when the General Assembly passed a hypothetical regulatory statute. Hence, consumers would be deprived of the benefits of competition and could be forced to pay higher prices for closings.

Conclusion

By prohibiting lay settlements, the proposed Opinion would likely reduce competition and raise prices to consumers, without a demonstration that lay settlements harm consumers in a way that could be prevented only by restricting real estate closings to lawyers. Accordingly, the Department of Justice recommends that the Board of Governors reject the proposed KBA Opinion.

The Department appreciates this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

Joel I. Klein
Assistant Attorney General
Jessica N. Cohen, Attorney
United States Department of Justice
Antitrust Division