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

Re: Kentucky Bar Association Opinion KBA U-58
Prohibiting Real Estate Closings By Non-Attorneys

Dear Members of the Board:

The United States Department of Justice submits these comments to assist the Board of Governors in reviewing Kentucky Bar Association ("KBA") Opinion KBA U-58, which would declare real estate closings by non-attorneys to be the unauthorized practice of law. We understand that the Board of Governors will consider KBA U-58 at its June 15, 1999 meeting. These comments supplement those the Department submitted in 1997 when the Board considered a similar opinion. At that time, the Board declined to adopt the opinion.

Although the Justice Department does not generally comment on proposed unauthorized practice of law rule-makings, we submit these comments to prevent harm to competition and consumers. Adopting KBA U-58 would deprive Kentucky consumers of the choice to use a lay settlement service, a choice the KBA supported in 1981 and that has since served Kentucky consumers well. Eliminating competition from lay services is likely to hurt Kentuckians by raising their closing costs and limiting their choices. KBA U-58 has not been shown to be necessary to protect consumers. Therefore, we urge you to reject the Opinion.

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, anti-competitive 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.

The Justice Department has challenged attempts by county bar associations to adopt restraints similar to the proposed KBA Opinion. For example, the Justice Department sued and obtained a judgment against one 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. 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).

The Proposed KBA Opinion

KBA U-58 would bar lay settlement agents from conducting closings for real estate sales and for any loans secured by real estate without the supervision of an attorney. But the Opinion would not require an attorney to be present at closing or even that the attorney represent the consumer-buyer or -seller. Instead, the attorney's lay employee could conduct the closing and the attorney might represent the lender. The Opinion would permit banks to close transactions in which they were the real parties in interest, but banks could not close other loans. In effect, the Opinion would require a consumer who otherwise might use a real estate agent, title company, title insurance underwriter, or other lay settlement service for closing to pay for the services of a lawyer. In doing so, the Opinion would directly overturn KBA Opinion U-31 (1981), which held that lay closings do not constitute the unauthorized practice of law.

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

In ascertaining whether a service is the practice of law in Kentucky, the Board of Governors should consider the public interest. "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). 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. As the Supreme Court of New Jersey wrote when considering a UPL opinion similar to the one the Board is considering:

> 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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> 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 Opinion Would Likely Hurt the Public By Raising Prices

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) (citing Standard Oil Co. V. FTC, 340 U.S. 231, 248 (1950)); accord, Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411, 423 (1990). Competition

benefits consumers both of 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, non-lawyers compete with attorneys in providing real estate closings. KBA U-58 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 Opinion would likely increase costs for consumers in two ways. First, it would force Kentuckians who would not otherwise pay for the services of a lawyer at closing to do so. Hence, the 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 harm those obtaining home equity loans or refinancing existing real estate loans who do not use a bank as their closing agent. Second, the Opinion, by eliminating competition from lay providers, would likely increase the price of lawyers' settlement services, since the availability of alternative, lower-cost lay services currently 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, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey, where lay settlements were commonplace, than in the northern part of the State, where lawyers conducted almost all settlements. This was true even for consumers who chose attorney closings. 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.[1]

The experience in Virginia was similar. Lay settlement services have operated in Virginia since 1981, when the state rejected an Opinion declaring lay settlements to be the unauthorized practice of law. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

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[1] 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.

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.[2]
In 1997, Virginia 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 an Opinion similar to the one now before the KBA. Proposed Virginia UPL Opinion No. 183.)

There is no reason to expect Kentucky's experience to be any different. In Kentucky, the use of lay settlement services has grown since Opinion KBA U-31 was rendered almost 18 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. In deciding whether to adopt KBA U-58, the Board should fully consider the potential harm to consumers from eliminating lay services.

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

KBA U-58 is premised on the argument that consumer protection necessitates having attorneys at closing. It assumes that lawyers are needed to answer consumers' legal questions and give legal advice at closing. Yet KBA U-58 contains no factual evidence or evaluation of how the availability of lay services has actually hurt consumers. The Opinion's consumer protection analysis fails to support the draconian measure of eliminating lay settlements. Moreover, KBA U-58 does not accomplish its ostensible purpose; it does not require that any attorney, much less an attorney representing the consumer, actually be present at the closing.

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[2] 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.

At the outset, it is important to consider that antitrust law and policy are themselves 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 all 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 anti-competitive 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).

KBA U-58 does not contain such a showing of need for a near-complete prohibition on lay closing service competition. The Opinion cites 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 despite the fact that lay closings have been permitted in Kentucky for nearly 18 years. A showing of harm is particularly important where, as here, the proposed restraint eliminates consumers' opportunity to use an entire class of providers. Without a showing of actual harm, the Board should not 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.

The Opinion is premised on the assertion that lawyers are needed at closing to answer the questions of consumers, interpret deeds and other documents, and give legal advice. 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, the Opinion gives no hint why lay closings should be considered

differently today than they were 18 years ago, when the KBA held that lay closings did not constitute the unauthorized practice of law.

KBA U-58 states, "[i]f a problem arises during closing and there is no attorney-client relationship, the parties are without benefit of independent counsel and may lack the leverage or will to halt a transaction that is not in their best interests." The Opinion, however, would not require consumers to hire their own lawyers to represent their interests. Thus, it does not assure that counsel acting on behalf of consumers would be available to advise them of all of their rights and obligations. In fact, the usual practice in Kentucky is that a representative of the lender closes the loan. This representative does not have "an attorney-client relationship" with the buyer or seller. Yet his or her participation would satisfy KBA U-58 if the representative was an attorney or supervised by one. The presence at closing of a lawyer or paralegal representing the lender would not advance the goal of consumer protection. While such lawyers might be able to provide some legal explanations to the consumers, they would not represent them. They could not advise the consumers about whether a particular deed or loan term was in their best interests. Nor would their presence likely give consumers "the leverage or will to halt a transaction that is not in their best interests." A consumer who needs legal advice at closing should hire his/her own lawyer, regardless of whether another party to the transaction is represented by a lawyer or person supervised by a lawyer.

There are several other reasons why the Opinion would be ineffective in achieving its asserted goals. First, under the 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 eye of the lawyer that protects consumers at closing, this eye might not witness the actual closing. No lawyer would necessarily be present to recognize special problems that only a lawyer could understand. Instead, the consumer might 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.

Second, even if an attorney conducted the closing, there would be no assurance that the attorney would be experienced in real estate matters or have any specialized real estate training that would protect consumers. Any attorney could conduct the closings.

Third, even if an experienced real estate lawyer conducted the closing, he/she could not change the terms of the standard loan forms at the consumer's request, as a lawyer might change a contract in another setting. Almost all mortgages involve standardized loan forms approved by Fannie Mae, Ginnie Mae, and Freddie Mac. These uniform forms are required for reselling the mortgage in the secondary market; the consumer cannot alter their terms, even on the advice of a lawyer.

Finally, not all closings involve first-time home buyers. A substantial number 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. While it is true that KBA U-58 would permit a bank to close loans in which it was a real party in interest (e.g., the lender), the Opinion would prevent other lay services from conducting closings of home equity loans or refinancings of existing loans. Moreover, buyers and sellers involved in commercial real estate purchases may already be represented by counsel, but may wish to use an independent lay settlement agent for the services involved in closing. Yet the Opinion would apply to commercial closings, forcing parties to these transactions to pay for the services of a separate lawyer for the closing.

Less Restrictive Measures May Protect Consumers

Approving KBA U-58 may impose substantially higher 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 perceived 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 to consumers 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.

General Assembly Action

One final issue should be mentioned. In 1997, some attorneys argued that the Board should approve the Opinion to "force the issue" and cause Kentucky to adopt a statute or Supreme Court order that permits lay settlements under certain regulated conditions. This is not a sound basis for adopting the Opinion. 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 any needs identified. 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 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 Opinion would likely reduce competition and raise prices, without any demonstration that this step is necessary to protect consumers. Accordingly, the Department of Justice recommends that the Board of Governors reject KBA U-58.

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

Sincerely yours,

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