UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

October 1, 2003

Unauthorized Practice of Law Committee
Indiana State Bar Association
c/o John A. Conlon, Esquire
500 N. Meridian Street
P. O. Box 441651
Indianapolis, Indiana 46244

Re: Comments On Draft Proposed Amendment To Indiana Supreme Court Admissions & Discipline Rule 24 Regarding Unauthorized Practice Of Law

Dear Mr. Conlon and Members of the Committee:

The Indiana State Bar Association's ("ISBA") Unauthorized Practice of Law Committee has drafted a proposed amendment to Indiana Supreme Court Admissions & Discipline Rule 24 in contemplation of submitting its proposal to the Indiana Supreme Court. On July 14, 2003, you asked the United States Department of Justice and the Federal Trade Commission ("FTC") for comments on the draft. This letter is submitted in response to your request.

The proposed draft amendment would, for the first time in Indiana, impose rules defining the practice of law. Our agencies are concerned that consumers could be adversely impacted by the proposed draft, because it is overbroad and likely to prevent nonlawyers from providing, in competition with lawyers, services that Indiana law currently permits. If implemented as written, the draft proposed rule would likely raise costs for consumers and limit their competitive choices. Antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury. Because the proposed rule is likely to restrain competition while likely providing little benefit to consumers, we recommend that Rule 24 be left in its current form, or alternatively, that the proposed revision be narrowed substantially.

The Interest And Experience Of The U.S. Department

The Justice Department and the FTC are entrusted with enforcing the federal antitrust laws. Both agencies 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 services offered by the learned professions.[2] Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

The Justice Department and the FTC have become concerned about increasing efforts to prevent nonlawyers from competing with attorneys in providing certain services through the adoption of unauthorized practice of law rules and opinions by state courts and legislatures. As Professor Catherine Lanctot has noted, "Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services."[3] 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. Our agencies have urged the American Bar Association and the States of Georgia, Kentucky, Virginia, Rhode Island, and North Carolina to reject such restrictions.[4] The Kentucky Supreme Court recently

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[1] *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)); *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[2] *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 689; *see also United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

[3] *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002) (statement of Professor Catherine J. Lanctot, Villanova University Law School) at http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/lanctot.pdf.

[4] Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission, on Review of UPL Advisory Opinion No. 2003-2, No. S03U1451 (Ga., filed July 28, 2003); letters from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, et al. (June 30, 2003, Mar. 28, 2003, Mar. 29, 2002); letters from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (March 20, 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 about proposed model statute or court rule); 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); Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000); letters 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). The *Amicus Curiae* brief to the Georgia Supreme Court and the letters to the American Bar

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agreed that such unauthorized practice of law ("UPL") opinions have the potential to restrain competition and rejected a proposed opinion that would have prevented laypeople from competing with lawyers to close real estate transactions.[5] In addition, the Justice Department has sued bar associations that have attempted to restrain competition from nonlawyers and obtained injunctions prohibiting this conduct because it violates the antitrust laws.[6] The FTC also has challenged anticompetitive restrictions on certain business practices of lawyers.[7] Our ongoing efforts in this area has led us to respond to your request for these comments.

The Proposed Draft Opinion Changes Indiana Practice

Indiana Admissions and Disciplinary Rule 24, entitled "Rules Governing the Unauthorized Practice of Law," sets forth the procedure for bringing actions to restrain or enjoin the unauthorized practice of law. Actions must be brought in the Indiana Supreme Court and must "charge specifically the acts constituting" unauthorized practice. Whether certain acts constitute the unauthorized practice of law has been left for the Supreme Court to decide in the context of those actions. Ind. Adm. & Disc. Rule 24. The rule today makes no effort to define

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Association, Rhode Island House of Representatives, North Carolina, and Virginia may be found on the Department of Justice web site at http://www.usdoj.gov/atr/public/comments/comments.htm and the FTC's web site, http://www.ftc.gov. The Justice Department letters to the Kentucky Bar Association and Rhode Island Senate are available at http://www.usdoj.gov/atr/public/comments/comments.htm and the Department's brief to the Kentucky Supreme Court at http://www.usdoj.gov/atr/cases/f4400/4491.htm.

[5] *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, No. 2000-SC-0206-KB (Ky. Aug. 21, 2003) (Westlaw: 2003 WL 21990261). Similarly, Virginia passed a law permitting lawyer-nonlawyer competition for real estate closings, and Rhode Island recently rejected a bill proposing to ban such competition. The American Bar Association substantially modified its proposal in light of comments from us and many other organizations and individuals, and North Carolina modified its proposal, as well.

[6] In *United States v. Allen County Indiana Bar Ass'n*, 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 Ass'n*, 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 F. 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 Ass'n of Architects*, 1990-2 Trade Cases ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors Representatives*, 1982-83 Trade Cases ¶ 65,210 (S.D.N.Y. 1982).

[7] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990). In addition, the FTC staff has conducted studies of the effects of occupational regulation and submitted comments about these issues to state legislatures, administrative agencies, and others. *See, e.g.*, Carolyn Cox & Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, The Federal Trade Commission, October 1990.

the practice of law itself. The Supreme Court of Indiana has exclusive jurisdiction over allegations of unauthorized practice of law.[8] It has on numerous occasions declined to give a comprehensive definition of the practice of law.[9]

The UPL Committee of the ISBA, a private trade association of attorneys, has drafted a proposed amendment to Rule 24.[10] Section 2(a) of the draft would define the practice of law as "ministering to the legal needs of another person for consideration given, either directly or indirectly." This definition includes providing to another person, "either directly or indirectly":

(1) Advice on a legal right;
(2) Negotiation or settlement of a legal right;
(3) Representation in a legal proceeding;
(4) Selection, preparation, or completion of a legal document;
(5) Management of a law practice; or
(6) Any other conduct determined to be the practice of law by the Indiana Supreme Court.

Section 2(b) of the draft rule lists certain activities in which nonlawyers would be permitted to engage, even if they constituted the practice of law. A nonlawyer could sell legal document forms previously approved by lawyers. A nonlawyer could select and complete legal documents that a lawyer had previously approved "by filling in the blanks where that activity requires only common knowledge regarding the required information and general knowledge of the legal consequences." Nonlawyers could represent people before administrative agencies if the representation met certain criteria. Nonlawyers would be allowed to work as neutral mediators, arbitrators, conciliators, and facilitators. They also could take part in labor negotiations; work as lobbyists or to request legislative change; and work for a lawyer as a paralegal or in another capacity.

In addition, Section 2(b)(8) provides that an employee may perform activity "for the exclusive benefit of the employer" provided that he/she "(i) does not engage in the 'practice of law' as defined in this rule," (ii) works permanently only for the employer, "(iii) does not select, prepare, or complete a legal document for the employer" except as provided in the proposed rule, and "(iv) does not represent the employer in a legal proceeding except as provided" in the

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[8] *Miller v. Vance*, 463 N.E.2d 250, 253 (Ind. 1984); *State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d 711 (1963).

[9] *See, e.g., Miller v. Vance*, 463 N.E.2d at 251; *Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d at 714.

[10] The Indiana State Bar Association is a private organization of lawyers and is not a state agency. John Conlon, Chair of the Unauthorized Practice of Law Committee, has represented to our agencies that the draft is a proposed amendment to Ind. Adm. & Disc. Rule 24. 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, for the Committee or Association to declare that activities are the unauthorized practice of law for any other purpose.

proposed rule or by rule of a court. Finally, the draft rule would permit nonlawyers to engage in activity that the Indiana Supreme Court determines is permissible.

Restrictions On Lawyer-Nonlawyer Competition Should Be Examined To Determine Whether They Are In The Public Interest

The Justice Department and the FTC recognize that there are circumstances requiring the knowledge and skill of a person trained in the law. Nonetheless, while there may be legitimate problems related to the delivery of certain legal services by nonlawyers, the Justice Department and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services.

Prohibitions on the unauthorized practice of law should serve the public interest.[11] In considering questions of the unauthorized practice of law, the Supreme Court of New Jersey explained,

> 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.[12]

The proposed ISBA definition is not in the public interest because it is overly broad and, by limiting competition, will likely cause more harm to consumers than it may prevent. Indiana has a tradition of allowing laypeople to compete with lawyers to provide services when doing so would benefit the public. The Indiana Supreme Court has held that it is not proper to "provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged according to its own specific circumstances."[13] "The law itself is by no means an absolute science, the practice of which can be accurately and

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[11] *See Indiana Real Estate Ass'n, Inc.*, 191 N.E. 2d at 713.

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

[13] *Miller v. Vance*, 463 N.E.2d at 251.

unequivocally defined."[14]Indeed, in *Miller v. Vance*, the Indiana Supreme Court observed that it should not place an "unreasonable burden on the public" by determining that lay bank employees who fill out mortgage forms are practicing law.[15] Likewise, in *Indiana Real Estate Ass'n, Inc.*, the Court held that "it cannot be urged with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent acting for one of the parties. Such restrictions would so paralyze business activities that very few transactions could be expeditiously consummated."[16]

The Draft Proposed Rule Would Likely Hurt Indiana Consumers By Restraining Competition Between Lawyers And Nonlawyers

The Justice Department and the FTC believe that adopting the proposed draft rule declaring certain actions to be the practice of law would restrict competition, harm consumers, and not serve the public interest. The ISBA's proposed draft rule is likely to eliminate many forms of lawyer-nonlawyer competition. While developing an exhaustive list of all possibly affected lay activities may be difficult, some examples include:

- real estate agents explaining to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and also explaining such things as the meaning of an easement and the possible need to lower the price of a home because of an unusually restrictive easement, or the requirements for lead, smoke detector, and other inspections imposed by state law;

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

- other lay advocacy organizations and consumer associations providing citizens with information about legal rights and issues;

- independent contractors advising a client about what must be done to comply with local zoning laws, state labor laws, or safety regulations;

- 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;

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

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[14] *Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d at 714.

[15] 463 N.E.2d at 253

[16] 191 N.E.2d at 715.

- inexpensive electronic software to complete wills, trusts, tax forms, and other legal documents, since the applications are somewhat interactive and select certain clauses for the documents based on answers that consumers give, as well as providing some legal information and/or advice about those clauses.

Moreover, the draft rule forbids laypeople from "directly or indirectly" engaging in the acts it defines as the practice of law. This language creates such vagueness and ambiguity that it is likely to greatly inhibit nonlawyers from competing with lawyers to provide services. This proposed language is likely to eliminate competition between nonlawyers and lawyers that Indiana currently permits. Indeed, the ambiguity could lead to lawyers suing to prohibit procompetitive conduct that was not intended to be forbidden as the unauthorized practice of law.

The ambiguity of this broad and vague prohibition on non-attorneys "directly or indirectly" engaging in the practice of law is particularly a problem with regard to giving "advice on a legal right." Read literally, the language could prevent any nonlawyer from giving any form of advice that could relate to a legal right, or even from providing information about those rights. Thus, nonlawyer competition that the Indiana Supreme Court has permitted could be prohibited by the ISBA's draft. For example, in *State ex rel. Indiana State Bar Ass'n v. Miller*, the Indiana Supreme Court observed that many nonlawyers were "as qualified if not more so than most lawyers" to explain such tax law terms as obsolescence and depreciation, and that it would not be the practice of law to do so, even by turning to court opinions to elucidate those terms.[17] Yet, under the Committee's proposed draft rule, doing so could be forbidden if it is deemed indirectly giving advice on a legal right.[18] Likewise, many of the examples of competition listed in the bullet points above could be construed as the direct or indirect giving of advice on a legal right and thus prohibited. While the Committee cites three cases for its assertion that laypeople should not be allowed to compete with lawyers by directly or indirectly giving advice on a legal right, none provides a basis for the expansive, anticompetitive "directly or indirectly" language or prohibit any giving "advice on a legal right."[19]

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[17] 770 N.E.2d 328 (Ind. 2002).

[18] The proposed rule would provide that nonlawyers can engage in activities the Indiana Supreme Court finds permissible. Oddly, however, the rule makes no effort to make clear that laypeople can compete by giving out legal information or offer the types of opinions permitted by the *ISBA v. Miller* decision–even while it recites a lengthy list of other permitted conduct. Furthermore, it is not clear what the effect of the rule would be on the *ISBA v. Miller* opinion, since the Supreme Court would be adopting the rule after issuing the opinion.

[19] One of the cited cases, *Miller v. Vance*, held that "the core element of practicing law is the giving of legal advice to a client and the placing of onself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." 463 N.E.2d at 251. Yet, the sensitive attorney-client relationship as part of the act of practicing law is absent from the draft rule. It expands "giving of legal advice to a client" to the much broader "directly or indirectly" giving "advice on a legal right," thereby increasing the restrictions on lay competition. Another, *Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938), is a case

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Similarly, the ISBA draft would prohibit laypeople not only from negotiating settlements of legal rights on behalf of clients, but also, more broadly, from any direct or indirect negotiation of any legal right. The provision's breadth and ambiguity is likely to impede competition between laypeople and attorneys in this area. For example, arguably, employees could not negotiate contracts on behalf of their employers or volunteers on behalf of their volunteer organizations. The two cases cited by the ISBA in support of this limitation were much narrower, dealing only with negotiating settlements on behalf of clients.[20]

Moreover, the draft rule carves out a very limited exception for nonlawyer employees performing services "for the exclusive benefit of their employers." At the same time, it also specifically prohibits them from "engag[ing] in the 'practice of law' as defined in this rule." *See* Section (2)(b)(8)(i). This prohibition effectively renders any special exception for employees meaningless because it limits them to the same activities that Section 2(b)(2) already allows all laypeople to do. Hence, an experienced lay employee could not give advice to an employer about what state labor laws or safety regulations require, as this would be advice on a legal right. Nor could he/she negotiate a contract on behalf of his/her employer. In addition, the exception does not cover independent contractors or volunteers for an organization.

By Prohibiting Nonlawyer Competition For Many Services, The Proposed Court Rule Would Likely Hurt The Indiana Public By Raising Prices And Reducing Consumer Choice

When nonlawyers compete with lawyers to provide services that do not require formal legal training, Indiana consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents

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decided decades before *Miller v. Vance* (1984), *Indiana Real Estate Ass'n, Inc.* (1963), and other cases in Indiana permitting laypeople to compete with lawyers for business. *Fink* held that a layperson could not represent a widow in negotiating the settlement of a claim against a railroad for the death of her husband. 17 N.E.2d 95. The third, *Pearson v. Gould*, held that a union representative could represent union members before the State Employees Appeals Commission. 437 N.E.2d 41 (Ind. 1982). The *Pearson* Court observed in dicta that giving "legal advice to clients" is the practice of law, as is the preparation of a will and giving advice as to its contents and legal effect. Giving legal advice is not the same as any "directly or indirectly" giving of advice on a legal right. Thus, the draft proposal appears to stifle competition in ways that current Indiana law does not.

[20] Furthermore, the draft cites a series of cases for the proposition that it is the practice of law to select, prepare, or complete legal documents. But, the draft relies almost entirely on dicta in those opinions or goes beyond the holdings of the courts. It, thus, could impose greater restraints on lay competition than Indiana law currently does. For example, one of the cases cited, *Gary Bar Ass'n v. Dudak*, 127 N.E.2d 522 (Ind. 1955), is a 50-year-old case about a nonlawyer judge representing parties before his own court, and writing pleadings for them. This has little bearing on the layperson who drafts a contract for his employer or volunteer organization in competition with a lawyer. The other cases, likewise, are either outdated or not on point. Three of the cases cited in the draft rule asserted in dicta that the preparation of legal instruments and contracts which legal rights are secured could be the practice of law, "although such matters may or may not be depending in a court." *Stern v. State Board of Law Examiners*, 199 N.E.2d 850, 854 (Ind. 1964); *Fink v. Peden*, 17 N.E.2d 95-96; *Eley v. Miller*, 34 N.E. 836-38 (Ind. 1893).

and commitments are sufficient. The use of lay services also can reduce costs to Indiana consumers.

By limiting the ability of lay persons to provide such services in competition with lawyers, the draft proposed rule would eliminate or reduce many of these benefits, potentially harming Indiana consumers in several ways. First, the proposal would force consumers who would not otherwise choose to hire a lawyer to do so. Businesses and individuals that rely on accountants, bankers, or other lay people who provide legal information along with other services arguably would be required to hire attorneys to provide that information. Hence, the proposal could increase costs for all consumers who might prefer the combination of price, quality, and service that a lay service provider offers. For example, although accountants and tax preparers do not typically itemize the legal-related services included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants' associations and other advocacy organizations are often free.[21] Evidence suggests that the use of lay real estate closers in various states provides a lower cost alternative for consumers. Will writing and other legal form-fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document.[22]

Second, the proposed rule, by eliminating competition from lay persons, would likely increase the price of lawyers' services because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even Indiana consumers who would otherwise choose an attorney over a lay service provider would likely pay higher prices. That was the conclusion that the New Jersey Supreme Court reached before ultimately rejecting an opinion that would have had the effect of eliminating lay real estate closings. Evidence gathered in that proceeding 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.[23] Likewise, in August 2003, the Kentucky Supreme Court concluded that prices for real estate closings for attorneys dropped substantially as a result of competition from lay

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[21] Although Section 2(a) states that the practice of law is ministering to the legal needs of another person "for consideration," which may be intended to exempt lay advocacy and consumer organizations, such as tenants' associations, the additional qualifier of "either directly or indirectly" makes it uncertain whether some other fee, such as association dues, might be construed as indirect consideration.

[22] While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software is available that permits the consumer to draft a will for less than $100.

[23] *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 attorney closings. *See* letters to the Virginia Supreme Court and Virginia State Bar, *supra* n. 4.

title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[24]

Third, the ISBA's draft may hurt Indiana consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. Consumers may choose to use legal software packages, like the will and trust-writing software, because they are relatively easy and convenient to use. The draft proposed rule could impair their ability to do so in the future. The software contains forms and choices that are selected and programmed by the companies offering the software. In some programs, the consumer answers questions posed by the application, which then automatically completes a will or other basic legal document using standardized provisions that are based on the consumer's answers. The consumer essentially fills in electronic "blanks"; however, the application sometimes offers advice based on information provided by the consumer. For example, the software may give consumers a definition of trustee and may advise them to designate two trustees, in the event that one trustee dies. The proposed definition does allow "the sale of a legal document form previously approved by a lawyer in any format," Section 2(b)(1), but does not address the issue of interactive software which provides some advice and legal information. Nor does the rule address the use of legal document forms that are not sold but that are merely distributed for free, such as on the Internet or through a self-help book provided by an organization.

There Is No Indication That The Proposed Definition Is Needed To Prevent Significant Consumer Harm

Restrictions on competition are generally considered harmful to consumers, and, accordingly, are justified only by a showing the restriction is necessary to prevent significant consumer harm and is narrowly drawn to minimize its anticompetitive impact.[25] A showing of likely harm is particularly important when, as here, the proposed restraint could prevent consumers from using entire classes of providers. Without a showing of likely harm, restraining competition in a way that is likely to hurt Indiana consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted.

The Justice Department and the FTC are unaware of any showing of likely harm that would justify a broad definition of the practice of law that would effectively preclude many nonlawyers from providing efficient services that are beneficial to Indiana consumers and serve the public interest.[26] The agencies have not seen any factual evidence in Indiana or elsewhere

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[24] *Countrywide Home Loans, Inc. v. Kentucky Bar Association*, No. 2000-SC-0206-KB at 24 (Ky. Aug. 21, 2003).

[25] *Cf. F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

[26] *See Countrywide Home Loans, Inc. v. Kentucky Bar Association*, No. 2000-SC-0206-KB at 33 (Ky.

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demonstrating that consumers are actually hurt by the availability of lay services.[27] Many of the proposed state bar agency unauthorized practice of law opinions that our agencies have reviewed set forth no factual evidence and little evaluation of how the ability of lay services had actually hurt consumers.[28] Likewise, the ISBA's draft rule provides no evidence of consumer harm to be remedied.

Even if the ISBA had concluded that consumers are being harmed by the provision of lay services, the draft rule does not guarantee that Indiana consumers will have the benefit of independent counsel in all situations. The selection, preparation, and completion of legal documents that the rule would require an attorney to do could be done by an attorney representing the other party. In the case of a real estate loan, the work could be done by the lender's lawyer, who represents neither buyer nor seller. These lawyers do not represent the consumer. While they might provide some legal explanations to consumers, they could not provide true legal advice to that consumer.[29]

For consumers, the services of a licensed lawyer may well be desirable in certain situations. A consumer might choose to hire an attorney to answer legal questions, provide legal advice, research the case law, negotiate settlements, or offer various protections. Consumers who hire attorneys may get better service and representation than those who do not. This is, however, no reason to restrict the ability of lay service providers to compete, as the proposed rule would.

Less Restrictive Measures May Protect Consumers

We urge the Committee to refrain from proposing an amendment to the current Admissions and Discipline Rule 24. As the Indiana Supreme Court has explained, there is an "infinite variety" of fact situations that must be judged according to their "own specific circumstances," and, therefore, a comprehensive definition of the practice of law is not

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Aug. 21, 2003); Justice Department and FTC letter to Rhode Island House of Representatives (Mar. 29, 2002); Justice Department and FTC letter to North Carolina Bar (Dec. 14, 2001); Justice Department letter to Kentucky Bar (June 10, 1999); Justice Department and FTC Letter to Virginia Supreme Court (Jan. 3, 1997), *supra* n. 4.

[27] To the contrary, the greatest frauds involving Virginia real estate settlements in Virginia in the 1990s were perpetrated by two attorneys, one of whose schemes cost home sellers and lenders nearly $5 million. *See* Justice Department and FTC letter to Virginia Supreme Court (Jan. 3, 1997), *supra* n.4.

[28] Moreover, a 1999 study by Professor Joyce Palomar of the University of Oklahoma College of Law found that the public did not suffer significantly greater losses from title defects in States where lay persons examined title, drafted mortgage documents, and supervised closings. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423 (1999).

[29] *See Countrywide Home Loans, Inc. v. Kentucky Bar Association*, No. 2000-SC-0206-KB at 30 (Ky. Aug. 21, 2003).

appropriate.[30] Even if the Committee is going to propose a draft rule, we would urge substantial changes so that the rule is appropriately tailored so as not to prohibit lay participation that is beneficial to consumers and in the public interest. As drafted, the proposed rule does not appear tailored to address any harms that might conceivably occur and appears overbroad, going beyond the scope of current Indiana law to prevent competition from lay providers.

Costs that the proposed rule likely would impose on consumers should not be tolerated without a convincing showing that lay services have not only injured Indiana consumers, but also that less drastic measures cannot remedy the perceived problem. If less drastic alternatives are available, they should be incorporated into any proposed statute. It is important to consider all of the facts, to "know all of the implications of the prohibition and its impact on the public" before foreclosing activity as the unauthorized practice of law.[31] The purpose of the power to declare activities to be the unauthorized practice of law is "'to serve the public's right to protection against unlearned and unskilled advice in matters relating to the science of the law . . . in these cases we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation.'"[32]

If a change in the rule is necessary to protect the public, the Committee should consider a formulation that allows greater competition between lawyers and nonlawyers. 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 relationship of trust or reliance." 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."[33] 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

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[30] *Miller v. Vance*, 463 N.E.2d at 251; *see also Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d at 714.

[31] *See In re Opinion No. 26*, 654 A.2d at 1357.

[32] *Id.*, citing *In re Applications of New Jersey Society of Certified Public Accountants*, 507 A.2d 711 (N.J. 1986).

[33] D.C. Court of Appeals Rule 49(b)(2) (2003) (outline letters omitted).

> 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.[34]

Likewise, the Indiana Supreme Court has held that at the heart of the practice of law is "the very sensitive relationship" where the client's confidence and the management of his/her affairs "is left totally in the hands of the attorney."[35]

In addition, the ISBA should omit the prohibition on "indirectly" engaging in the forbidden activities as this has the potential to make the proposed rule ambiguous and prohibit permissible, procompetitive conduct. The expansion created by this term appears to go beyond the scope of existing Indiana restraints on lay competition. Similarly, as proposed above, the ability to sell legal document forms approved by a lawyer should be broadened, for example, as Texas has done. Texas permits the creation, design, sale, or distribution of such software or similar products so long as they clearly and conspicuously state that the products are not a substitute for the advice of an attorney.[36]

Finally, the new proposal would allow any "duly organized local bar association" to bring suit for unauthorized practice of law in any Indiana Circuit Court, in addition to permitting the Indiana Attorney General, Indiana Supreme Court Disciplinary Commission, Indiana State Bar Association (or committee thereof) to bring suit in the Supreme Court. By contrast, the current Rule 24 requires that all actions be brought before the Indiana Supreme Court, and permits local bar associations to bring actions only by leave of court. Because local bar associations may seek to bring such actions to foreclose lay competition, we recommend that the Committee not change the current rule in this regard.

Conclusion

The proposed draft definition, which has ambiguous definitions of the practice of law that go beyond existing Indiana restrictions on the unauthorized practice of law, would likely reduce competition from nonlawyers. Indiana consumers, in turn, would likely pay higher prices and face a smaller range of service options. The proposed amendment contains no showing of harm to consumers from lay service providers that would justify these reductions in competition, and the Department of Justice and the Federal Trade Commission are aware of no such evidence.

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

[35] *Miller v. Vance*, 463 N.E. 2d at 251.

[36] *Unauthorized Practice of Law Comm. v. Parsons Technology, Inc.*, 179 F.3d 956 (5th Cir. 1999).

Without a showing of likely harm, restraining competition in a way that is likely to harm Indiana consumers by eliminating their ability to choose among competing providers is unwarranted. We therefore recommend that Rule 24 be left in its current form, or alternatively, that the proposed revision be narrowed substantially.

Thank you for requesting the opinion of the Justice Department and the Federal Trade Commission. We appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

/s/

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By Order of the
Federal Trade Commission,

/s/
Timothy J. Muris
Chairman

/s/
Todd J. Zywicki, Director
Office of Policy Planning