



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

December 16, 2004

Denise Squillante, Esquire, Co-Chair  
Lee J. Gartenberg, Esquire, Co-Chair  
Task Force To Define The Practice  
Of Law In Massachusetts  
Massachusetts Bar Association  
20 West Street  
Boston, Massachusetts 02111-1204

Re: Comments on Draft Proposed Definition  
of the Practice of Law in Massachusetts

Dear Ms. Squillante, Mr. Gartenberg, and Members of the Task Force:

We are writing about your recent proposal to define the practice of law and enumerate some exceptions. The proposed definition has been formulated by the Massachusetts Bar Association's ("MBA") Task Force to Define the Practice of Law in Massachusetts. The Department of Justice and Federal Trade Commission ("FTC") are concerned that the proposal is not in the best interest of consumers, as it would prevent non-lawyers from providing services in competition with lawyers in situations where there is no clear demonstration that non-lawyer services would actually harm consumers. For example, the definition has the potential to discourage lay activities such as real estate agents explaining certain aspects of a home purchase to consumers, accountants providing advice regarding tax filings, and the use of interactive self-help legal software to produce simple legal documents. This would likely raise costs for consumers and limit their choices. Because the proposed rule is likely to restrain competition without providing any benefits to consumers, we recommend against adopting such a definition of the practice of law. 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.

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. 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.'"<sup>1</sup> Competition benefits consumers of both traditional manufacturing industries and professional services.<sup>2</sup> 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 are concerned about increasing efforts to prevent non-lawyers from competing with attorneys in providing certain services through the adoption of excessively broad 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."<sup>3</sup> 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 FTC and Justice Department have urged the American Bar Association and the Indiana State Bar Association, as well as the states of Virginia, Rhode Island, Kentucky, North Carolina, Georgia, West Virginia, and Ohio, to reject such restrictions on competition between lawyers and non-lawyers.<sup>4</sup> We recently submitted a letter in support of

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<sup>1</sup> *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).

<sup>2</sup> 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. American Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

<sup>3</sup> Professor Catherine J. Lanctot, Villanova University Law School, "Regulating the Provision of Legal Services in Cyberspace," remarks at the Federal Trade Commission Public Workshop on *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Internet Legal Services* (Oct. 9, 2002), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/lanctot.pdf>.

<sup>4</sup> Letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (October 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), available at

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legislation permitting real estate closing services to be performed by non-lawyers in Massachusetts in response to a request by Representative Paul Kujawski of the Massachusetts House of Representatives.<sup>5</sup> Separately, the Department of Justice has obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-lawyers, since this conduct violates the antitrust laws.<sup>6</sup> Our ongoing efforts in this area have led us to submit these comments.

### The MBA Task Force's Proposed Rule Change

The MBA's Task Force has drafted a proposed definition of the practice of law. Section (c) states that:

A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

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<sup>4</sup>(...continued)

<http://www.usdoj.gov/atr/public/comments/comments.htm>; 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 FTC in *Cleveland Bar Association v. CompManagement, Inc.*, No. 04-0817 (filed Aug. 3, 2004), available at <http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf>; Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahan 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> and <http://www.ftc.gov/be/V040017.pdf>; 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.ftc.gov/os/2003/07/georgiabrief.pdf> and <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 to the American Bar Association, Indiana, Rhode Island, North Carolina, Georgia, and Virginia may be found on the FTC's web site, <http://www.ftc.gov>, and the Department of Justice's website, <http://www.usdoj.gov/atr/public/comments/comments.htm>.

<sup>5</sup> Letter from the Justice Department and the FTC to Representative Paul Kujawski of the Massachusetts House of Representatives (Oct. 6, 2004).

<sup>6</sup> In *United States v. Allen County Bar Association*, the Justice Department 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 F. Supp. 435 (D.D.C. 1996), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001); *National Soc'y of Prof'l Eng'rs 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).

- (1) Giving advice or counsel to a person as to his or her legal rights or responsibilities or those of others;
- (2) Selecting, drafting, reviewing, recording, or completing legal documents or agreements that affect the legal rights or responsibilities of a person;
- (3) Creating, conveying, evaluating, or terminating a person's legal interest in real property;
- (4) Representing a person before a tribunal, including, but not limited to, preparing or filing documents or conducting discovery, or appearing before such body; or
- (5) Negotiating legal rights or responsibilities on behalf of a person.

Section (d) of the draft lists certain exceptions to the presumption:

Exceptions: The following are permitted as exceptions to the requirements of Paragraph (a):

- (1) Serving in a neutral non-adjudicative capacity as a mediator, conciliator or facilitator, or in an adjudicative capacity under court supervision;
- (2) Affording advocacy assistance by non-lawyers through a governmental entity, a qualified legal assistance organization, or a not-for-profit entity, where no fee is charged, or as permitted by G.L.c.209A;
- (3) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements; and
- (4) Participating in a regulatory or administrative proceeding pursuant to the rules of the agency, where no fee is charged for such participation.

We understand that the Task Force originally submitted its proposal to the MBA House of Delegates last Spring and that the House referred the proposal back to the Task Force for further review and consideration. The Task Force has proposed that (1) the House of Delegates adopt the definition, and (2) the House of Delegates authorize a petition to the Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct to incorporate the proposed definition into the Massachusetts Rules of Professional Conduct.

The MBA is a private organization of lawyers and is not a state agency. This letter is addressed to the MBA's proposal to the Supreme Judicial Court to change the rules. The 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 Task Force or the MBA to define certain activities as the practice of law for any other purpose. Nor does the letter address whether the MBA has adopted adequate safeguards to ensure that its discussions on this issue do not violate the antitrust laws.

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 circumstances requiring the knowledge and skill of a person trained in the law. Nonetheless, the Justice Department and the FTC believe that consumers generally benefit from lawyer-non-lawyer competition in the provision of many services.

Prohibitions on the unauthorized practice of law should serve the public interest, as the Massachusetts Supreme Judicial Court recognized in *Lowell Bar Ass'n v. Loeb*.<sup>7</sup> An inquiry into the public interest, however, involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.<sup>8</sup> More recently, the Supreme Court of New Jersey has 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.

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.<sup>9</sup>

The MBA Task Force has proposed to define broadly what constitutes the practice of law in Massachusetts. This proposed definition is not in the public interest because, by unnecessarily

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<sup>7</sup> *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943).

<sup>8</sup> See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb*, 421 U.S. at 787.

<sup>9</sup> *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995).

limiting competition between attorneys and non-attorneys, it will likely cause more harm to consumers than it may prevent. Indeed, one senior member of the MBA Task Force who helped introduce the proposal to the MBA's House of Delegates said, "Business and government is [sic] seeking to level the playing field on the theory that consumers will have more choice and this will drive prices down for legal services," adding that "we are going to be marginalized out of practice."<sup>10</sup> This statement suggests that the purpose of the definition is to protect lawyers from competition, not to serve the interests of the public.<sup>11</sup>

### The Proposed Rule Would Likely Hurt Massachusetts Consumers by Restraining Competition Between Lawyers and Non-lawyers

The Justice Department and the FTC believe that adopting the proposed definition would harm consumers and fail to serve the public interest. The broad restrictions on lay practice found in the draft definition – and the narrow exceptions found in subsection (d) – could restrict and eliminate many forms of lawyer/non-lawyer competition. While developing an exhaustive list of all possibly affected lay activities may be difficult, some 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;
- tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant problem;<sup>12</sup>

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<sup>10</sup> Massachusetts Bar Association, *Delegates Debate Law Practice Definition, Other Issues At May Meeting* (June 9, 2004), available at [http://www.massbar.org/article.php?c\\_id=6650](http://www.massbar.org/article.php?c_id=6650).

<sup>11</sup> See *Lowell*, 52 N.E.2d at 31 (excluding non-attorneys from performing certain tasks cannot be justified on the grounds of "protection of the bar from competition").

<sup>12</sup> This activity would be exempted under Section (d)(2) of the proposed definition only if (1) the tenant receiving advice is deemed to be "a person who has obstacles to access to justice;" and (2) the tenants' association does not charge a fee and is a government entity, a not-for-profit entity, or a "qualified legal assistance organization," defined as:

a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe on the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

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- 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;
- 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;<sup>13</sup>
- 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; and
- inexpensive electronic software to complete wills, trusts, tax forms, and other legal documents, because the applications can be 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.<sup>14</sup>

By Prohibiting Non-lawyer Competition for Many Services,  
the Proposed Rule Would Likely Hurt the Massachusetts  
Public by Raising Prices and Reducing Consumer Choice

When non-lawyers compete with lawyers to provide services that do not require formal legal training, Massachusetts consumers may 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 use of lay services also can reduce costs to consumers.

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<sup>12</sup>(...continued)

*See* Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law* and Proposed Rule 9.1(i) in Ex. B to *Report of the Task Force to Define the Practice of Law*.

<sup>13</sup> Section d(2) of the proposed definition would exempt lay organizations, advocates, and consumer associations only if these entities provided advice to institutionalized persons, or to “a person who has obstacles to access to justice.” *See* Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law*. Further, to qualify for the exception under Section d(2), these entities cannot charge a fee and must be either a government entity, a not-for-profit entity, or a “qualified legal assistance organization.”

<sup>14</sup> *See* Section c(2) of the proposed definition, which would define “selecting, drafting . . . or completing legal documents” as the practice of law.

By limiting the ability of lay persons to provide such services in competition with lawyers, the proposed rule would eliminate or reduce many of these benefits, potentially harming Massachusetts consumers in several ways. First, the proposal would force consumers who would not otherwise hire a lawyer to do so. Businesses and individuals that rely on accountants, bankers, advocacy organizations, or other lay people for advice and information related to the services that these professionals provide arguably would be required to hire attorneys instead. Hence, the proposal could increase costs for all consumers who might prefer the combination of price, quality, and service that a non-lawyer provider offers. For example, although accountants and tax preparers do not typically itemize the legal-related functions 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 individual and organizational advocates are often provided at substantially lower cost than an attorney would charge. Evidence suggests that the use of lay real estate closers in various states provides a lower cost alternative for consumers.<sup>15</sup> 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.<sup>16</sup> Further, the proposal may hurt Massachusetts 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. For example, consumers may choose to use legal software packages, like the will and trust-writing software, because they are relatively easy and convenient to use.

Second, by eliminating competition from non-lawyers, the proposed rule 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 Massachusetts consumers who would otherwise choose an attorney over a lay service provider would likely pay higher prices if the proposed rule were adopted. The New Jersey Supreme Court reached this same conclusion 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.<sup>17</sup> Likewise, in August 2003, the Kentucky Supreme

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<sup>15</sup> See, e.g., *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003) (“before title companies emerged on the scene, [the Kentucky Bar Association’s] members’ rates for such services were significantly higher”). 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.

<sup>16</sup> While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software that permits the consumer to draft a simple will is available for less than \$100.

<sup>17</sup> 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  
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Court concluded that prices for real estate closings for attorneys dropped substantially as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."<sup>18</sup>

Finally, because the unauthorized practice of law is a crime in Massachusetts, punishable by a fine or imprisonment,<sup>19</sup> the Task Force should act with particular care in seeking to have the Supreme Judicial Court define activities as the practice of law. The broad definition the MBA has proposed, coupled with such stringent punishment, is likely to chill conduct even beyond that which the MBA intends to prohibit. For example, some accountants or real estate agents may be hesitant to provide clients with non-legal advice for fear of being engaged in the unauthorized practice of law. By further limiting the areas where non-attorneys are willing to practice, this over-deterrence is likely to exacerbate cost increases borne by consumers.

#### There Is No Indication that the Proposed Definition Is Needed to Prevent Significant Consumer Harm

Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a showing that they are necessary to prevent significant consumer harm and are narrowly drawn to minimize its anticompetitive impact.<sup>20</sup> 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 that current practice harms consumers, a restraint on competition is likely to hurt Massachusetts consumers by raising prices and eliminating their ability to choose among competing providers, without providing any countervailing benefits. The Justice Department and FTC are unaware of any evidence that allowing non-lawyers to provide certain services has harmed consumers so as to justify a broad definition of the practice of law that effectively precludes non-lawyers from providing many services that benefit consumers and serve the public interest.

First, the agencies have not seen any factual evidence from the Task Force Report demonstrating that consumers are actually hurt by the availability of lay services. The Task Force Report asserts that

the chief reason for defining the practice of law is to protect the public welfare and ensure that members of the public not suffer harm from the activities of persons who are

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<sup>17</sup>(...continued)

Virginia Supreme Court and Virginia State Bar, *supra* n.4.

<sup>18</sup> *Countrywide Home Loans, Inc.*, 113 S.W.3d at 120.

<sup>19</sup> G.L.c. 221 § 41.

<sup>20</sup> *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 market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

not trained to apply the general body and philosophy of the law to fact specific matters, who may be influenced by factors other than their client's interests, or who are not subject to the direct oversight and supervision of the Court.<sup>21</sup>

Yet the Task Force offers no evidence that consumers have “suffer[ed] harm” under the current regime.<sup>22</sup> Absent such evidence, it does not appear that the proposed definition is needed to “protect the public welfare.”

Further, the Task Force's proposal seeks, among other things, to declare all real estate conveyancing and closing activity to be the practice of law. But, as the Justice Department and FTC observed in our recent letter to Massachusetts Representative Paul Kujawski, those that have examined the issue have failed to find evidence that allowing non-attorneys to perform real estate settlement functions results in consumer harm. For example, opponents of allowing lay settlements have expressed a concern that buyers and sellers will have questions about the transaction and the documents that a lay settlement provider cannot or should not answer.<sup>23</sup> However, with regard to the Kentucky Bar's assertion that attorneys need to be present at closing to answer legal questions, the Kentucky Supreme Court found that “few, if any, significant legal questions arise at most residential closings.”<sup>24</sup> Further, with regard to a list of questions the Kentucky Bar alleged were likely to arise at closing, the court noted that “most of the witnesses conceded that questions of the nature of those [questions] listed . . . are asked, if ever, before the closing, when there is time to resolve any problems.”<sup>25</sup> Likewise, the New Jersey Supreme Court found that the South Jersey practice of using non-attorneys to settle real estate transactions “has been conducted without any demonstrable harm to sellers or buyers.”<sup>26</sup>

Scholarship also supports the conclusion that consumers face no additional risk of harm from turning to lay providers to perform real estate settlement services. One study, for example, compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibit lay provision of these settlement services. The author found “[t]he only clear conclusion” to be “that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision

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<sup>21</sup> Report at ex. A, p.1.

<sup>22</sup> As noted by the Justice Department and the FTC in a 1997 letter to the Virginia Supreme Court, attorneys have been responsible for fraud involving Virginia real estate settlements in the 1990s. *See* Justice Department and FTC letter to Virginia Supreme Court (Jan. 3, 1997), *supra* n.4.

<sup>23</sup> *See, e.g., Mass. Conveyancers Ass’n, Inc. v. Colonial Title & Escrow Inc.*, 2001 Mass. Super. LEXIS 431, at \*20-21 (Suffolk, June 5, 2001).

<sup>24</sup> *Countrywide Home Loans, Inc.*, 113 S.W.3d at 119.

<sup>25</sup> *Id.*

<sup>26</sup> *In re Op. No. 26*, 654 A.2d at 1359.

of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."<sup>27</sup>

Similarly, scholarship indicates that consumers in other areas likely to be affected by the proposed definition face little risk of harm from non-lawyer competition. According to Professor Deborah Rhode, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find that they perform as well as or better than lawyers.<sup>28</sup> Likewise, a systematic survey found that complaints about unauthorized practice of law in most states did not come from consumers (who would be the victims of such conduct) but from lawyers, who did not allege any claims of specific injury.<sup>29</sup> 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.<sup>30</sup>

It is also important to note that the proposed definition does not guarantee that Massachusetts consumers will have the benefit of independent or experienced counsel; it only assures that an attorney, rather than a lay person, will be involved in certain transactions. 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. Real estate loan work could be done by the lender's lawyer, and the attorney who settles a real estate transaction typically will represent the lender as well. In these cases, the lawyers involved do not represent the consumer. While they might provide some legal explanations to consumers, they could not provide true

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<sup>27</sup> Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 520 (1999).

<sup>28</sup> 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”).

<sup>29</sup> *Id.*

<sup>30</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

legal advice to a consumer or protect him or her.<sup>31</sup> Nor would their presence likely give a consumer the leverage to halt a transaction that is against his or her best interest. The same is true of a lawyer who represents both lender and buyer. Under Massachusetts law, moreover, absent such an attorney-client relationship, a party cannot assert a malpractice claim against an attorney.<sup>32</sup> In addition, the only requirement in the Task Force definition is that it be a lawyer who performs the service; the lawyer need not have any particular expertise or experience with the type of law or service.

Although the intent of the Task Force's proposal may be to ensure that consumers receive advice only from highly-trained individuals, consumers who receive assistance from individual advocates and advocacy organizations may be unable to hire a lawyer and may simply go without assistance altogether. A 1996 ABA task force survey, for example, concluded that low income (less than \$25,000 per year) and middle-income (between \$25,000 and \$60,000 per year) households are severely underserved by the legal system.<sup>33</sup> Specifically, the ABA found that of the low- and middle-income households in the sample that had legal problems, only one-third of low-income and only 40 percent of middle-income households handled them through the legal system. Though cost was a lesser concern for middle-income households, both low- and middle-income households listed cost as a major reason for avoiding the legal system.<sup>34</sup> Given its very narrow exemption for advocacy programs, the proposed definition is likely to thwart attempts to provide cost-effective legal services to this underserved population.<sup>35</sup>

For consumers, the services of a licensed lawyer may well be desirable in certain situations. A Massachusetts 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 non-lawyers to compete, as the proposed Task Force definition would.

Until demonstrated otherwise, accountants, bankers, individual advocates and advocacy organizations, real estate brokers, and other skilled professionals should remain able to provide advice and legal information related to their particular practices without harming the public.

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<sup>31</sup> See *Countrywide Home Loans, Inc.*, 113 S.W.3d at 122.

<sup>32</sup> See, e.g., *McCormack v. Galego*, 1996 WL 131209, at \*3 (Mass. Super. Mar. 4, 1996).

<sup>33</sup> 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.

<sup>34</sup> *Id.*

<sup>35</sup> See notes 12-13, *supra*.

This already occurs every day in multiple jurisdictions, with little or no evidence that consumers would benefit if the same advice were provided solely by an attorney.

### Less Restrictive Measures May Protect Consumers

Absent a clear demonstration not only that lay services have injured Massachusetts consumers, but also that less drastic measures cannot remedy any perceived problem, the proposed definition should not be adopted. Indeed, as a threshold matter, less restrictive alternatives to protect consumers are already in place. First, through reputation, the marketplace is likely to limit the ability of non-attorneys to provide shoddy service or otherwise take advantage of consumers. As the Kentucky Supreme Court has recognized, lay providers earn their livelihoods from providing these services; they risk those livelihoods if they commit acts that hurt consumers.<sup>36</sup> Consequently, they have great incentives to act ethically and professionally. Further, just as attorneys are subject to statutory, malpractice, and contract claims, lay providers are subject to similar claims if their negligence causes consumer harm.<sup>37</sup> For example, G.L.c. 93A provides a cause of action to consumers and businesses harmed by “unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>38</sup>

Although we urge the Task Force to refrain from proposing this amendment to the current Massachusetts Rules of Professional Conduct, if the Task Force considers a change in the rules necessary, any change should be narrowly tailored to address demonstrated harms and not to prohibit non-lawyer competition that is beneficial to consumers and in the public interest. Less restrictive alternatives are available to protect consumers. In real estate closings, for example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in

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<sup>36</sup> *Countrywide Home Loans, Inc.*, 113 S.W.3d at 121.

<sup>37</sup> *Id.*

<sup>38</sup> G.L.c. 93A § 2. G.L.c. 93A § 9 provides a cause of action for consumers, and G.L.c. 93A § 11 provides a cause of action for businesses. A consumer may have additional leverage over an attorney who provides shoddy or dishonest service because the consumer can refer the attorney to the bar association for misconduct, and an attorney also may be less likely to be “judgment proof” to the extent that he or she is more likely than a non-attorney to carry malpractice insurance against negligence claims. Further, in a negligence case, an attorney likely is subject to a higher standard of care than is a lay provider. *See Fishman v. Brooks*, 487 N.E.2d 1377, 1379 (Mass. 1986) (standard of care for non-specialist in a legal malpractice suit is “the degree of care and skill of the average qualified practitioner”). Nevertheless, there is no reason to believe that the standard of care the law requires of a lay person is below what is necessary to perform correctly a legal task entrusted to him or her, especially in view of the generally simple legal tasks most often performed by non-attorneys. Further, it is likely to be more costly for a consumer to bring a legal malpractice case against an attorney than to bring a negligence case against a lay person. Under Massachusetts law, a lawyer’s breach of the duty of care must be proven by expert testimony, unless “the alleged malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence.” *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 515 N.E.2d 891, 894 (Mass. App. Ct. 1987) (internal quotations omitted).

proceeding with a real estate transaction without an attorney.<sup>39</sup> This measure permits consumers to make an informed choice about whether to use lay closing services.

### Conclusion

The Task Force's proposed definition of the practice of law will likely unnecessarily and unreasonably reduce competition between attorneys and non-attorneys. Massachusetts consumers will likely pay higher prices and face a smaller range of service options with little or no offsetting benefit. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition. As the New Jersey Supreme Court has concluded:

Not every such intrusion by laypersons into legal matters disserves the public: this Court does not wear public interest blinders when passing on unauthorized practice of law questions. We have often found, despite the clear involvement of the practice of law, that non-lawyers may participate in these activities, basing our decisions on the public interest.<sup>40</sup>

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

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<sup>39</sup> *In re Opinion No. 26*, 654 A.2d at 1363.

<sup>40</sup> *Id.* at 1352.

Sincerely yours,

/s/

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