



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

June 21, 2006

By email and first class mail
Assemblywoman Helene E. Weinstein
Chair, Committee on Judiciary
New York State Assembly
3520 Nostrand Avenue
Brooklyn, NY 11229

Re: Assembly Bill A05596

Dear Assemblywoman Weinstein:

Pursuant to our conversations with Committee on Judiciary ("the Committee") staff, we are pleased to provide our comments on Assembly Bill A05596 ("A05596" or "the bill" or "the proposed legislation") which would establish that certain services related to real estate transactions may be provided only by attorneys.

The Justice Department and the Federal Trade Commission ("FTC") believe that non-attorneys should be permitted to compete with attorneys except where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers. Competition leads to lower prices, better products and services, and enhanced consumer choice. We are concerned that the proposed legislation, which would prevent non-attorneys from competing with attorneys in situations where there is no clear showing that non-attorney service providers have caused consumer harm, is not in the best interests of consumers. We recommend that the Committee reject the bill so as to preserve attorney/non-attorney competition.

The Interest and Experience of the U.S. Department
of Justice and the Federal Trade Commission

The Justice Department and the FTC are entrusted with enforcing the federal antitrust laws. We work to promote free and unfettered competition in all sectors of the American

economy. The United States Supreme Court has observed that “ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”¹ Like all consumers, consumers of professional services benefit from competition,² and if competition to provide such services is restrained, consumers may be forced to pay increased prices or accept services of lower quality.

The Justice Department and the FTC are concerned about increasing efforts across the country to prevent non-attorneys from competing with attorneys through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures. In addressing these concerns, the Justice Department and the FTC encourage competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these letters and filings, the Justice Department and the FTC have urged several states, the American Bar Association, and many state bar associations to reject or narrow such restrictions on competition between attorneys and non-attorneys.³ Separately, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition by non-

¹ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); accord *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

² See, e.g., *Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); see also *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), modified, 135 F. Supp. 2d 28 (D.D.C. 2001).

³ See letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (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 Ass'n (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm>; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at <http://www.usdoj.gov/atr/cases/f201100/201197.htm>; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. 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, Massachusetts, North Carolina, Georgia, Kansas, and Virginia may be found on the Department of Justice's website, <http://www.usdoj.gov/atr/public/comments/comments.htm>.

attorneys in violation of the antitrust laws.⁴ These comments are part of our ongoing efforts in this area.

The Proposed Legislation

Section 484 of Article 15 of New York’s Judiciary Law states that certain activities, including “preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate,” may only be performed by attorneys.⁵ The proposed legislation would add a new section, 484-A, which would define the following tasks as “the historic and essential elements of the practice of relevant real estate law in the state:”

- conducting title searches;
- preparing title abstracts;
- reading or rendering opinions on real estate titles and the insurability of said titles;
- preparing or issuing title insurance reports or commitments;
- clearing title exceptions;
- marking up title insurance reports or commitments;
- collecting title insurance premiums; and
- issuing title insurance policies on behalf of title insurance companies.⁶

While proposed Section 484-A does not expressly bar non-attorneys from providing these services, defining such services as “the historic and essential elements of the practice of . . . law” will have the same practical effect.

The proposed legislation would also expand the list of activities that only an attorney may provide to include certain activities that presently can be conducted in New York by non-attorneys. Specifically, the proposed legislation would prohibit anyone other than an attorney from:

⁴ In *United States v. Allen County 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. N.Y. 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 lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). See also *United States v. 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. See, e.g., *United States v. Am. Bar Ass’n*, 934 Supp. 435; *Prof’l Eng’rs*, 435 U.S. 679; *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc’y of Authors’ Reps.*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

⁵ N.Y. Jud. L. Art. 15 § 484 (McKinney’s 2006).

⁶ A05596 § 2.

- giving advice or negotiating the terms and conditions for the sale of real property;
- preparing contracts or agreements for the sale of real property;
- rendering opinions on the legal status of or requirements to clear real estate titles; and
- preparing or receiving compensation for passing upon the regularity and legality of legal documents or instruments.⁷

The proposed legislation would further modify Article 15 by amending Section 495. Subsection 5 of Section 495 currently allows corporations and voluntary associations (collectively, “companies”) to examine and insure titles to real property, and to prepare deeds, mortgages, assignments, discharges, leases or any other instruments affecting real property “insofar as such instruments are necessary to the examination and insuring of titles, and necessary or incidental to loans made by any such corporation or association.”⁸ A05596 would bar non-attorneys employed by such companies from performing such work.⁹ It also would bar these companies from representing anyone in a real estate or mortgage closing, or any other legal transaction or activity where A05596 bars non-attorney service providers.¹⁰

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

The Justice Department and the FTC recognize that there are services requiring the knowledge and skill of a person trained in the law that should be provided only by attorneys. However, we also believe that consumers benefit from attorney/non-attorney competition in the provision of many other services. Allowing non-attorneys to compete in the provision of certain types of services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. As the United States Supreme Court stated:

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*

⁷ *Id.*

⁸ N.Y. Jud. L. Art. 15 § 495.5 (McKinney’s 2006).

⁹ A05596 § 3.

¹⁰ *Id.*

durability - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.¹¹

In general, competition policy calls for any restriction on competition to be justified by a valid need for the restriction, such as the need to protect the public from harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.¹² The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-attorneys to perform certain tasks, but also consideration of the benefits that accrue to consumers when attorneys and non-attorneys compete.¹³

The Proposed Legislation Would Likely Hurt New York Consumers by Restraining Competition Between Attorneys and Non-Attorneys

The Justice Department and the FTC believe that adopting the proposed legislation would harm consumers and not serve the public interest. The legislation's restrictions on non-attorney service providers will eliminate attorney/non-attorney competition for many services where competition likely benefits consumers. If the proposed legislation is adopted, New York consumers likely will be disadvantaged in at least the following ways:

- Prices that consumers pay to negotiate real estate transactions are likely to increase. The proposed legislation would force New Yorkers to retain an attorney to obtain "advice or [to] negotiate the terms and conditions of and thereafter prepare contracts or agreements for the sale of real property."¹⁴ It would further harm consumers by removing significant non-attorney competition from the marketplace with respect to the sale of real property. This would appear to be contrary to the long history of real estate transactions in New York,¹⁵ and as explained below would likely result in an increase in fees charged by attorneys for real estate services.

¹¹ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (emphasis added); *accord*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

¹² *Cf. FTC v. Ind. Fed'n 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).

¹³ *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

¹⁴ A05596 § 1.

¹⁵ *See, e.g., Duncan & Hill Realty, Inc. v. Dep't of State*, 62 A.D.2d 690, 696 (N.Y. App. Div., 1978) (noting that "from time immemorial real estate brokers and agents have drafted 'simple' contracts between their clients as part of their work").

- Costs for Tasks Relating to Insurability of Title Are Likely to Increase. Section 495 of Article 15 currently appears to allow non-attorneys to perform such tasks as title searches, the preparation of title abstracts, and other services related to the insurability of titles.¹⁶ The proposed legislation would require title companies to hire attorneys to provide these services,¹⁷ and is thus likely to result in higher prices.
- Real estate closing costs are likely to increase. The proposed legislation would bar non-attorneys from conducting closings. Subsection 5 of Section 495 would prohibit corporations and voluntary associations that provide title services from representing anyone “in a real estate or mortgage closing wherein none but attorneys may act as set forth in [Article 15].”¹⁸ If a closing requires any of the services that the legislation states must be provided by an attorney, a title company may not represent a party at that closing, and the consumer or the title company will be forced to hire an attorney. Thus, the effect of the bill will likely be to increase the price of closing, particularly to those consumers who would otherwise not choose to hire an attorney.¹⁹
- Fees for legal representation relating to real estate transactions are likely to increase. The availability of alternative, lower-cost lay services typically constrains the fees that attorneys can charge.²⁰ The proposed legislation would eliminate that constraint. All consumers, even those who ordinarily would choose an attorney over a lay agent, may be forced to pay higher fees.
- Fees charged for real estate services currently provided by non-lawyers are likely to increase. By prohibiting the use of non-attorney title and closing services the proposed legislation will likely reduce competition from mortgage lenders, title

¹⁶ N.Y. Jud. L. Art. 15 § 495.5 (McKinney’s 2006).

¹⁷ See A05596 § 3.

¹⁸ A05596 § 3.

¹⁹ 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 approximately \$150 less than attorney closings. See Letters to the Virginia Supreme Court and Virginia State Bar, *supra* n. 3.

²⁰ See, e.g., *Countrywide Home Loans, Inc. v. Ky. 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”). See also, *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995) (Evidence gathered in that proceeding indicated that buyers and sellers in areas of New Jersey where lay-assisted closings were prevalent paid on average \$350 and \$450 less for closings, respectively, than buyers and sellers in parts of the state where lay-assisted closings were not prevalent.)

companies, title insurers and other service providers who may rely on alternative service providers to conduct title searches, record deeds and financing, and perform other services. These entities will be forced to hire attorneys to perform such services and would likely need to raise the prices that they charge New Yorkers to offset their higher costs.

**There Is No Indication that the Proposed Restrictions
Are Needed to Prevent Significant Consumer Harm**

The Committee should reject A05596 unless it is presented with strong factual evidence demonstrating that New Yorkers are being harmed by the availability of real estate transaction services performed by non-attorneys, and that such harm is not outweighed by the harm to consumers of foreclosing competition. The Justice Department and the FTC are not aware of evidence demonstrating that consumers have been harmed by non-attorneys giving advice or negotiating terms and conditions for the sale of real property, preparing contracts or agreements for such transactions, or conducting title searches – activities that are commonly provided by non-attorneys in many states.²¹ In the absence of such evidence, we believe that the proposed legislation’s expansion of the definition of the practice of law unnecessarily limits competition between attorneys and non-attorneys, and will likely cause more harm to consumers than it may prevent. It is thus not in the public interest.

Many of the services the proposed legislation would reserve for attorneys do not require the special skills, training, and abilities of an attorney. For example, legal training is almost certainly not required to collect title insurance premiums, issue title insurance policies on behalf of title insurance companies, or issue title insurance reports. The Kansas Bar Association, to cite one example, specifically exempted these services from the definition of the practice of law that it proposed to the Kansas Supreme Court in 2005.²² The proponents of A05596 have not demonstrated that skilled non-attorneys cannot perform such tasks effectively.

Consumers likely face little risk of harm from non-attorney competition in many areas. For example, studies of lay specialists who provide bankruptcy and administrative agency

²¹ The memorandum in support of the proposed legislation asserts that consumers have been harmed by non-attorney real estate brokers and title insurance agents but provides no data showing that such harm occurs to a meaningful extent. *See* Memorandum in Support of Legislation, at <http://assembly.state.ny.us/leg/?bn=A05596>. Furthermore, the memorandum provides no evidence that whatever harm occurs outweighs the benefits consumers derive from the existence of lay providers as an alternative to attorneys. *Id.*

²² The Justice Department and the FTC submitted comments to the Kansas Bar Association regarding its proposed definition. *See* Letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass’n (Feb. 4, 2005), available at <http://www.usdoj.gov/atr/public/comments/comments.htm>.

hearing representation found that they perform as well as or better than attorneys.²³ Another study 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 of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law.”²⁴ Perhaps most significantly, a recent survey found that complaints about the unauthorized practice of law in most states did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury.²⁵ 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.²⁶

In short, the drafters of A05596 appear not to have made a substantive showing of need to justify the extensive prohibitions of lay service competition that they have proposed. Absent such a showing, restraining competition in a way that is likely to harm New Yorkers by raising prices and eliminating their ability to choose among competing providers is unwarranted.

²³ 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”).

²⁴ Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 520 (1999).

²⁵ Rhode, *supra* n.22, at 407-08.

²⁶ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

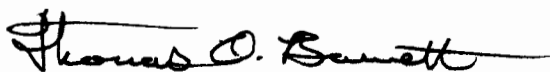
Conclusion

The assistance of an attorney during a real estate-related transaction may be desirable, and consumers may decide to retain an attorney in certain situations. A consumer might choose to hire an attorney to answer legal questions, perform title work, provide advice, or resolve disputes. Consumers who hire attorneys may in fact get better service and representation than those who do not. Nonetheless, the choice of hiring an attorney or a non-attorney should rest with the consumer, particularly where there is no evidence that consumers are harmed by using non-attorneys to provide certain types of real estate services.

The proposed legislation likely will unnecessarily and unreasonably reduce competition between attorneys and non-attorneys for services related to real estate transactions. We urge the Committee to reject it.

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

Sincerely yours,

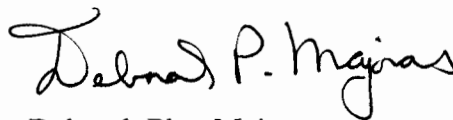


Thomas O. Barnett
Assistant Attorney General

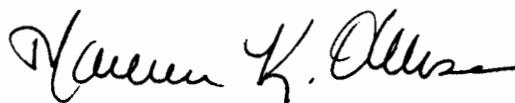


Aaron Comenetz
Trial Attorney
United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,



Deborah Platt Majoras
Chairman



Maureen K. Ohlhausen
Director
Office of Policy Planning