



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

March 20, 2003

Standing Committee on the  
Unlicensed Practice of Law  
UPL Advisory Opinions  
State Bar of Georgia  
104 Marietta Street, NW  
Suite 100  
Atlanta, Georgia 30303

Re: Comments On Potential Unlicensed Practice Of Law  
Opinion Regarding Real Estate Closing Activity

Dear Committee Members:

The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") submit this letter in response to the solicitation for public comments by the Standing Committee on the Unlicensed Practice of Law about the performance of certain real estate closing-related activities by nonlawyers. At its March 21, 2003, public hearing, the Standing Committee will address this question:

Is the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender?

In sum, the Standing Committee will consider whether preparing a deed and facilitating its execution—regardless of whether such deed effects a change of ownership—is the practice of law, thus prohibiting nonlawyers from competing with lawyers to provide these services. Deeds are involved in many types of real estate transactions in Georgia, including, but not limited to the purchase and sale of property (which includes the execution of a warranty deed), mortgage transactions which take the form of a security deed in Georgia; the refinancing of mortgage loans and the creation of new security deeds for that purpose, and the obtaining of second mortgages

and home equity lines of credit through deeds that secure debt. Deeds are executed in both residential and commercial transactions. Thus, an opinion such as the one under consideration by the Standing Committee, defining these activities as the practice of law, may have a very broad impact.

Consumers can benefit when nonlawyers compete to provide services that do not legitimately constitute the practice of law. Banning such competition is likely to increase closing costs and decrease convenience for Georgia consumers and businesses. 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>1</sup> Such concerns bespeak caution when, as here, the Standing Committee is asked to define the practice of law in a way that would curb competition from lay providers in preparing and facilitating the execution of deeds. 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 requested opinion is likely to restrain competition while likely providing little benefit to consumers, the DOJ and the FTC urge the Standing Committee to find that preparing or facilitating the execution of a deed is not the practice of law, but instead is an activity that can be performed by lay practitioners. Alternatively, we urge the Standing Committee to render no opinion on this issue.

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

The DOJ 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>2</sup> Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions.<sup>3</sup> Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

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<sup>1</sup> *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), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/lanctot.pdf>.

<sup>2</sup> *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).

<sup>3</sup> 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).

Together, the DOJ and the FTC have become increasingly concerned about efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of opinions and laws by state courts and legislatures relating to the unlicensed practice of law.<sup>4</sup> In addressing these concerns, the DOJ and the FTC encourage competition through advocacy letters such as this one. The DOJ and the FTC have been concerned particularly about attempts to restrict nonlawyer competition in real estate closings. We have urged the American Bar Association and the States of Kentucky, Virginia, Rhode Island, and North Carolina to reject such restrictions, through letters and through an *amicus curiae* brief filed with the Kentucky Supreme Court in 2000 by the DOJ.<sup>5</sup> Moreover, the DOJ has brought suit against bar associations that have attempted to restrain competition from nonlawyers and it obtained injunctions prohibiting this conduct.<sup>6</sup> The FTC also has challenged anticompetitive restrictions on certain business practices of lawyers.<sup>7</sup> Our ongoing concern in this area has led us to submit these comments.

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<sup>4</sup> In some states, state bar agencies' governing bodies adopt the opinions, which are reviewed and approved by the state Supreme Court. *See, e.g.*, Va. S. Ct. R. Pt. 6, § IV ¶ 10 (requiring approval of unauthorized practice of law opinions by both the governing Council of the Virginia State Bar and the Virginia Supreme Court); Ky S. Ct. R. 3.530 (requiring approval of a proposed opinion by the Kentucky Bar's Board of Governors; "any person or entity aggrieved or affected" by the opinion has the right to appeal to the Supreme Court).

<sup>5</sup> Letter from the DOJ and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002) *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; letter from the DOJ and the FTC to Speaker of the Rhode Island House of Representatives, et al. (Mar. 29, 2002); letter from the DOJ and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the DOJ 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 DOJ to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997); letter from the DOJ and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the DOJ and the FTC to Virginia State Bar (Sept. 20, 1996). The letters to the American Bar Association, Rhode Island, 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 DOJ letter to the Kentucky Bar Association is available at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the Brief to the Kentucky Supreme Court at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>.

<sup>6</sup> In *United States v. Allen County Indiana Bar Ass'n*, the DOJ 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 DOJ 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).

<sup>7</sup> *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 Requested Opinion and Public Hearing

Under the Georgia Code, the practice of law includes "conveyancing."<sup>8</sup> Under current law, nonlawyers may compete with attorneys to provide some services related to preparing deeds and facilitating their execution, i.e., incident to conveyancing. Examples include drafting deeds for lawyers, examining the title record and clearing exceptions to that title, and facilitating of the signing of the deed.<sup>9</sup> The Standing Committee has been asked whether preparing the deed and facilitating its execution constitutes the unlicensed practice of law.

State Bar of Georgia Rule 14-9.1(f) describes the procedure by which the Standing Committee may issue an unlicensed practice of law opinion. Although there is some ambiguity to the rule, the Standing Committee may issue an advisory opinion, decline to issue one, or issue an informal opinion. There appears to be no opportunity for further review of the opinion by the Georgia State Bar Board of Governors. An advisory opinion issued by this Committee may or may not be reviewed by the Georgia Supreme Court. An opinion approved by the Court is binding precedent; an opinion reviewed and rejected has no force or effect. If the Court does not review the opinion, it is binding on the Standing Committee, the State Bar of Georgia, and the individual who petitioned for the opinion, and serves as persuasive authority for the Court. The Court can review an opinion on its own or can do so on the petition of the State Bar or the person who sought the initial opinion.<sup>10</sup> No other person, including a non-lawyer competitor or a consumer who wishes to hire nonlawyers, can seek Supreme Court review of the opinion. Thus, an opinion written by the Standing Committee and not even reviewed by the State Bar's Board of Governors or the Supreme Court could have a widespread anticompetitive impact that is likely to harm Georgia consumers.

For example, the State Bar of Georgia rules appear to contemplate that the Standing Committee can issue an advisory opinion, unreviewed by the Bar's Board of Governors and Supreme Court, and the Standing Committee's opinion could be viewed as persuasive authority in civil actions to enjoin the unlicensed practice of law that were appealed to the Supreme Court.<sup>11</sup> Moreover, in Georgia, it is a criminal misdemeanor to engage in the unlicensed practice

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<sup>8</sup> GA. CODE ANN. § 15-19-50.

<sup>9</sup> These include nonlawyers not employed by or contractors for the banks and other entities listed in GA. CODE ANN. § 15-19-52.

<sup>10</sup> State Bar of Georgia Rule 14-9.1(f).

<sup>11</sup> State Bar of Georgia Rule 14-9.1(f). This letter should not be construed as offering any opinion about whether the DOJ and the FTC consider it legal under the Sherman Act, 15 U.S.C. § 1, for the Committee to declare the real estate activities at issue to be the unlicensed practice of law without Supreme Court review of such an opinion.

of law.<sup>12</sup> The good faith *facilitation* of the execution of a security deed for the benefit of a seller, borrower or lender in Georgia could thus become a criminal offense.

### The Public Interest Warrants Granting Georgians the Choice To Use Lay Providers

As in other states, Georgia's statutory prohibitions on the unlicensed practice of law are designed to serve the public interest.<sup>13</sup> They should not be interpreted in a manner inconsistent with that purpose. In determining how best to protect the public interest, the Standing Committee should weigh the harm that would result from the adoption of any proposed opinion against the harm that might result if such an opinion were not implemented and lay persons could compete with lawyers in preparing and facilitating the execution of deeds. As explained below, the DOJ and the FTC believe that adopting an opinion declaring that these activities fall within the definition of the practice of law would not serve the public interest.

### By Prohibiting Nonlawyer Competition For Many Services, the Proposed Statutory Definition Would Likely Harm Georgia Consumers by Preventing Competition and Adversely Affecting Prices

When nonlawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider several relevant factors in selecting a service provider, including cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In several states, nonlawyers compete with attorneys to provide services related to the preparation and execution of a deed, including the examination and clearing of title, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds.<sup>14</sup> If the Standing Committee adopts an opinion declaring the preparation of deeds and facilitation of their execution to be the practice of law, Georgia consumers may lose the benefits resulting from competition between lay providers and lawyers.

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<sup>12</sup> GA. CODE ANN. § 15-19-56.

<sup>13</sup> *Lowe v. Presley*, 86 Ga. App. 328, 332, 71 S.E.2d 730, 734 (Ga. App. 1952). *See also In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (in making unauthorized practice of law determinations, courts must examine "whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law"); *Unauthorized Practice of Law Comm. v. Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988) (public interest must guide unauthorized practice of law decisions); Va. S. Ct. R. Pt. 6, § I (Introduction) (unauthorized practice of law statute designed to protect the public interest).

<sup>14</sup> *See* letters to the Rhode Island House of Representatives, North Carolina State Bar, Kentucky Bar Association, Supreme Court of Virginia, and Virginia State Bar and the *amicus curiae* brief filed with the Kentucky Supreme Court, *supra* note 5.

Specifically, consumers may be harmed in several ways. First, the opinion would force consumers who would not otherwise choose to hire a lawyer to do so. Hence, it would increase costs for all consumers who might prefer the combination of price, quality, and service that a lay service offers.<sup>15</sup> The New Jersey Supreme Court reached this conclusion before rejecting an opinion that would have had the effect of eliminating nonlawyer real estate closings. Evidence presented in that proceeding indicated that real estate closing fees were much lower in southern New Jersey, where lay closings were commonplace, than in the northern part of the state, where lawyers conducted almost all closings.<sup>16</sup>

Second, a ban on lay competition for these deed-related activities has the potential to affect the price of lawyers' services, because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Even if there are a limited number of lay competitors today, they may restrain the fees that lawyers can charge. Moreover, the ability of nonlawyers to enter the Georgia market may reduce costs in the future. An opinion that prevents them from entering and competing would likely prevent costs from falling. Consequently, even consumers who otherwise would choose an attorney over a lay service would be adversely affected by the opinion. Evidence gathered in the New Jersey proceeding found that, in parts of the state where lay closings are prevalent, buyers represented by counsel paid on average \$350 less for closings, and sellers represented by counsel paid \$400 less.<sup>17</sup>

Third, a ban on the preparation of deeds and the facilitation of their execution by anyone other than a licensed Georgia attorney could reduce competition from out-of-state service providers. In the real estate mortgage market, for example, lenders outside Georgia may compete by offering lower interest rates or more attractive loan packages than similar in-state institutions. These lenders may lack facilities in Georgia. They may hire out-of-state providers to prepare deeds and may contract with Georgia lay providers to facilitate the execution of those deeds.<sup>18</sup> Some of these lenders may conduct their entire loan application and approval process

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<sup>15</sup> To the extent that there are a limited number of lay competitors currently operating in Georgia, a ban on nonlawyer competition would not only affect these current competitors but would prevent future lay competitors from entering the Georgia market. In other states, lay competition has grown first in the larger cities and then spread to more rural areas. For example, in Kentucky, lay real estate closers entered the market in the Cincinnati suburbs, spread to Lexington and Louisville, and then to other parts of the state. As lay competition grew in that state, prices for real estate closings fell, according to information that the DOJ received from industry representatives. See letters from the DOJ to Board of Governors of the Kentucky Bar Association, *supra* note 5.

<sup>16</sup> See *In re Opinion No. 26*, 654 A.2d at 1348-49. A special master was appointed in New Jersey to hold a thorough 16-day evidentiary hearing before making an initial recommendation. *Id.* Likewise, in 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. VA. CODE ANN. §§ 6.1-2.19 - 6.1-2.29 (West 2001). 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 cited *supra* note 5.

<sup>17</sup> See *In re Opinion No. 26*, 654 A.2d at 1348-49.

<sup>18</sup> For example, an out-of-state lender could hire a Georgia nonlawyer to examine title and clear the  
(continued...)

via the Internet, simultaneously reducing costs and increasing customer convenience.<sup>19</sup> A ban on competition from anyone other than a licensed Georgia attorney has the potential to impair this competition between lenders, and also to impair the ability of lenders and others to compete via the Internet.

Fourth, a ban on lay competition could hurt 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, some lay closing services compete with attorneys on the basis of convenience to close loans at nontraditional times (such as evenings or weekends) and locations (such as the consumer's home). In addition, out-of-state consumers buying property in Georgia may wish to use mail-in or Internet services for obtaining their loans. Consumers may execute their deeds and other papers before a notary they have paid in the state where they currently reside, before mailing the documents back to the lender. They may conduct the execution in the office of a lawyer in their current state. This activity would by definition involve the facilitation of deed execution by someone other than a licensed Georgia attorney. If consumers could not do this, their costs could substantially increase because they would have to pay for travel to Georgia to execute their deeds.

#### An Overly Broad Opinion Could Have an Adverse Impact on E-Commerce

In addition to the significant restrictions on consumer choice and increases in consumer costs that flow from an overly broad definition of the practice of law in the non-electronic realm, these potential restrictions are likely to impede substantially the growth of e-commerce.<sup>20</sup> The Internet is changing the way many goods and services are delivered, and consumers benefit from the increased choices and convenience and decreased costs that the Internet can deliver.

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<sup>18</sup>(...continued)  
exceptions to that title.

<sup>19</sup> Under Georgia law, a lender or other party can draw up legal instruments for another party provided that it is done at no fee and at the request and under the direction of the person desiring to execute the instrument. GA. CODE ANN. § 15-19-52. Presumably, this would allow Internet lenders to continue to close their own loans, including drawing up the deed so long as no additional charges were levied. If, however, the Internet lender sought to impose an additional charge, as lawyers currently do, it would be unable to provide this service. Likewise, if it relied on consumers to get their own notaries for witnessing the deed execution, the Internet lender may have facilitated the execution of a deed without using a licensed Georgia attorney and could run afoul of the proposed ban.

<sup>20</sup> As explained above, these Internet providers may use mail-in closings rather than requiring consumers to close their loans and execute their deeds in the office of a Georgia lawyer. These providers may have used attorneys outside Georgia to draw up deeds or lay people to facilitate the execution of those deeds.

The FTC recently held a three-day public workshop examining potential new barriers to e-commerce in ten different industries.<sup>21</sup> That public workshop considered whether states have enacted regulations that may have the effect of aiding existing bricks-and-mortar businesses at the expense of new Internet competitors and whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics. One panel specifically addressed real estate/mortgages/financial services. Congress, as well, recently has begun examining Internet commerce issues, and has indicated it will continue to examine how legal restrictions may work to impede e-commerce.<sup>22</sup> While the FTC staff is still evaluating the testimony and evidence from the workshop, one thing is clear already: when restrictions may foreclose potential new Internet competitors, one should proceed cautiously, mindful of the unintended consequences that may unduly limit the choices of consumers.

### There Is No Indication That The Proposed Ban on Lay Providers Is Needed to Prevent Significant Consumer Harm

Under antitrust law, restrictions on competition are generally considered harmful to consumers and, accordingly, are justified only by a showing that the restriction is necessary to prevent significant consumer harm and is narrowly drawn to minimize its anticompetitive impact.<sup>23</sup> A showing of likely harm is particularly important when, as here, the proposed restraint could prevent consumers from using an entire class of providers. Without a showing of likely harm, restraining competition in a way that is likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted.

The DOJ and the FTC are unaware of any showing of likely harm that would justify the Committee adopting an opinion that would require a lawyer to prepare the deed and perform all activities that facilitate its execution. Many of the proposed unauthorized practice of law opinions that our agencies have reviewed set forth no factual evidence and little evaluation of how the availability of lay services had actually hurt consumers.<sup>24</sup> Some evidence tends to indicate that lay closings do not result in significant harm consumers. A 1999 study by Professor Joyce Palomar of the University of Oklahoma found that the public did not suffer significantly

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<sup>21</sup> See *Possible Anticompetitive Efforts to Restrict Competition on the Internet*, Federal Trade Commission, Public Workshop (2002), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

<sup>22</sup> See *State Impediments to E-Commerce: Hearing Before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection* (2002) (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission), available at <http://www.ftc.gov/os/2002/09/020926testimony.htm>.

<sup>23</sup> See generally *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Antitrust laws are themselves a very important form of consumer protection and consumers benefit immensely from competition between different types of service providers. See *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 695; accord, *Superior Court Trial Lawyers Association*, 493 U.S. at 423.

<sup>24</sup> See *supra* note 5 (and letters and briefs cited therein).



greater losses from title defects in states where lay persons examined title, drafted mortgage documents, and supervised closings.<sup>25</sup> At a minimum, the Standing Committee should not adopt a ban on lay providers without strong factual evidence demonstrating that Georgians are actually hurt by the availability of nonlawyer service providers and a strong showing that this is not outweighed by the harm to consumers of foreclosing competition. Even in that case, any opinion should be narrowly tailored so as not to prohibit lay participation that is beneficial to consumers and in the public interest.

The proposed ban on "facilitat[ing] the execution" of deeds has the potential to be overly broad and unlimited, sweeping in much activity by lay people. All kinds of activities could be considered facilitating the execution of a deed. Is it "facilitation" to clear title exceptions? Is it "facilitation" to obtain releases from previous mortgages so that the title may be cleared? Would the preparation of the HUD-1 and other papers related to a real estate transaction be considered "facilitating" the deed's execution? These are all activities that lay people are capable of performing, and generally should be permitted to perform, in competition with attorneys.

Furthermore, the proposed ban on lay competition will not guarantee that consumers will have the benefit of independent counsel or the ability to stop transactions that are not in their best interest. In Georgia, the attorney who closes the loan and who would prepare the deed and facilitate its execution is most often the lender's lawyer. These lawyers do not represent the consumers. While they might provide some legal explanations to consumers, they could not advise buyers or borrowers about whether a particular deed or loan term was in their best interests, or negotiate on the consumer's behalf with the lender about the deed. They could not provide legal representation to the consumer with regard to the title or other components of the transaction.<sup>26</sup> It is not clear at all that requiring the lender's lawyer to prepare the deed and perform all activities facilitating its execution would protect consumers.

In addition, it appears that an attorney's paralegals and other lay employees or contractors could prepare and facilitate the execution of deeds under Georgia statute as long as the attorney maintains responsibility to his/her clients for the information and services.<sup>27</sup> Thus, lawyers are not required to be present while their lay employees or contractors prepare deeds and perform activities that would facilitate their execution. If it is the practiced eye of the lawyer that protects consumers, then this eye could be absent in these circumstances, just as easily as when a lay provider is involved in the transaction. Moreover, nothing requires the attorneys, or their lay employees or contractors, to have any experience in, or specialized knowledge of, real estate transactions or law. Any lawyer can provide these services.

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<sup>25</sup> Joyce Palomar, *The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423 (1999).

<sup>26</sup> See DOJ and FTC letter to North Carolina Bar (Dec. 14, 2001); DOJ letter to Kentucky Bar (June 10, 1999); DOJ and FTC letter to Virginia Supreme Court (Jan. 3, 1997), *supra* note 5.

<sup>27</sup> See GA. CODE ANN. §15-19-54 (permitting the provision of clerical and information services by laypersons to attorneys).

The assistance of a licensed lawyer to prepare deeds and facilitate their execution may be desirable to certain consumers, and consumers may decide they need a lawyer in certain situations. Consumers might choose to hire an attorney to answer legal questions, perform title work or otherwise facilitate execution of their deed, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may, in fact, get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this does not warrant eliminating lay deed-related services as a competitive alternative. Rather, where as here there is likely little benefit to consumers, the choice of hiring a lawyer or a non-lawyer should rest with the consumer.<sup>28</sup>

### Less Restrictive Measures May Protect Consumers

A ban on lay competition likely would result in additional costs to consumers, and should not be imposed without a convincing showing that lay services have not only injured consumers, but also that less drastic measures cannot remedy the perceived problem. Any proposed opinion should incorporate less drastic alternatives. 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 unlicensed practice of law.<sup>29</sup> Indeed, 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."<sup>30</sup> Thus, absent proof that lay providers have substantially harmed consumers, they should be able to prepare deeds and facilitate their execution.

Less restrictive alternatives are available to protect consumers with regard to deed-related services. For example, the New Jersey Supreme Court requires written notice to consumers of the possible risks involved in proceeding with a real estate closing without an attorney.<sup>31</sup> This measure permits consumers to make an informed choice about whether to use lay closing services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997.<sup>32</sup> This statute permits consumers to choose lay closers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds. Though more regulatory than

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<sup>28</sup> See *In re Opinion No. 26*, 654 A.2d at 1360.

<sup>29</sup> See *In re Opinion No. 26*, 654 A.2d at 1357.

<sup>30</sup> *Id.*

<sup>31</sup> *In re Opinion No. 26*, 654 A.2d at 1363.

<sup>32</sup> VA. CODE ANN. §§ 6.1-2.19 - 6.1-2.29 (West 2001).

the New Jersey approach, the Virginia approach is clearly a more procompetitive alternative than an outright ban on lay closings.<sup>33</sup>

### Conclusion

By including overly broad presumptions of conduct considered to be the practice of law, the potential opinion would likely reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options. Future growth of competition from lay providers—with the attendant likely reduction in costs and increase in service options—would be severely stunted if not eliminated. For this reason, the DOJ and the FTC urge the Standing Committee either to adopt an opinion concluding that it is not the practice of law to prepare deeds and facilitate their execution or to decline to issue any opinion at all.

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<sup>33</sup> The Virginia approach carries some risk of consumer harm, because licensing regulation itself can be used to thwart competition. *See* Cox and Foster, *supra* note 7.

The Justice Department and the Federal Trade Commission 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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/s/

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Antitrust Division

By Order of the  
Federal Trade Commission,

/s/

Timothy J. Muris  
Chairman

/s/

Jerry Ellig, Acting Director  
Office of Policy Planning