UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

January 25, 2008

via facsimile (808-539-4801) and first-class mail
Judiciary Public Affairs Office
417 South King Street
Honolulu, HI 96813

Re: Comments on Proposed Definition of the Practice of Law

Dear Sir or Madam:

The Justice Department and the Federal Trade Commission ("FTC") are pleased to provide comments on the proposed addition to the rules of the Supreme Court of Hawai'i ("the proposal" or "the proposed rule") in which the Hawai'i State Bar Association ("HSBA") requests that the Court create a new rule to define the practice of law. If adopted, the proposed rule would bar non-lawyers from competing with lawyers for a range of services and could unnecessarily increase the prices paid by Hawaiians for those services.[1]

The Justice Department and the FTC believe that the definition of the practice of law should be limited to activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. We are concerned that the proposal will unduly restrict non-lawyers from competing with lawyers because it defines the practice of law in broad terms, including:

- giving advice or counsel to another person about the person's legal rights and obligations;
- performing legal research;
- selecting, drafting, or completing documents that affect the legal rights of another person; and

[1] This letter focuses on the effects of the proposed rule on consumer welfare, and does not address whether the proposed rule and potential competitive restraints arising from enforcement under it would be immunized from the federal antitrust laws under the state action doctrine.

- negotiating legal rights or obligations . . . on behalf of another person.[2]

To some extent, the proposed rule preserves lawyer/non-lawyer competition by creating exceptions for services that non-lawyers may provide, regardless of whether they fall within the proposed definition.[3] While such exceptions are desirable, they cannot capture every situation where competition from non-lawyers would benefit consumers.

The broad, general definition in the proposal therefore would likely force Hawaiians who would not otherwise hire a lawyer to do so by limiting the resources consumers may rely upon to obtain legal information. This could preclude use of a number of services that provide reasonable options for some consumers, such as:

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

- lay organizations, advocates, and consumer associations providing citizens with information about legal rights and issues and helping them negotiate solutions to problems; and

- human resources management and other specialists advising employers about employment discrimination and sexual harassment rules, as well as federal, state and local labor, immigration, zoning, safety and other regulatory compliance issues.[4]

In what follows, we provide background information and further explanation of our concerns, and then suggest particular language to limit the proposed definition to services where specialized legal skills are required and an attorney-client relationship is present.

---

[2] Proposed Rule __(b).

[3] *See* Proposed Rule __(c). The exceptions include situations when an individual: (1) appears *pro se*; (2) "act[s] as a representative when authorized by law or by a government agency;" (3) serves as a mediator, conciliator or facilitator; (4) serves as in-house counsel pursuant to certain restrictions; (5) engages in legislative lobbying; (6) sells legal forms; (7) serves as a negotiator for an employee organization or employer; (8) serves as a clerk to a judge, justice or member of the Bar; or (9) serves as a paralegal under the supervision of a judge, justice or member of the Bar.

[4] Depending on how exception (c)(2) of the proposed definition (which permits non-lawyers to act as a representative when authorized by law or government agency) and relevant statutes and rules are construed, the definition may also bar non-lawyer competition for the provision of services in other areas.

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.'"[5] Like all consumers, consumers of professional services benefit from competition,[6] and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality.

The Justice Department and the FTC are concerned about efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures. Some of these proposals appear to be little more than overt attempts by lawyers to eliminate competition from alternative, lower-cost non-lawyer service providers; others, while appearing to be good faith efforts to protect consumers, have not been tailored narrowly enough to avoid unnecessary harm to competition. 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 states, the American Bar Association, and state bar associations to reject or narrow proposed restrictions on competition between lawyers and non-lawyers.[7] Separately, the Justice Department has obtained

---

[5] *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).

[6] *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).

[7] *See* letter from the Justice Department to the Wisconsin Supreme Court (December 10, 2007); letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (April 27, 2007 and June 21, 2006); 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-

(continued...)

injunctions prohibiting bar associations from unreasonably restraining competition by non-lawyers in violation of the antitrust laws.[8] Our comments on the proposed rule are part of our ongoing efforts in this area.

Restrictions on Competition Should Be Closely Examined to Determine Whether They Are in the Public Interest

Restrictions on competition generally are harmful to consumers. Such restrictions are in the public interest only if they are needed to achieve some overriding benefit – such as preventing significant consumer harm from the provision of services by providers who lack the requisite knowledge and training – and are narrowly drawn to minimize their anticompetitive impact.[9] The Justice Department and the FTC recognize that there are some services that should be provided only by lawyers because they require legal knowledge and training. For example, only someone who understands law and litigation procedures should represent clients in open court in matters involving their legal rights. Such a requirement protects consumers as well as the court. But consumers also benefit when non-lawyers compete with lawyers to provide many other services that do not require legal training, knowledge or skills.[10] Allowing non-lawyers to

---

[7](...continued)
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, Wisconsin, Indiana, New York, Rhode Island, Massachusetts, North Carolina, Georgia, Kansas, and Virginia may be found on the Justice Department's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[8] 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 titles. 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 F. 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).

[9] *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 marketplace cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[10] "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

(continued...)

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

Sound competition policy calls for any restriction on competition to be justified by a valid need, such as protecting 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-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.[13]

The Justice Department and the FTC are not aware of evidence of consumer harm arising from non-attorneys providing services such as those referenced above that do not require the skill or knowledge of a lawyer but may still fall within the scope of the Rule.[14] In the absence of such evidence, we believe that the definition of the practice of law proposed by the HSBA unnecessarily limits competition between lawyers and non-lawyers and likely will cause more harm to consumers than it will prevent. Accordingly, the proposed definition is not in the public interest.

---

[10](...continued)
consumers of such nonlawyer services." Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000).

[11] *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423.

[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] The letter from the HSBA to the Court that accompanied the proposal states that the HSBA has "examined the various issues, complaints and concerns regarding the unauthorized practice of law." Letter from Jeffrey S. Portnoy, President, Hawai'i State Bar Association, to The Honorable Ronald T.Y. Moon, Chief Justice, Supreme Court of Hawai'i (July 23, 2007), at http://64.29.92.27/. Yet the letter provides no information on the content of those issues, complaints and concerns, nor data showing that any such harm occurs to a meaningful extent. *See id.* Nor does the letter suggest that whatever harm might occur would outweigh the benefits consumers derive from the ability to obtain services from lay providers as an alternative to lawyers. *Id.*

Evidence suggests that lay people can and do competently perform many of the services that the Rule would limit to lawyers.[15] Academic research indicates that consumers likely face little risk of harm from non-lawyer competition in many areas. For example, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find that they perform as well as or better than lawyers.[16] Similarly, a study comparing five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of such services found, "The only clear conclusion . . . is 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."[17]

If non-lawyers were barred from providing the services encompassed by the proposed rule, fees for those services likely would rise. Consumers who otherwise would receive assistance from non-lawyer service providers – tenants' associations, lay organizations, and others – would be forced to choose between hiring a lawyer and going without assistance altogether. The potential harm from increasing the cost for these services may deter some consumers from seeking assistance of any kind. A 1996 ABA task force survey concluded that low income and middle-income households were underserved by the legal system, with cost being a major reason why these groups avoided the legal system.[18]

Even Hawaiians who would choose a lawyer over a lay service provider likely will pay higher prices if the proposed rule is adopted. Evidence gathered in a New Jersey Supreme Court proceeding indicated that, in communities in New Jersey where non-lawyers frequently competed with lawyers to close real estate transactions, buyers represented by counsel paid on average $350 less for closings, and sellers represented by counsel paid $400 less, than in the

---

[15] Significantly, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 407-08 (2004).

[16] 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").

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

[18] 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.

New Jersey communities where lay closings were not prevalent.[19] Likewise, the Kentucky Supreme Court concluded that prices for real estate closings by lawyers dropped substantially–by as much as one percent of the loan amount plus fees–as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[20] And, in Virginia, where the legislature passed a law upholding the right of consumers to continue using lay closing services, proponents of lay competition presented survey evidence suggesting that lay closings in Virginia cost on average $150 less than lawyer closings.[21]

Restrictions on Lawyer/Non-Lawyer Competition Should Be Limited
to Services Provided Pursuant to an Attorney-Client Relationship

The difficulties identified above could be addressed with a relatively simple change in the proposed rule. The proposed rule appears to be overbroad because it would bar non-lawyers from providing services in certain instances where it is apparent that specialized legal skills are not required. In instances where specialized legal skills are required, an attorney-client relationship generally will exist. To preserve competition, and to benefit consumers, the Court should consider adopting language similar to that found in Rule 49 of the District of Columbia Court of Appeals. Rule 49 defines the practice of law as "the provision of professional legal advice or services *where there is a client relationship of trust or reliance*."[22] The Commentary to Rule 49 makes clear that giving advice or counsel to others as to legal rights or responsibilities is not necessarily the practice of law. Rather, such services may be the practice of law *if* they are provided in the context of an attorney-client relationship. The Commentary explains:

> As originally stated in sections (b)(2) and (3) of the prior Rule, the "practice of law" was broadly defined, embracing every activity in which a person provides services to another relating to legal rights. This approach has been refined, in recognition that there are some legitimate activities of non-Bar members that may fall within an unqualifiedly broad definition of the law. The definition set forth in section (b)(2) is designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. . . . The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or

---

[19] *See In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995).

[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").

[21] *See* letters to the Virginia Supreme Court and Virginia State Bar, *supra* n.7.

[22] D.C. Court of Appeals Rule 49(b)(2) (2004) (outline letters omitted) (emphasis added).

> implicit representation of authority or competence to practice law, or that both are absent. . . . [T]he Rule is not intended to cover conduct which lacks the essential features of an attorney-client relationship. . . . Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law are not engaged in the practice of law, because their relationship with the customer is not based on a reasonable expectation that learned and authorized professional legal advice is being given. Nor is it the practice of law under the Rule for a person to draft an agreement or resolve a controversy in a business context, where there is no reasonable expectation that she is acting as a qualified or authorized attorney. . . .[23]

Adding the requirement of an attorney-client relationship and similar commentary to the proposed rule would protect consumers from harm caused by persons engaged in the unauthorized practice of law, while also preserving lawyer/non-lawyer competition that benefits consumers.[24]

Our suggestion that the Court adopt language similar to that found in Rule 49 when defining the practice of law – specifically, that the elements of an attorney-client relationship must be present for activity to be the practice law – is consistent with Court precedent. Like the Hawai'i legislature, this Court has not formally defined the practice of law. Instead, this Court has examined, on a case-by-case basis, whether conduct has violated Section 605-14 of the Hawai'i Revised Statutes. In the reported opinions, this Court has determined that various activities constitute the practice of law, including: (1) filing legal pleadings such as complaints, claims, and objections to motions, on behalf of another;[25] (2) claiming to represent a client in a letter to a lawyer, and signing the letter as "attorney for;"[26] (3) agreeing to represent a client, accepting retainer fees, appearing before a government agency and in court on the client's

---

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

[24] If the State Bar is concerned that consumers may not always know that the special skills of a lawyer are required for a particular task, and thus might unknowingly rely on non-lawyers for services that require legal skills, a notice requirement applicable to the particular settings in which the concern arises could be established. For example, the New Jersey Supreme Court addressed concerns about non-lawyer provision of services at real estate closings not by banning non-lawyer closing services but by requiring merely that consumers be provided a written notice explaining the risks involved in proceeding in a real estate transaction without a lawyer. *In re Opinion No. 26*, 654 A.2d at 1362-64. This type of disclosure requirement applicable to specified areas of commerce would permit consumers to make an informed choice about whether to use non-lawyer service providers.

[25] *In re Ellis*, 522 P.2d 460, 461-62 (Haw. 1974).

[26] *Fought & Co. v. Steel Eng'g & Erection, Inc.,* 951 P.2d 487, 495-96 (Haw. 1998) (*citing State v. Gilbert*, 708 P.2d 138 (Haw. 1985)).

behalf, and preparing and signing a motion to continue a case on the client's behalf;[27] and (4) analyzing briefs and other papers submitted by parties to litigation, planning appeal strategy, and preparing a statement of position in anticipation of mediation, all on behalf of another.[28] In each of these cases, there appears to have been a relationship of trust or reliance and a representation of authority or competence to practice law. Thus, the conduct this Court found unlawful under Section 605-14 would still constitute the unauthorized practice of law under our proposal.

Conclusion

The choice of whether to use a lawyer or non-lawyer service provider should rest with the consumer unless it is clear that specialized legal skills or training are required. Lawyer/non-lawyer competition benefits consumers, particularly when there is no evidence that consumers have been harmed by non-lawyer service providers. We urge the Court to revise the proposed rule to preserve competition in service areas for which the knowledge and skill of a lawyer is not required.

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

---

[27] *Office of Disciplinary Counsel v. Lau*, 941 P.2d 295, 295-96, 298 (Haw. 1997).

[28] *Fought & Co.*, 951 P.2d at 496 (Haw. 1998). In *Fought & Co.*, the Court examined the legislative history of Sections 605-14 and 605-17 of the Hawai'i Revised Statutes that prohibit and criminalize the unlicensed practice of law. *951 P.2d at 495-96.* The Hawai'i legislature stated that it was not feasible to define specific types of services as the practice of law because societal changes "continually create new concepts and new legal problems" *Id. at 495* (*quoting* Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal at 661; Hse. Stand. Comm. Rep. No. 612, in 1955 House Journal at 783), and therefore expressly declined to adopt a definition of the practice of law when drafting the statutes. *Id.* However, the legislature observed that the practice of law includes, among other things, "the preparation of any document or the rendition of any service to a third party affecting the [party's] legal rights, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy." *Id.* Given its refusal to define the practice of law in the statute, it seems likely that the legislature intended its commentary as guidance on the scope of activities that *may* be the practice of law, but did not intend that *all* activities within that scope be deemed the practice of law.

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