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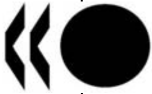

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from the United States

-- Session I --

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BRINGING COMPETITION INTO REGULATED SECTORS: THE LEGAL PROFESSION SUBMISSION OF THE UNITED STATES

1. Introduction

1. Professions in the United States are often subject to laws and regulations specifying who may enter the profession and what types of minimal competency requirements must be satisfied before the individual can receive a license. The legal profession, as noted in the section on professions in OECD's Background Note by the Secretariat for this session, is no exception. The Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("Justice Department") (collectively, the "agencies") have a longstanding interest in assessing the impact of such restrictions on competition.

2. In the United States, the fifty states, rather than the federal government, regulate the legal profession. One aspect of their regulation is to define through "unauthorized practice of law" ("UPL") statutes those activities that are reserved for lawyers. While almost all states (with the exception of Arizona) have statutes that purport to define the practice of law, these UPL statutes tend to be vague in scope and contain broad qualifiers. For example, the Texas UPL statute states that "the definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."[1] These types of open-ended statutory definitions give courts and bar associations scant guidance when they attempt to apply UPL statutes to specific facts.

3. There are four primary actors involved in such regulation: state bar associations (private organizations of lawyers, not state agencies); state bar agencies (which formulate rules for court approval), state legislatures (which pass laws defining the profession of law); and state courts (often the supreme, or highest, courts of each state). Generally, the highest court in a state has the power to regulate the practice of law within the state, often through authority to promulgate legal practice rules or interpreting state statutes that define the practice of law. Often the highest court in a state oversees the rules of professional conduct, including the definition of the practice of law. The definition of the practice of law determines the acts that are considered legal practice as well as the individuals who can perform them, i.e., only state certified attorneys.

4. UPL statutes prevent non-lawyers from competing with lawyers in a variety of services. UPL statutes and regulations may be justified when excluding non-lawyers from offering a particular service when there is a clear showing that it advances an important consumer protection objective and the benefits to consumers outweigh the harms created by the reduction in competition. The general justification for excluding persons not admitted to the bar from the practice of law is the protection of the public, not protection of lawyers from competition. However, at times, state UPL provisions have also been used to prohibit non-lawyers from offering professional services that are not legal in nature, such as performing real estate closings without rendering legal advice, or from providing certain types of services that may nominally be legal services, but that some non-lawyer professionals are equally qualified to provide, such as tax advice.[2]

2. FTC and Justice Department Efforts to Promote Competition

5. The agencies have become increasingly concerned about efforts to prevent non-lawyers from competing with attorneys in the provision of certain services through the adoption of overly broad UPL opinions and laws by state bar associations, courts, and legislatures. Since 1996, the agencies have worked to address these concerns principally through advocacy efforts. The antitrust agencies jointly authored a series of advocacy letters opposing laws, regulations, and other proposals that would broaden the definition of "unauthorized practice of law" in ways that would foreclose competition from other professionals in rendering particular services.

6. The agencies have been concerned particularly about attempts to restrict non-lawyer competition in real estate closings.[3] In the majority of states, non-lawyers compete with lawyers to provide real estate closing services. However, in the last few years, several state bar associations and legislatures have sought to adopt opinions that declare real estate closing services to be the practice of law, and thus prevent non-lawyers from closing real estate transactions. The agencies use three primary tools to convey their arguments in this area, depending on the audience. The two primary advocacy instruments are letters addressed to the bar association or legislature and legal briefs before the state court. Both are often announced by a press release that summarizes the facts and arguments to the public, at times attracting news media attention in the local jurisdiction. While the letters and briefs contain similar arguments, briefs are more formally structured to match the rules of the court, containing relevant cites to past cases in the jurisdiction. For the purposes of this paper, the aspects described below are similar for both the advocacy letters and briefs.

7. In addressing these concerns to state legislatures or bar associations, the agencies encourage competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these filings, the agencies 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, Ohio, and Massachusetts to reject such restrictions on competition between lawyers and non-lawyers.[4] In addition, the Justice Department has challenged in court attempts by bar associations to restrain competition from non-lawyers,[5] and the FTC has challenged anticompetitive restrictions on certain business practices of lawyers.[6]

8. Although the agencies' advocacy efforts usually focus on policy-makers, the agencies have also responded to requests for comment from private bodies that propose model UPL statutes and regulations. In December 2002, for example, agencies sent a joint letter to the American Bar Association's Task Force on the Model Definition of Unauthorized Practice of Law, which had drafted a definition of unauthorized practice of law for consideration by state legislators and regulators. The letter suggested that the proposed definition is unnecessarily broad, citing FTC and Justice Department experience with uses of UPL to foreclose competition in real estate closings and other arenas. The letter also noted than an overly broad definition of UPL could prevent consumers from using popular software programs for writing wills and preparing other legal documents, since these programs could be considered rendering legal advice if they provide suggestions in response to information input by the customer.[7] The letter also explained that an overly broad definition of UPL could prevent a wide variety of non-lawyer advocates from competing with lawyers to give legal information and resolve problems for consumers.

2.1 Determining When Competition Benefits Consumers

9. The Justice Department and the FTC urge policy-makers to consider whether lawyer/non-lawyer competition is in the public interest. The antitrust agencies recognize that there are circumstances requiring the knowledge and skill of a person trained in the law, but nonetheless believe that consumers generally benefit from competition between lawyers and non-lawyers in the provision of many services. The agencies argue that prohibitions on the unauthorized practice of law should serve the public interest. 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.[8] If the antitrust agencies determine that the proposed UPL statutes will harm competition, they engage in efforts to educate decision-makers about possible anticompetitive effects.

2.2 The Content of the Advocacy Letters

2.2.1 Overall Purpose

10. The joint competition advocacy letters or briefs submitted to courts, begin with a clear articulation of the antitrust agencies' interest and experience in promoting competition in all sectors of the American economy. The antitrust agencies also emphasize their foremost concern in evaluating regulation – consumer welfare. Overall, the letters or briefs provide a clear, single-minded consumer-focused message. Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a clear showing that they are necessary to prevent significant consumer harm and are narrowly drawn to minimize its anticompetitive impact. Without a showing that a practice harms consumers, a restraint on competition is likely to hurt consumers by raising prices and eliminating consumers' ability to choose among competing providers, without providing any countervailing benefits.

11. After the initial statement of interest, the letters or briefs then address the specific proposed change to the definition of the practice of law that they are responding to and set out the appropriate standard under which to evaluate the change – that prohibitions on the unauthorized practice of law should serve the public interest. The inquiry into the public interest 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. The antitrust agencies advocate that decision makers should balance the harm that would be caused by banning non-lawyer services against the harm that might be caused by continuing to allow them. The advocacy letters seek both to demonstrate the harm to consumers when competition is reduced and expose the weaknesses of the argument that UPL restrictions are needed to protect consumers at real estate closings.

2.2.2 Applying the Standard – Touting Benefits of Competition

12. After setting out the public interest standard, and explaining that the balance should focus on harm and benefits to consumers, the letters then address how the new provision will affect consumers. Here, the procompetitive message is that consumers generally benefit from lawyer/non-lawyer competition in the provision of real estate closing services. Restrictions on such competition are not in the public interest because, when they unnecessarily limit competition between lawyers and non-lawyers, they likely cause more harm to consumers. Specifically, the letters outline the likely consequences of the UPL restrictions. First, such restrictions force consumers who would not otherwise hire a lawyer to do so.

Businesses and individuals that rely on non-lawyers for advice and information related to real estate closing services and other types of services would be required to hire attorneys instead. Since the cost of retaining an attorney for those same services is often higher, this is a demonstrable harm to consumers in the form of higher costs. The letters cite evidence from studies in other jurisdictions that suggest that the use of non-lawyers in various states provides a lower cost alternative for consumers.[9] Second, by eliminating competition from non-lawyers, UPL restrictions likely increase the price of lawyers' services because the availability of alternative, lower-cost non-lawyer service providers will no longer be a threat. Consequently, even consumers who would otherwise choose a lawyer over a non-lawyer would likely pay higher prices if the proposed rule were adopted. For example, in several letters, the agencies have cited findings by the New Jersey Supreme Court that real estate closing fees were much lower in southern New Jersey whether or not the transaction included a lawyer, where non-lawyer settlements were commonplace, than in the northern part of the state where lawyers conducted almost all settlements.[10]

2.2.3 Applying the Standard – Addressing the Offered Justifications

13. Next, the letters turn to the offered justifications for the UPL restriction. The lawyer proponents of UPL restrictions often argue that regulation is necessary to protect consumers from inferior non-lawyer services. To this argument, the agencies answer that 1) the marketplace is likely to limit the ability of non-attorneys to provide shoddy service or otherwise take advantage of consumers, 2) there is no evidence from other jurisdictions of widespread harm due to non-lawyers performing non-legal real estate closing services, and 3) there are less competitively restrictive means to protect consumers than an outright ban on non-lawyer services. The letters directly address the justification put forth by the state bar association, state bar agency, or legislature that has proposed the restriction. Often, the advocates for the restriction have not provided any factual evidence demonstrating that consumers are actually hurt by the availability of non-lawyer real estate services. Indeed, the failure to cite any instances of actual consumer injury from non-lawyer real estate closings undercuts the professed consumer protection arguments in favour of the UPL restriction. The antitrust agency letters argue that other states and academics who have examined the issue have routinely failed to find evidence that allowing non-attorneys to perform real estate settlement functions results in consumer harm.[11]

14. The antitrust agencies argue that sweeping restrictions on competition be justified by a credible showing of need for the restriction and require that the restriction be narrowly drawn to minimize its anti-competitive impact. Part of the advocacy effort against the adoption of anticompetitive UPL restrictions related to real estate closing is that consumers can be protected by measures that restrain competition less than a complete ban on non-lawyer settlements. In response to advocacy efforts from the antitrust agencies and others, Virginia, confronted with similar issues in 1997, adopted a statute that permits consumers to choose lay settlement providers, which are now regulated by the state. Hence, Virginia consumers continue to have the benefits of competition, including lower-cost settlements. In another example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. This measure permits consumers to make an informed choice about whether to use non-lawyer closing services.

3. Conclusion

15. The agencies' efforts against unnecessary competitive restrictions on the unauthorized practice of law related to real estate services and other kinds of services emphasize consumer choice and the benefits that lead to reduced prices and better services. Indeed, the letters and briefs acknowledge that the

assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. The letters do not express a preference for either lawyer or non-lawyer services, but rather focus on the benefits of competition between the two choices. The overall theme of the UPL efforts matches the overall message of any antitrust advocacy that seeks to bring competition into regulated sectors: consumers benefit immensely from competition among different types of service providers. Accordingly, the UPL efforts seek to prevent unnecessary competitive restrictions that would deprive consumers of the ability to choose to use a non-lawyer and are likely to impose higher closing costs on consumers, who would no longer be able to reap the benefits of competition from non-lawyers.

ANNEX A

1. Examples of Joint Justice Department-FTC Advocacy Efforts to Prevent UPL Regulations that Restrict Competition

1.1 Kentucky

In 1981, the Kentucky Bar Association, the state bar agency, approved an opinion that held that non-lawyers conducting a real estate closing did not engage in the unauthorized practice of law. This allowed Kentucky consumers to choose to use a non-lawyer closing agent. However, in 1997, the KBA's Unauthorized Practice of Law Committee drafted an opinion that would have prevented non-lawyers from competing with attorneys in providing real estate closing services. The Justice Department and others submitted comments opposing adoption of the rule on grounds that it was anticompetitive and also unnecessary to protect the public. In November 1997, the Board of Governors of the KBA declined to adopt the opinion. But again, in the spring of 1999, a revised version of the restriction was presented to the Board of Governors. The opinion was approved in 1999, even though there was no evidence that Kentucky consumers were substantially harmed over the 18 years when non-lawyer real estate closings were allowed. In Kentucky, after the Board of Governors approves a UPL opinion, an aggrieved party may file a motion with the Kentucky Supreme Court seeking review of the opinion. In 2000, the Justice Department asked the Supreme Court of Kentucky to reject a KBA advisory opinion that declared real estate closings performed by non-lawyers the unauthorized practice of law. The Court ruled against the KBA and rejected the proposed change to the definition of the unauthorized practice of law.

1.2 Rhode Island

In 2002 a bill was introduced into the Rhode Island House of Representatives that would prevent non-lawyers from competing with lawyers to perform real estate closings. The proposed bill prohibited lay closing services in both residential and commercial deals and purchases, refinancing, second mortgages, and other transactions. The agencies submitted a letter to the legislators, urging them to reject the proposed bill. The agencies expressed concern that the bill likely would cause Rhode Island consumers and businesses to pay more for real estate closings and could also prevent them from benefiting from competition from out-of-state and Internet lenders that could provide more convenient closing services. According to the letter, one industry source estimated that Rhode Islanders could pay $200-$500 more, if buyers must pay for their own attorneys, as well as the lender’s closing lawyer. The Rhode Island House of Representatives did not enact the bill into a law. The following year, however, a similar bill was introduced into Rhode Island House of Representatives. The agencies again sent a letter in 2003 to the legislators, citing the same concerns they had with the 2002 bill. The bill went to the state Senate and the Justice Department objected again. The bill died and did not become law.

ANNEX B

- **American Bar Association**: 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), available at: http://www.ftc.gov/opa/2002/12/lettertoaba.htm, and http://www.usdoj.gov/atr/public/comments/200604.htm.

- **Georgia**: 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; and letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003), available at: http://www.ftc.gov/be/v030007.htm.

- **Indiana**: Letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (October 1, 2003), available at: http://www.usdoj.gov/atr/public/comments/205733.htm.

- **Kentucky**: 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; and letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at http://www.usdoj.gov/atr/public/comments/comments.htm.

- **Massachusetts**: Letters from the Justice Department and the FTC the Massachusetts Bar Association and to Representative Paul Kujawski of the Massachusetts House of Representatives (Dec. 16, 2004 and Oct. 6, 2004), available at: http://www.ftc.gov/os/2004/12/041216massuplltr.pdf and http://www.ftc.gov/os/2004/10/041008kujawskicomment.pdf.

- **North Carolina**: Letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002), available at: http://www.usdoj.gov/atr/public/comments/11438.htm; and letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001), available at: http://www.usdoj.gov/atr/public/comments/9709.htm.

- **Ohio**: 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.

- **Rhode Island**: 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), available at: http://www.usdoj.gov/atr/public/press_releases/2003/201130.htm#63003 and http://www.usdoj.gov/atr/public/press_releases/2003/200899.htm#1; and letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2003), available at: http://www.ftc.gov/be/v020013.pdf.

- **Virginia**: Letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997), available at: http://www.usdoj.gov/atr/public/comments/3967.htm; and letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996), available at: http://www.usdoj.gov/atr/public/comments/vaupllltr.htm.

- **West Virginia**: Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon 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.

NOTES

1. Tex. Gov't Code Ann. §§ 81.101 (b).

2. Other examples include advice to tenants by tenants associations and to home buyers by realtors about what the state's laws require, estate planning, the provision of legal information but not advice by trained lay people, the negotiation of agreements that could have a legal effect, the completion of purchase and sale agreements by real estate agents, and various forms of compliance training for corporate employees.

3. Real estate closing services can include the preparation and execution of a deed, including the examination and clearing of title, answering non-legal questions during the closing process, witnessing signatures at closing, and disbursing of funds. A number of states either require or are considering requiring the presence of attorney at all residential real estate closings - sometimes even including refinancing of existing mortgages, where no real estate changes hands.

4. For a complete list of citations, please see Annex B.

5. In *United States v. Allen County Indiana Bar Ass'n*, the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). *See also United States v. New York County Lawyers' Ass'n,* No. 80 Civ. 6129 (S.D.N.Y. 1981) (Justice Department obtained court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with other attorneys).

6. *Federal Trade Commission 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 and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, The Federal Trade Commission, October 1990.

7. The FTC-Justice Department letter to the ABA is available at: http://www.ftc.gov/opa/2002/12/lettertoaba.htm,and http://www.usdoj.gov/atr/public/comments/200604.htm.

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

9. Cited in several of the joint Justice Department/FTC letters and briefs, a 1996 Media General study conducted in Virginia found that non-lawyer real estate closings were substantially less expensive than attorney closings. The average closing costs including title examination were $451 for lawyers versus $272 when non-lawyers were used. The study, and joint Justice Department/FTC advocacy efforts, helped persuade the Virginia legislature to reject a proposed law that would have barred non-lawyer closers, but instead pass a statute that allows consumers to choose non-lawyers who are regulated through licensure and other means.

10. South New Jersey buyers unrepresented by counsel paid no closing costs, while unrepresented sellers paid about $90; buyers unrepresented by counsel throughout the entire transaction, including closing, paid on average $650, while sellers paid $350. North New Jersey buyers represented by counsel paid on average $1,000, and sellers $750. In Re Opinion No. 26, 654 A.2d at 1349.

11. One study cited in the letters compared five states where non-lawyers provide non-legal real estate services with five states that prohibit non-lawyer provision of such services. The study's goal was to determine "whether members of the public suffer actual harm from lay provision of real estate settlement services." The author found "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." Joyce Palomar, *The War Between Attorneys & Lay Conveyancers Empirical Evidence Says "Cease Fire!,"* 31 Conn. L. Rev. 423, at 477 and 520 (1999), cited in the agencies' letter to Representative Paul Kujawski of the Massachusetts House of Representatives, October 6, 2004, at http://www.usdoj.gov/atr/public/comments/205772.htm.