UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

May 17, 2007

By email and first class mail
Rules Committee of the Superior Court
Attn: Carl E. Testo, Counsel
P.O. Box 150474
Hartford, CT 06115-0474

Re: Proposed Section 2-44A of the Rules of the Superior Court entitled "Definition of the Practice of Law"

Dear Mr. Testo:

The Staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] is pleased to submit these comments on Proposed Section 2-44A of the Rules of the Superior Court entitled "Definition of the Practice of Law" ("§ 2-44A" or "proposed rules").[2] We understand that the Proposed Rules were made available for public comment on May 8, 2007, and although comments must be received by May 16, 2007, you will accept comments filed electronically on May 17, 2007.

The FTC Staff believe that non-attorneys should be permitted to compete with attorneys in areas where no specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers. We are concerned that the Proposed Rules could be interpreted in an overly-broad manner, which would have an adverse effect on competition and consumers. We recommend that the Committee clarify the rules to provide ample guidance to the public as to what types of conduct the Court will and will not consider punishable as the unauthorized practice of law. Further, we recommend that such modifications and clarifications be guided by the principle that only services requiring the skill or knowledge of a lawyer be reserved as the practice of law.

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[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

[2] The proposed rules are available in the May 8, 2007 edition of the Connecticut Law Journal, available at http://www.jud.ct.gov/Publications/PracticeBook/pblj_050807.pdf.

The Interest and Experience of the Federal Trade Commission

The FTC is entrusted with enforcing, among other things, the federal antitrust laws. The FTC works 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.'"[3] Consumers of professional services, like all consumers, benefit from competition.[4] If competition to provide such services is restrained, consumers may be forced to pay higher prices or accept lower quality services.

The FTC Staff is concerned about efforts across the country to prevent non-attorneys from competing with attorneys through the adoption of excessively broad restrictions by state courts, state bars and legislatures. The FTC and its Staff encourage competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these letters and filings, the FTC has 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.[5] Many of these advocacy efforts have been successful in preserving attorney/non-

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[3] *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).

[4] *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).

[5] *See, e.g.* joint letter from the FTC and Justice Department to the Committee on the Judiciary of the New York State Assembly (June 21, 2006) *available at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf; joint letter from the FTC and Justice Department to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) *available at* http://www.ftc.gov/be/v050002.pdf; joint letter from the FTC and Justice Department to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004) *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; joint letter from the FTC and Justice Department to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003) *available at* http://www.ftc.gov/os/2003/10/uplindiana.htm; joint letter from the FTC and Justice Department 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; joint letter from the FTC and Justice Department to the Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002) *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm; joint letter from the FTC and Justice Department to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002) *available at* http://www.ftc.gov/be/v020013.pdf; joint letter from the FTC and Justice Department to President of the North Carolina State Bar (July 11, 2002) *available at* http://www.ftc.gov/os/2002/07/non-attorney involvment.pdf; joint letter from the FTC and Justice Department to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001) *available at* http://www.ftc.gov/be/V020006.htm; joint letter from the FTC and Justice Department to Supreme Court of Virginia (Jan. 3, 1997); joint letter from the FTC and Justice Department to Virginia State Bar (Sept. 20, 1996). *See also* 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 (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 (July 28, 2003) available

attorney competition.[6] These comments are part of our ongoing efforts in this area.

The Proposed Rules

By statute non-attorneys are prohibited from practicing law in Connecticut.[7] The statute, however, leaves defining what constitutes the practice of law to the Connecticut Judiciary.[8] The Proposed Rules would codify the definition of the practice of law, which historically has been defined in Connecticut through court decisions.

The Proposed Rules would expressly forbid non-attorneys from holding themselves out as being qualified to practice law,[9] from representing parties in court and other identified tribunals,[10] and from engaging in other conduct that may indicate the occurrence of the authorized practice of law as defined by statute, ruling or other authority.[11] The Proposed Rules would also allow non-attorneys to perform several tasks that otherwise may be considered the practice of law.[12] For example, they would allow non-attorneys to sell legal documents or forms approved by a Connecticut lawyer,[13] serve as neutral mediators in dispute resolution,[14] and allow non-attorneys to participate in labor negotiations under collective bargaining agreements.[15] Also, the Proposed

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at http://www.usdoj.gov/atr/cases/f201100/201197.htm.

[6] For example, the bill that was the subject of recent joint FTC and Justice Department comments to the New York State Assembly on April 27, 2007 was rejected by the Committee on the Judiciary. Similarly, in Kansas, following a February, 2005 joint letter, the Bar has tabled the proposed rules limiting attorney/non-attorney competition in a wide array of services that do not require the skill or knowledge of lawyer. Also, comments provided to the North Carolina Bar in 2001 and 2002 resulted in the bar adopting an ethics opinion that allowed for non-attorneys to provide settlement services.

[7] Conn. Gen. Stat. § 51-88.

[8] Conn. Gen. Stat. § 51-80. The legislature expressly omitted from the practice of law such things as a town clerk preparing deeds, mortgages, releases, and various certificates, self-representation in legal matters, and issues concerning out-of-state attorneys engaged in specific proceedings. Conn. Gen. Stat. § 51-88(d).

[9] *See* § 2-44A(a)(1).

[10] *See* § 2-44A(a)(4).

[11] *See* § 2-44A(a)(2), (3), (5) & (6).

[12] *See* § 2-44A(b).

[13] *See* § 2-44A(b)(1).

[14] *See* § 2-44A(b)(3).

[15] *See* § 2-44A(b)(4).

Rules would allow non-attorneys to perform any tasks the Connecticut Courts had previously, "determined do not constitute the practice of law."[16]

The Proposed Rules Are Likely to Restrict Consumer Choice

The FTC Staff recognizes that there are some services requiring the specialized knowledge and skill of a person trained in the practice of law that should be provided only by attorneys. However, allowing non-attorneys to compete in the provision of certain types of services that do not require such knowledge and skill 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.[17]

We understand that Proposed Rule 2-44A is meant to clarify what conduct constitutes the practice of law. However, some points of the proposal are overly broad and are likely to unduly restrict attorney/non-attorney competition. For example, Rule 2-44A(a)(2), (3) and (5) may be read to require an attorney for the selection or modification of legal forms, negotiating regarding any transaction involving property (real or personal), preparing documents related to the sale of property, performing real estate closing services, and other services. As noted with similar proposals in Kansas and Massachusetts, such a broad definition of the practice of law is likely to unnecessarily restrain competition in service areas that do not necessarily require the skill or knowledge of a lawyer to perform.[18] For example, the proposed rules would appear to limit the

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[16] § 2-44A(b)(11). One commentator has explained that decisions regarding the conduct of non-attorneys in Connecticut are few and relatively old, and there are doubts that they would be upheld if addressed by today's court. *See* Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for their Reform*, 36 CTLR 303, 306-10 (Winter, 2004). Johnstone reports that rulings affecting non-attorneys prevent banks from appearing as fiduciaries in a probate matter, prohibit a mutual fund operation from preparing trust and estate documents for customers and providing related advice, bar a legal document preparation service from preparing wills, living trusts, name change and divorce documents, and prohibit non-attorneys from providing document preparation for individuals seeking pro se divorce papers. *Id.* at 311-32. Other Court decisions have allowed accountants to provide tax advice and allow individuals to appear on their own behalf in legal matters without representation. *Id.*

[17] *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).

[18] *See* joint letter from the FTC and Justice Department to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) at 5-7 (discussing the types of non-attorney competition that may be restricted under a similar proposal in that jurisdiction.); *see also* joint letter from the FTC and Justice Department to Task Force to Define the Practice of Law

ability of non-attorneys to perform certain tasks related to the closing of real estate transactions. There is empirical evidence, however, that consumers benefit from this competition. Not only are lay services cheaper, but evidence suggests that the availability of lay service providers puts competitive pressure on the fees attorneys charge.[19] Evidence gathered in a New Jersey Supreme Court proceeding that allowed lay closings indicated that, in parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid on average $350 less for closings and sellers represented by counsel paid $400 less than in parts where lay closings were not prevalent.[20] Likewise, the Kentucky Supreme Court concluded that prices for real estate closings for lawyers dropped substantially as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[21]

Given the benefits of competition, any restrictions on competition should 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.[22] 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.[23] 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

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in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004) at 6-9 (same).

[19] *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").

[20] *See In re Opinion No. 26*, 654 A.2d 1344, 1348-49. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than $150 less than lawyer closing. See letters to the Virginia Supreme Court and Virginia State bar, *supra* n. 5.

[21] *Countrywide Home Loans, Inc.*, 113 S.W.3d at 120.

[22] *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).

[23] *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).

> 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.[24]

We are not aware of evidence of consumer harm arising from non-attorneys providing services which may fall within the scope for the proposed rules that would justify foreclosing competition. Further, empirical studies have compared attorney and non-attorney provisions of certain services and have found that consumers likely face little risk of harm from non-attorney competition in many areas. For example, a study of lay specialists who provide bankruptcy and administrative agency hearing representation found that they perform as well as or better than attorneys.[25] The 1999 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.[26] 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."[27]

We recommend that the Committee revisit the rules and provide additional comments and guidance to avoid unnecessary restraints on attorney/non-attorney competition. For example, the District of Columbia defines the practice of law as, "the provision of professional legal advice or services where there is a client relationship of trust or reliance.[28] The District of Columbia rule sets forth several provisions similar to those delineated in § 2-44A, but the District of Columbia

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[24] AMERICAN LAW INSTITUTE RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

[25] 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").

[26] Rhode, supra n.22, at 407-08.

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

[28] D.C. Court of Appeals Rules 49(b)(2) (2004) (outline letters omitted)

also provided commentary to narrow the breadth of the Rule and clarify its purpose. The commentary sets forth:

> 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 implicit representation of authority or competence to practice law, or that both are absent. . . . 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. . . .[29]

Adding commentary of this type to the Proposed Rules would serve the public interest in protecting attorney/non-attorney competition. If the Committee is still concerned that consumers may rely on non-attorneys for services that draw close to those requiring the skill and knowledge of an attorney, then it would be better addressed by a rule directed more narrowly to prevent potential harm to consumers than by a broader limit affecting competition. For example, in real estate closings, instead of banning non-attorney closing services, the New Jersey Supreme Court requires that consumers be provided a written notice explaining the risks involved in proceeding

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

in a real estate transaction without an attorney.[30] This type of disclosure in a specified area of commerce permits consumers to make an informed choice about whether to use non-attorney closing services.

Conclusion

The Proposed Rules risk unnecessarily reducing competition between attorneys and non-attorneys for many services that do not require the skill and knowledge of an attorney, including closing services related to real estate transactions. We urge the Committee to modify the rules to insure that competition is not constrained in service areas for which the knowledge and skill of a lawyer is not required. We also encourage the Committee to consider the competitive impact of the Proposed Rules, whether areas that will curtail competition will be outweighed by countervailing benefits to consumers, and whether the Proposed Rules may be more narrowly drawn to correct for specific and identified market failures.

Respectfully submitted,

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[30] *In re Opinion No. 26*, 654 A.2d at 1363.