



Comments of the Section of Antitrust Law

The American Bar Association Section of Antitrust Law comprises 10,000 private practitioners, corporate counsel, government lawyers, judges, academicians, and economists interested in the formulation and enforcement of competition and consumer protection law and policy.

The Antitrust Section has supported proposals within the American Bar Association to broaden consumers' choices in obtaining legal services, consistent with protecting the public and preserving the core values of the legal profession. In recent years, the Antitrust Section has supported proposed amendments to the ABA Model Rules of Professional Conduct intended to enhance consumer choice by recognizing and facilitating multijurisdictional and multidisciplinary practice of law.

The Antitrust Section has considered the Board of Governors' Resolution creating the Task Force on the Model Definition of the Practice of Law, President Carlton's Challenge Statement, the Task Force's proposed Model Definition, and comments of the Antitrust Division of the United States Department of Justice and the Federal Trade Commission (the "Agencies"). The Section is pleased to have this opportunity to provide its own comments, which were **adopted** by its Council on January 19, 2000.

The Antitrust Section shares the Agencies' belief that the draft Model Definition too broadly defines the practice of law to include services that could be provided effectively by nonlawyers. The sampling of statutory definitions the Task Force provides on its website reveals that jurisdictions adopting such broad practice of law definitions find it necessary to carve out exceptions for real estate brokers, tax return preparers, and other nonlawyers offering law-related advice. The Agencies' comments enumerate additional areas in which services touching the law could be provided by nonlawyers at lower cost and no apparent harm to consumers.

The Antitrust Section also shares the ABA's oft-articulated concern that too many Americans of modest financial means forego help with law-related problems because they cannot afford a lawyer. With that in mind, the Section encourages the ABA to focus its considerable resources on its role as advocate to educate the public on the benefits of obtaining cost-efficient legal services and to urge increased support for pro bono services, rather than simply seeking to preclude nonlawyer services through overbroad definitions. The Section respectfully submits that the ABA would better serve the interests of the public by educating them on the reasons why they should turn to attorneys, rather than encouraging adoption of broadly worded UPL statutes that may, for example, be used to prevent nonlawyer credit counselors from helping consumers negotiate payment plans with their creditors or to prevent laypersons from assisting poor immigrants fill out INS forms.

These concerns echo in the writings of noted commentators. *See, e.g.*, Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”* 31 CONN. L. REV. 423, 471-474 (1999). Leading legal ethics professors predict “that the public will not forever tolerate the bar’s monopoly over the practice of law and over the critical power to define what is meant by ‘the practice of law.’” 2 GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, *THE LAW OF LAWYERING* 46-4 (3d ed.

2001). The Section notes that while the Task Force’s comments state that its proposed Model Definition is not intended to cover the sale of self-help publications, including interactive software, it recently took state legislation to overturn such an interpretation of Texas’ unauthorized practice of law statute.

The Section of Antitrust Law joins in the Agencies’ conclusion that a compelling case has not yet been made that the public has been harmed or is in danger of being harmed in all cases by obtaining law-related advice from nonlawyers. Perhaps that evidence will come in the Task Force hearings.

The Section concerns itself with consumer protection law and policy, as does the Federal Trade Commission. In many circumstances, the best protection is found in full and truthful disclosure of facts necessary to enable consumers to make informed decisions.

President Carlton challenged the ABA “to address *whether* to create a model definition of the practice of law that would support the goal to provide the public with better access to legal services [and] be in concert with government concerns about anticompetitive restrictions . . .” (emphasis added). The Section of Antitrust Law concludes, along with the Arizona Supreme Court, among others, that an exhaustive definition is impossible.

The Section encourages the Task Force to consider an approach that focuses less on broadly defining what lawyers do – which inevitably will encompass services that could be provided effectively by nonlawyers – and focuses more on providing consumers with full disclosure of the provider’s qualifications. Persons who assist consumers with contracts, government forms, and other documents or actions that affect legal rights should disclose plainly if they are not licensed to practice law and that the consumer may wish to consult a licensed attorney. (Of course, courts and government agencies will continue to determine the qualifications of those entitled to practice before them.)

The Section suggests that the Task Force should also consider other means to protect consumers from unqualified nonlawyers, such as increasing efforts to educate the general public as to the questions to ask service providers when seeking certain law-related services that further competition on the merits. In sum, the Section believes that the ABA should focus its efforts on seeking to serve the interests of the public, rather than engaging in efforts that may, unfortunately, be viewed as primarily attempting to unduly protect the economic interests of the profession.

The Section urges the Task Force to recommend that the ABA resolve affirmatively to embrace competition among lawyers and nonlawyers in the provision of legal information and legal services, and to promote that competition by providing consumers with the education and disclosures needed to make informed choices.

The Section of Antitrust Law appreciates the opportunity to provide these brief comments and looks forward to participating in the Task Force’s hearings and to providing further comments as the Task Force reconsiders its draft Definition.