May 21, 1999

Washington State Bar Association
Committee to Define the Practice of Law
2101 Fourth Ave.
Fourth Floor
Seattle, WA 98121-2330

Re: Proposed Rule Defining the Practice of Law

Dear Committee Members:

Thank you for the opportunity to comment on your committee's draft rule defining the practice of law. We hope to contribute some thoughts that will assist your committee and the Board of Governors when it considers the issues you raise.

As a preliminary matter, it is worth describing the nature and purpose of the Access to Justice Board. The leadership of the Washington State Bar Association was instrumental in establishing the Access to Justice Board in 1994 as an independent board under the auspices of the Washington Supreme Court. Our current and recent members include judges from the Court of Appeals and Superior Court, former state and local bar presidents, pro bono coordinators and program directors, and other leaders in our profession. We are all lawyers and reflect the geographic, ethnic, and professional diversity within the legal profession. We share in common a belief in the importance of the mission for which the Access to Justice Board was created: to improve access to our civil justice system with a particular emphasis on the unmet needs of low and moderate income people in Washington State.

It is from this perspective we consider and comment on your committee's proposed definition of the practice of law. From the text of the definition, we were unsure of its purpose. Before a rule is drafted or adopted, it is important to know what goals it seeks to meet. A distinct, but related inquiry is what values does the rule seek to promote. Protection of the public from unskilled, incompetent or unethical providers of legal services? Improvement of the quality of the legal services currently provided? Increase in access to justice? Correspondingly, what practices will the rule, if adopted, prevent? Is the rule the best way to accomplish those goals? Are there alternative means of accomplishing these same goals?

No rule or regulation exists in a vacuum and must have purpose and context to avoid becoming irrelevant or a mere abstraction. This is particularly important considering the potential consequences that any such rule would have on the scope of the legal profession's exclusive professional prerogative to practice law and how such a rule would impact the application of criminal and civil laws on non-lawyers who perform services that fall within the scope of the definition. How would the rule impact the delivery of legal services, access to justice and other professional and paraprofessional activities? We would want to know more about the effect of this rule on existing statutes, regulations, and professional rules of conduct and admission.

The Washington Supreme Court's recent decision in *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 969 P.2d 93 (1999), underscores the primacy of these threshold questions: Why are we proposing this rule? What are the purposes of the rule? What values does the rule promote or undermine? The *CTX Mortgage* decision has much to offer on the issues raised by any attempt to define the practice of law, yet is given little consideration in the proposed rule. More on *CTX Mortgage* later.

These threshold issues and many others are discussed in a thoughtful and thought-provoking memo prepared by Judge T.W. "Chip" Small, Chelan County Superior Court, and a member of our Board. We enclose a copy of his original memorandum along his supplemental memorandum commenting on the most recent version of the proposed rule. His memos explain how the proposed definition is simultaneously both too broad and too narrow in its attempt to fashion a definitive and singular definition of what it means to practice law. The memos further point out the need to consider the impact that technology may have on the delivery of legal services in the future.

One of the implicit goals of the proposed definition is to protect the public from harm resulting from the delivery of unqualified or unethical services by people who lack the substantive knowledge to render informed judgments on matters that implicate the application of legal principles to specific facts. In addition to this important consumer protection goal, the Access to Justice Board believes that if a rule is adopted, it should also be designed to promote the availability of affordable, effective, and good-quality legal services.

The rule appears to be based on an assumption that only lawyers are competent to provide any of the services that fall within the definition. While we have not developed a position on this issue, we think this underlying assumption should be examined openly and critically. Inasmuch as we believe the public interest should be the paramount consideration in shaping the development of any such rule, we would want to examine how, and to what extent, this assumption remains valid from the perspective of the public that our profession is committed to serve.

The rule must also take into consideration the reality that the legal needs of the poor go largely unmet. State and federal funding has been slashed in recent years, IOLTA funding is at risk, and the generosity of the private bar has not and can not fill the gap. Few programs or resources address the unmet needs of the middle class for whom lawyers are too expensive. As a result, the great majority of people cannot afford legal services and are effectively denied their legal rights and benefits. The Washington State Bar Association Board of Governors has acknowledged the significance of this problem, declared it a "crisis," and is taking several important steps to increase access to justice.

Angry and frustrated over the legal profession's inability to meet their needs, the public is finding and creating a demand for alternatives. (See the recent *ABA Journal* article, "Lawyers, Heal Thyselves," May 1999, page 96, attached to Judge Small's memo.) Lawyers need to understand and address this need and find a way to help satisfy it without exposing the public to incompetent and unscrupulous people who do greater damage to the legal rights of the clients they purport to help.

We share your committee's interest in protecting the public, but think that before this rule is adopted, the bar should consider the merits and efficacy of other ways this goal might be met. Other possible solutions come to mind, including greater training and education, improved supervision, regulation, licensing, and accountability, greater public information and education, required disclosure of qualifications, or mandatory bonding or insurance requirements. We make no recommendation on which combination of such alternatives would work best, but suggest these alternatives be explored.

We recognize that much of the Committee's work predated the Supreme Court's recent decision in *CTX Mortgage.* This opinion raises many thoughtful concerns that would bear on an

effort to define the practice of law. Within the narrow confines of the specific issue in the *CTX Mortgage* case, the Court addressed two issues: (1) does CTX Mortgage Company perform legal services when its lay staff prepares loan documents and, if so, (2) is it in the public interest to allow it to do so? After considering the nature and complexity of the legal tasks performed and after weighing the cost, convenience, and risk of harm, the Court approved the long-standing practice of having these trained and supervised non-lawyers provide these limited services.

By acknowledging the dual considerations of consumer protection (protecting the public from unqualified providers of legal services) and access to justice (making legal services convenient and affordable), the Court rejected a mechanistic approach and instead embraced a practical approach to determining when and under what circumstances non-lawyers can and should be permitted to provide services that fall within the traditional definition of the practice of law. The parameters of this pragmatic and consumer-oriented approach will evolve over time. As have many other courts in the United States, our Supreme Court may consider it unnecessary or unhelpful to try to fashion a singular definition of the practice of law, preferring instead a case-by-case approach.

The focus of your committee's proposed rule is on the initial issue addressed in the *CTX Mortgage* case, namely, what is the practice of law. However, the second issue–whether a particular practice is in the public interest–may be more important. Many non-lawyers provide services that are legal in nature. Realtors, accountants, contractors, financial planners, arbitrators and mediators, sports agents, etc. Other examples are listed in Judge Small's enclosed memo. By the same token, lawyers commonly engage in activities under the umbrella of "practicing law" which many other professionals also regularly engage in, including lobbying, mediating disputes, preparing tax returns, assisting with resource referral or case management, and providing social work services, to name a few. The only unique activity the public recognizes as the peculiar province of lawyers is appearing in court.

Some instances of non-lawyer "practice of law" have widespread support, such as limited practice officers, courthouse facilitators, domestic violence advocates who work with legal services programs, and lay representatives in administrative hearings. Other instances have widespread opposition, such as the unqualified and incompetent family law practitioners who do not understand the law and butcher the legal rights of those clients who are unfortunate or foolish enough to use their services.

Laws and regulations permeate society. The realities of commerce and the demands of the public will not allow us to change the fact that some "legal services" are and will continue to be provided by non-lawyers. Our challenge is to determine when and under what circumstances this is appropriate (i.e., "authorized"). The second half of your proposed rule offers some specific exceptions, but no standards, no guidance, and no criteria with which one could determine the legitimate parameters of the unauthorized practice of law.

Our cautious approach stems in part from the fact that many courts and bar associations have grappled with this issue, only to decide not to adopt a definition of the practice of law, perhaps finding the task impracticable, unworkable, or unwise. The courts in this state, for example, have often noted how difficult it is to define the practice of law and have instead taken a case-by-case approach. The approach now includes a balancing of the public interest in cost and convenience against the risk of harm if incompetent people are providing legal services. The balance to be struck in any given instance is necessarily fact-based and will depend on information about the nature of the services provided, the qualifications of the people providing those services, the likelihood and consequences of possible error, and the financial costs involved

depending how the services are provided. All these factors are relevant after the *CTX Mortgage* decision. Further, given the evolutionary nature of these issues–and our profession's consideration of them–there may well be greater wisdom in approaching these issues on a case-by-case basis in light of an overriding philosophy that identifies the relevant factors and competing interests, always with the public interest at heart.

Striking a proper balance is an enormously difficult challenge. The public will not be served well if the restrictions are relaxed so much that we expose the public to unqualified and unscrupulous providers of legal services. Yet if the rules are too restrictive, we will effectively deprive people of their legal rights because the cost remains beyond the reach of most people.

These issues are old as the profession. There are no simple answers nor ones that can satisfy the competing interests among all members of the public or within our own profession. The Access to Justice Board is mindful of the difficulties presented by the challenge of drafting a definition of the practice of law that does not damage, unintentionally or otherwise, the paramount need to protect the public and meet their legal needs.

We welcome the opportunity to provide further information or assistance. Thank you again for inviting our input.

Sincerely yours,

Kenneth H. Davidson
Chair, Access to Justice Board

Enclosures

cc: Washington State Bar Association President M. Wayne Blair (w/ encl.)
Jan Michels, Washington State Bar Association Executive Director (w/ encl.)