Federal Trade Commission
Public Work Shop on "Possible Anticompetitive Efforts to
Restrict Competition on the Internet"
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My name is Richard Granat and I am Co-Chair of the ELawyering Task Force of the Law Practice Management Section of the American Bar Association. The ELawyering Task Force was established by William Paul, formerly President of the American Bar Association. Its purpose is to develop approaches which enable lawyers to deliver legal services over the Net to people of moderate means and therefore connect with what is known as the "latent market for legal services."

I am also, the President of MyLawyer.com, Inc. MyLawyer.com is a legal information service company operating a family of legal web sites on the Internet. These web sites are designed to assist pro se litigants by providing interactive forms that can be assembled on-line. I am also a member of the Maryland Bar (for more than 30 years), where I have practiced from time to time, mostly in the family law area.

My views stated here are my own and do not represent the position of the American Bar Association in any way.

The focus of this workshop is the possible anticompetitive efforts by states to restrict competition of commerce over the Internet. In the context of the legal profession, this means evaluating the impact of the ethical rules and codes of conduct that govern lawyers in the various states. These are almost always established and enforced by the state's highest courthouse.

Many of these ethical codes were framed in an era that was pre-internet, when lawyers practiced law entirely within a local community from a physical office that had a presence within a community and where the attorney was a member of that state bar.

The Internet has made it possible for attorneys to deliver legal services at a distance. For example, here are a few legal services that can now be effectively delivered at a distance using the Internet as a platform:

- Provide legal advice on-line;
- Provide interactive document drafting and legal form assembly services through the web browser to clients who live or are located at greater distance from the lawyer's physical office;
- Offer on-line dispute settlement services;
- Provide informed referrals, by helping clients analyze their problems, and, where appropriate, referring these clients to attorneys specialized in the area of practice most relevant to the client's needs;

- Publish legal information and on-line questionnaires that can assist consumers in understanding their legal problems at lower cost that the traditional one-to-one advisory model.

A case can be made that the Internet, by increasing the reach of attorneys to deliver legal services at low cost, can result in greater efficiencies due to traditional economies of scale resulting from serving many clients simultaneously. Reaching a larger number of clients through the use of Internet technologies would enable lawyers to invest capital in the technological and management methods that would rationalize this broad delivery of legal services, particularly to the middle class.

The uniform position of states has been that communications on law firm web sites are subject to regulation under their respective rules governing lawyer advertising and solicitation. Each state has its own rules that govern lawyers within its jurisdiction. State rules that govern lawyer advertising give little guidance on electronic communications by lawyers. Crafted within the context of print and broadcast media, jurisdictions apply these mandates to lawyers' Internet communications as if they were print media or radio or TV advertisements.

More specifically, some state ethical rules require law firms to maintain physical offices. Other rules require law firms to meet multi-state advertising rules and even to maintain copies of "advertisements" for further inspection, as if web sites were "print ads" in newspapers. Other rules impose limits on solicitation which when applied in cyberspace; severely restrict the kinds of applications that can be deployed on a web site. The impact of these rules, when taken together, casts a pall on the willingness of lawyers to use the Internet as a mechanism for innovation. Since violations of state ethical rules can lead to sanction or even disbarment, lawyers are naturally reluctant to push the envelope of innovation.

Unfortunately the structure of state regulation of the legal profession restricts not only the capacity of attorneys to offer these innovative services, but the rules against the unauthorized practice of law restrict the capacity of new entrants into the legal industry.

Apart from lawyer regulation, the bar itself restricts innovation, by imposing an irrational set of rules that define what is the "unauthorized practice of law," in the name of protecting the consumer from harm. These rules apply to persons who do not operate in cyberspace as well. However, the impact of these rules when applied to new entities who wish to provide innovative legal services over the Internet is severe, since the impact is to restrict these innovations entirely under the threat of criminal and civil sanctions.

One method of expanding consumer choice is to empower qualified non-legal entities to offer routine legal assistance services for matters like uncontested divorce and Chapter 7 bankruptcy. Almost every scholar and bar commissions that has systematically studied access to non-lawyer assistance has concluded that this is a viable way of reducing the cost of access to legal services and the legal system. Virtually no experts believe that

current prohibitions on such assistance make any sense. Current bans on unauthorized practice of law by lay competitors are sweeping in scope and unsupportable in practice.

In 1995, The ABA sponsored a Commission on Non-Lawyer Practice and generated a favorable report on the use of paralegals and other non-legal entities to deliver routine legal services. The Commission urged the ABA to reform the rules governing the unauthorized practice of law, but the ABA refused to budge on authorized practice issues. The ABA House of Delegates adopted none of the proposals for reform made by the Commission. As a result, states continue to enforce unauthorized practice rules with a vengeance, chasing after non-lawyer advocates when there is no question that they are providing quality services that lawyers would not provide. Today, this same zeal towards enforcement of unauthorized practice laws is focused on legal web sites that are operated by non-law firms seeking to offer innovative services over the Internet.

During the last five years there has been a proliferation of non-lawyer legal web states providing legal information, document assembly services, dispute settlement services, all on a multi-jurisdictional basis at lower cost than lawyers can provide within the local communities. As in other industries, technology has the capacity to reform and rationalize the delivery of products and services.

Rather than embrace these innovations, the ABA voted to increase enforcement of unauthorized practice laws, a decision inconsistent with the recommendations of its own expert Commission. We have state bar presidents running on a platform of enforcing the unauthorized practice of law against non-lawyer web sites that might be offering legal advice or other services which border on the practice of law.

More recently, the American Bar Association has proposed Hearings on the definition of the Unauthorized Practice Law, to be held at this year's mid-year meeting in Seattle, [see: http://www.abanet.org/cpr/model_def_home.html]. The ABA Commission has proposed a revised definition, which states in part:

(1) The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

(2) "Person" includes the plural as well as the singular and denotes an individual or any legal or commercial entity.

The tautological nature of the definition stated in (1) is obvious on its face. It suggests that only a person "trained in the law," is capable of giving legal advice, providing legal information, or settling a conflict. It would prohibit one person from advising or discussing with another at a cocktail party their legal rights in a particular situation, and it would prevent a non-lawyer web site from providing detailed legal information, expert legal systems, legal document assembly services, and structured legal advice. It suggests that only lawyers are competent to provide legal advice to others or that only lawyers are permitted to utter "legal speech."

If the FTC really wants to deal with the anticompetitive effects of regulation on the Internet, it needs to focus more particularly on the underlying system of ethical rules that govern the legal profession. Even as recently as this summer, at the ABA Annual Meeting, the ABA House of Delegates endorsed and approved the recommendations of the Ethics 2000 Commission which retains the archaic structure of state regulation and strict enforcement of the prohibition against the unauthorized practice of law. The ABA House of Delegates has rejected proposals that would enable companies such as Sears and Wal-Mart to employ lawyers to provide simple low cost legal services. The new recommendations of the MJP Commission and Ethics 2000 reinforce restrictions on splitting fees with non-lawyers and limit multidisciplinary collaboration. These efforts also have the impact of restricting consumer choice, particularly on the Internet. These ABA efforts to maintain the monopoly that lawyers have over the delivery of legal services, is not in step with the efforts of other Western nations to reform and de-regulate their legal industries.

Other countries typically permit non-lawyers to give legal advice and to provide assistance on routine matters. And no evidence suggests that these lay specialists are inadequate. A case in point involves England's Citizens Advice Bureau, which provides low cost assistance with non-lawyer staff. The addition of computers within the CAB which are tied into the Internet, and in turn access legal information databases, have made these entities even more valuable points of entry into the legal system for consumers are seeking a low cost alternative.

I urge the FTC to take notice of what is happening within the legal profession across the pond in Great Britain to de-regulate the legal profession there in the interest of increasing consumer choice.

The equivalent of the American Bar Association of England, with the prodding of the FTC's counterpart on the UK, has concluded that de-regulation of the profession would reduce market inefficiencies to the advantage of the consumer.

As a result, they have made what lawyers in this country would consider to be startling recommendations, which will soon become the basis for a new regulatory framework in the UK.

Specifically, the rule restricting the services which solicitors employed by non-solicitor entities may provide to their employer's customer is to be revoked. The reform will amend Rule 4 of the Solicitors Practice Rules. This means that financial institutions, banks, insurance companies and even the Wal-Mart's of the UK can employ lawyers directly to serve consumers. There are suitable restrictions being put in place to make sure that the independence of the law is maintained as well as traditional core values such as confidentiality and conflict of interest.

In addition the rule prohibiting fee sharing will be abolished, subject to the provision to reinforce the requirement that solicitors must ensure that fee sharing does not impede their ability to give independent advice to their client.

A central objective of the liberalization is the belief that it would lead to an overall demand for legal services because of the greater access potential provided by large corporate chains. These organizations would be able to offer employed lawyers the kind of capital investment and financial backing which many solos and small law firms do not have leading to a rationalization of the entire delivery system of legal services, by financing the development of new Internet technologies that when used together with lawyers on-site would reduce the cost of delivering legal services over-all. This concept of "click and mortal" – namely the use of internet technologies (bits) with human lawyers (atoms), holds the promise of creating new ways of delivering legal services that will reach the broad middle class. But creation of these systems will involve the investment of large sums of capital and the implementation of management and marketing technologies which exceed the capabilities of today's typical small law firm. True innovation in the legal service delivery system will require investments in R&D. The "unauthorized practice rules" prevent this investment from happening and as a result legal services are delivered today pretty much they way they have always been- on a one-to-one basis, expensively, and often created individually for each client, without the economies of scale that are now reforming other industries, such as banking, real estate, and brokerage. Ironically the policy work and research of the UK Bar Council that has lead to these recommendations seems to be completely off the radar screens of the leadership of the legal profession in the US.

Already there is movement by some major players in the UK to develop and invest in major technology and management platforms that hold the promise of delivering a new level of legal services that can tap into what has been called the "latent market for legal services. "

Large banks and financial institutions such as Abbey National and Virgin, are planning to enter the market for the delivery of personal legal services. It is anticipated that the introduction of these larger entities might result in the reduction of the number of lawyers/solicitors who serve the public The end result is that the members of the public who heretofore have not had access will now have access at price points that simply were not available.

While it is too early to tell how these reforms will work out in practice, the fact that the US legal profession continues to maintain barriers to competition under the rubric of "unauthorized practice of law," shows how out of touch it is with real consumer interests.

What would make a difference, instead, would be a legal profession that was truly committed to the public interest and access to justice by empowering a range of alternatives, not all of which would be wholly dependent on lawyer participation in client problem resolution and the delivery of legal service, and which would reduce the barriers to innovation on the Internet caused by excessive state regulation of the legal industry.