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No. SU-2018-161-M.P.

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**IN THE SUPREME COURT OF RHODE ISLAND**

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**IN RE WILLIAM E. PAPLAUSKAS, JR.**

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**ON REPORT OF THE UNAUTHORIZED PRACTICE OF LAW  
COMMITTEE  
(UPLC 2015-6)**

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***AMICUS CURIAE* BRIEF OF CONSUMERS FOR A  
RESPONSIVE LEGAL SYSTEM  
D/B/A RESPONSIVE LAW**

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Pursuant to Rule 16(h) of the Supreme Court Rules of Appellate Procedure, Consumers for a Responsive Legal System d/b/a Responsive Law (“Responsive Law”) respectfully submits this brief as *amicus curiae*. Responsive Law expresses its opposition to the Rhode Island Unauthorized Practice of Law Committee’s recommendation that the Court pronounce that certain real estate transactions constitute the practice of law. Real estate transactions that do not require legal judgment and that can be standardized should not necessitate lawyer involvement in all circumstances.

### STATEMENT OF INTEREST

Responsive Law is an advocate for consumers of legal services. Responsive Law, based in Washington, D.C., is a non-profit 501(c)(3) corporation with a national focus on making the legal system more affordable, accessible, and accountable. It advocates for lowering and removing barriers to the legal system. Responsive Law’s mission includes facilitating legal self-help resources, championing innovative lawyers and courts, and promoting competition to traditional legal services.

### ISSUES

#### **I. Allowing Only Lawyers to Facilitate Real Estate Transactions Reduces Access to Justice by Preventing the Public from Hiring More Affordable Service Providers**

The justice gap in the United States extends from the poorest Americans across the middle class. In the World Justice Project 2017-2018 report, the United States ranks 94th out of 113 countries (tied with Cameroon, Uganda, and Zambia) in the affordability and accessibility of

its civil justice system.<sup>1</sup> Many Americans cannot afford to pay lawyers for assistance with everyday legal needs, even though the average American household faces a significant legal problem every year.<sup>2</sup> More Americans do not address their legal problems due to lack of access to justice than their peers in countries such as England and the Netherlands, where there are fewer restrictions on offering legal services. Small businesses also struggle with the gap in access to justice, with over half facing legal problems without legal assistance.<sup>3</sup> The typical three-person middle-class Rhode Island household requires approximately a day of work to afford one hour of a lawyer's time, which means that larger households will face an even greater financial burden.<sup>4</sup>

## **II. Trained Non-Lawyer Service Providers Who Are Competent in Real Estate Matters Can Advise and Assist in Real Estate Transactions**

The Unauthorized Practice of Law Committee identifies five specific transactions that it believes should constitute the practice of law: title examination, real estate closing, deed drafting, residency affidavit, and power of attorney drafting. Many of the documents can be drafted with

<sup>1</sup> World Justice Project, WJP Rule of Law Index 2017-2018 (2018), available at [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf).

<sup>2</sup> Gillian K. Hadfield & Jamie Heine, *Life in the Law—Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate-income American households face an average of two legal problems annually).

<sup>3</sup> LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), available at <https://www.business.com/images/content/58a/da0bd2f87b1207f721220/0-0/>.

<sup>4</sup> Kathleen Elkins, *Here's How Much Money Middle-Class Families Earn in Every US State*, CNBC (March 13, 2018) (stating that according to Pew Research Center, the median household income of three-person middle-class families in Rhode Island in 2016 was \$74,908). Assuming that the average Rhode Island income is based on an eight-hour workday five days a week, a middle-class Rhode Island household would need to save approximately one day worth of income to afford one hour of a lawyer's time.

standard forms. Deeds can be drafted based on templates, prior transactions, information in purchase and sales agreements, or information communicated by the buyer's closing agent. A standardized residency affidavit form is available on the website for the Rhode Island Division of Taxation.<sup>5</sup> R.I. Gen. Laws § 18-16-2 provides language for the statutory short form power of attorney, and the Rhode Island Division of Taxation also provides a standardized power of attorney form.<sup>6</sup>

With respect to real estate closings, even if lawyers may provide better services in some instances, it should be the choice of the consumer as to whether the increase in quality is worth paying a premium. The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) have urged the states to allow consumers the choice of relying on lay closing services. In a letter to the Virginia State Bar and comments to the Virginia Supreme Court, the federal agencies opposed an unauthorized practice of law opinion prohibiting non-lawyers from conducting real estate closings.<sup>7</sup> According to the agencies, this opinion would have deprived consumers of their choice and stifled competition, thus increasing real estate closing costs. The agencies cited a New Jersey Supreme Court holding that allowed non-lawyers to conduct closings, finding that closing fees decreased accordingly. *In re Opinion No. 26 of the Committee On The Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995). The Virginia State

<sup>5</sup> State of Rhode Island Division of Taxation Department of Revenue, <http://www.tax.ri.gov/taxforms/nrrewh.php>.

<sup>6</sup> See also State of Rhode Island Division of Taxation Department of Revenue, <http://www.tax.ri.gov/taxforms/>.

<sup>7</sup> Letter to the Virginia State Bar from the Department of Justice and the Federal Trade Commission, Sept. 20, 1996, <https://www.justice.gov/atr/proposed-upl-opinion-183-non-lawyers-conducting-real-estate-closings>. See also Comments on Proposed UPL Opinion 183, <https://www.justice.gov/atr/comments-proposed-upl-opinion-183-non-lawyers-conducting-real-estate-closings>.

Bar later rescinded its opinion. See *Virginia UPL Opinion 183*, Virginia State Bar, available at <http://www.vsb.org/site/regulation/virginia-upl-opinion-183>.

The DOJ and FTC also noted that the DOJ obtained a judgment against an Indiana county bar association restraining title insurance companies from engaging in competition in certifying titles. *United States v. Allen Cty. Ind. Bar Ass'n*, Civil Action No. F 79-0042., 1980 U.S. Dist. LEXIS 14680 (N.D. Ind. Oct. 7, 1980). Title insurance companies can subscribe to online resources that reproduce documents recorded daily by the local register. Finally, the agencies noted that the DOJ prevailed with a court order against a New York county bar association that attempted to restrict corporate fiduciaries from providing trust and estate services to compete with attorneys. *United States v. N.Y. Cty. Lawyers' Ass'n*, No. 80 Civ. 6129 (LBS)., 1981 U.S. Dist. LEXIS 16250 (S.D.N.Y. Oct. 14, 1981).

### **III. Pronouncing that Real Estate Transactions Constitute the Practice of Law When Such Transactions Do Not Require Legal Judgment Risks Antitrust Liability**

Preventing competition from non-lawyers also gives rise to potential antitrust liability. The Supreme Court's 2015 decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state-action immunity from antitrust laws only if it is subject to active supervision by the state. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

This active supervision requirement requires an independent analysis as to whether certain conduct constitutes the unauthorized practice of law. The Court's role in reviewing the

Committee's decision is thus more legislative than judicial, requiring the Court to review the decision on policy grounds and foresee anticompetitive effects of such decisions.<sup>8</sup>

The DOJ and the FTC determined in 2007 that state proposals requiring lawyers to perform certain real estate services that had been performed by non-lawyers were unnecessary to protect consumers and could, instead, increase prohibitive costs for consumers.<sup>9</sup> The Court should follow this view and remove anti-competitive barriers to services.

#### **IV. Rhode Island Should Not Restrict Non-Lawyer Service Providers Without Defining and Identifying the Consumer Harm That They Cause to Parties in Real Estate Transactions**

There are several examples of non-lawyer service providers throughout the United States that have helped consumers resolve their legal issues. Online services like Legal-Zoom have had as many as one million users over the course of a decade without reliable evidence of incompetence. Andrew Perlman, *Towards the Law of Legal Services*, 37 *Cardozo L. Rev.* 49, 102 (2015) (stating that “more than one million consumers have used LegalZoom in the last ten years alone, and there is no reliable evidence of incompetence”). Other services such as Call for Action use a national network of more than 1200 non-lawyer volunteers to help people resolve consumer complaints, and Harvard University’s Small Claims Advisory Service uses undergraduate students without lawyer supervision to help guide people through Massachusetts small claims courts.

<sup>8</sup> For a full discussion of the implications of *Dental Examiners* on anticompetitive regulatory action by the bars, see Responsive Law’s Comments to the State Bar of California Governance in the Public Interest Task Force on Consumer Protection in the Wake of the *Dental Examiners* Decision, [https://www.responsivelaw.org/uploads/1/0/8/6/108638213/responsive-law-comments-to-ca-governance-task-force\\_1.pdf](https://www.responsivelaw.org/uploads/1/0/8/6/108638213/responsive-law-comments-to-ca-governance-task-force_1.pdf).

<sup>9</sup> Opening Remarks by Federal Trade Commission Chairman Joseph J. Simons for Competition in Residential Real Estate Brokerage – An FTC-DOJ Workshop, June 5, 2018, [https://www.ftc.gov/system/files/documents/public\\_statements/1383151/simons\\_-\\_real\\_estate\\_competition\\_workshop\\_opening\\_remarks\\_6-5-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1383151/simons_-_real_estate_competition_workshop_opening_remarks_6-5-18.pdf).



Similarly, in England and Wales, there has been a robust market of non-lawyer service providers for decades, in both litigation and legal advice. For example, McKenzie Friends provides moral support, takes notes, assists in the management of court papers and provide advice on courtroom conduct. It has operated for nearly fifty years, with a recent report finding that there was "no evidence of [consumer detriment] occurring on any scale."<sup>10</sup> More broadly, the United Kingdom's Citizens Advice has used non-lawyer volunteers to provide advice on legal and other matters to tens of millions of people for over seventy-five years, and has a 97% consumer satisfaction rating.<sup>11</sup> In contrast to these records of consumer satisfaction, lawyers have a consumer satisfaction rating of 76%,<sup>12</sup> with one lawyer discipline complaint filed annually for every fifteen lawyers.<sup>13</sup> Even when compared to the already highly regulated services of lawyers, leading non-lawyer service providers do not appear to have a consumer protection problem.

It is also worth noting that regulation—or prohibition—of services by the bar is not the only way to protect consumers. Non-lawyers who provide real estate services—including title insurance companies, banks, notaries public, and real estate brokers—are already regulated in Rhode Island through licensing, providing consumers with protection in addition to generally

<sup>10</sup> Legal Services Consumer Panel, "Fee Charging McKenzie Friends," p. 5 (April 2014), [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2014%2004%2017%20MKF\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf).

<sup>11</sup> Client satisfaction with the Citizens Advice service," (2014), [https://www.citizensadvice.org.uk/Global/Migrated\\_Documents/corporate/client-satisfaction-2.pdf](https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/client-satisfaction-2.pdf) (retrieved April 28, 2016).

<sup>12</sup> ABA Section of Litigation, "Public Perception of Lawyers: Consumer Research Findings," p. 19 (April 2002).

<sup>13</sup> ABA Center for Professional Responsibility, "Survey on Lawyer Discipline Systems," (2015), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2015\\_s\\_old\\_results.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_s_old_results.authcheckdam.pdf).

applicable consumer protection laws. It is also significant that there has been no demonstration by the Committee of actual harm to consumers from non-lawyer services.

Without a finding of actual harm or the reasonable probability of harm, rules for unauthorized practice of law can be used to protect lawyers from competition, rather than to protect consumers from incompetence. Many non-lawyers who wish to be innovators in delivering access to justice—both online and bricks-and-mortar—cite prosecutions for unauthorized practice of law as one of the main obstacles to their businesses. Until a requirement-of-harm provision is added to unauthorized practice of law rules, providers of innovative, affordable law-related services will be unable to provide affordable services to customers without fear of running afoul of unauthorized practice of law prohibitions.

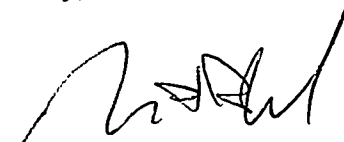
### CONCLUSION

The Committee's recommendation to pronounce services for many real estate transactions as the practice of law does not serve the public interest. Without identifying the consumer harm caused by non-lawyers assisting real estate transactions—especially when the Committee has not explained the specific need for lawyers to be exclusively permitted to advise such transactions—a pronouncement limiting more affordable services for the public would continue the access to justice gap that currently exists.

Respectfully submitted,

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Dated: February 1, 2019

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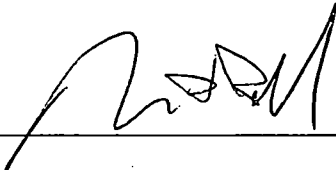
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