

June 13, 2023

The Honorable Phillip Chen
Assembly Member, 59th District
1021 O Street, Suite 4620
P.O. Box 942849-0059
Sacramento, California 95814

Dear Assemblyman Chen:

The Antitrust Division of the United States Department of Justice (“The Division”) is pleased to respond to your request and provide its views on California Assembly Bill (“AB”) No. 690 (“the proposed bill”), which would extend the operation of existing California law that authorizes qualified practitioners known as legal document assistants (LDAs) and unlawful detainer assistants (UDAs) who are not attorneys to offer limited legal-related services until January 1, 2030.

The Antitrust Division is committed to promoting free and fair competition by enforcing the federal antitrust laws, including in the market for legal services – a critical market for consumers, workers, and small businesses alike. If adopted, AB 690 would promote and protect competition in the market for legal service by expanding the pool of available service providers. Continuing to authorize non-lawyers to compete with lawyers for certain services would enable consumers to access justice at lower costs, expand choice in the delivery of legal-related services, and lift barriers to employment for workers. Unduly broad restrictions on the practice of law impose significant competitive costs on consumers and workers and impede innovation. For these reasons, the Antitrust Division encourages the California State Legislature to adopt AB 690.

The mission of the Antitrust Division is to enforce the federal antitrust laws, which help ensure economic opportunity and fairness by promoting free and fair competition. As the United States Supreme Court has long recognized, “[t]he heart of our national economic policy long has been faith in the value of competition.”¹ For this reason, our antitrust laws are “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”² Free and fair competition produces lower prices for consumers. It safeguards consumer choice. It protects workers in securing and maintaining fair wages and good working conditions. And it fuels innovation that is essential to the American dream.

¹ *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

² *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

Because of the importance of legal services to consumers, our economy, and our democracy, the regulation of the practice of law has been an area of interest for the Antitrust Division for decades.³ The Division has long argued that consumers generally benefit from competition between lawyers and non-lawyers in the provision of a wide range of services.⁴ Although the “practice of law” is largely regulated at the state level, the United States Supreme Court has made clear that federal antitrust law generally applies to the legal profession.⁵ Consistent with these principles, the Antitrust Division has brought its own enforcement actions under the federal antitrust laws and obtained injunctions against unreasonable restraints in the marketplace for legal services, including unreasonable restraints on competition between lawyers and non-lawyers.⁶ The Division has also obtained injunctions against anticompetitive restrictions imposed on the delivery of legal services and anticompetitive activities by bar associations.⁷ And the Division regularly files statements of interest and amicus briefs in litigation by other parties regarding the appropriate breadth of the practice of law.⁸

³ See Letter from U.S. Department of Justice, Antitrust Division to North Carolina General Assembly (Feb. 14, 2023).

⁴ See, e.g., Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Task Force of the Model Definition of the Practice of Law, American Bar Ass’n, *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law* (Dec. 20, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf> (reaffirming that consumers generally benefit from lawyer-non-lawyer competition); Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Kansas Bar Ass’n, *Comments on Proposed Definition of the Practice of Law* (Feb. 4, 2005), <https://www.justice.gov/atr/comments-kansas-bar-associations-proposed-definition-practice-law> (same); Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Montana Supreme Court, *Comments on Proposed Revisions to the Rules on the Unauthorized Practice of Law* (Apr. 17, 2009), <https://www.justice.gov/atr/comments-proposed-revisions-rules-unauthorized-practice-law> (same).

⁵ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (holding that activities of state and county bars were not exempt from the Sherman Act on the grounds that “[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”); see also *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (holding that a market allocation agreement between competing providers of bar review courses violated the Sherman Act).

⁶ See, e.g., *United States v. N.Y. County Lawyers Ass’n*, No. 80 Civ. 6129 (S.D.N.Y. 1981) (prohibiting county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys); *United States v. Allen County Bar Ass’n*, Civ. No. F-79-0042 (N.D. Ind. 1980) (enjoining county bar association that had restrained title insurance companies from competing in the business of certifying titles); *United States v. County Bar Ass’n*, No. 80-112-S (M.D. Ala. 1980).

⁷ See *United States v. Am. Bar Ass’n*, 934 F. Supp. 435, 435 (D.D.C. 1996); *Nat’l Society of Prof’l Engineers v. United States*, 435 U.S. 679 (1978); *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) i/69,256 (D.D.C. 1990); *United States v. Soc’y of Authors’ Reps.*, 1982-83 Trade Cas. (CCH) i/65,210 (S.D.N.Y. 1982).

⁸ See, e.g., Brief *Amicus Curiae* of the United States of America and the FTC in *In Re William E. Paplauskas, Jr.*, No. SU-2018-161-M.P. (Sept. 17, 2018); Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (July 28, 2003); Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass’n *et al.* in *Ky. Land Title Ass’n v. Ky. Bar Ass’n*, No. 2000-SC-000207-KB (Feb. 29, 2000).

The Division also regularly shares its expertise by evaluating the likely competitive effects of restrictions on the practice of law in in public comments and in letters responding to requests from relevant stakeholders, including state legislatures, federal agencies, bar associations, and international organizations.⁹ The Division has urged that restrictions on the delivery of legal services be limited to activities in which (1) specialized legal skills are required such that there is an implicit representation of authority or competence to practice law; and (2) a relationship of trust of reliance exists.¹⁰ The Division also advocates for the elimination of undue restrictions on competition between lawyers and non-lawyers that are not necessary to address legitimate and substantiated harms to consumers or are not sufficiently narrowly drawn to minimize anticompetitive effects.¹¹ While there are circumstances in which the public interest requires certain restrictions, as a general matter, the antitrust laws require that restrictions on competition are both necessary to prevent significant consumer harm and narrowly drawn to minimize its anticompetitive impact.¹²

Section 6400 of California’s Business and Professions Code, first enacted in 1998, expanded the pool of eligible service providers by permitting qualified practitioners who are not lawyers to provide limited legal-related services.¹³ For example, LDAs may provide assistance with routine tasks such as typing and filing paperwork for child support modifications, child custody and visitation orders, domestic violence restraining orders, guardianships, limited conservatorships, and other form-intensive documents.¹⁴

⁹ See, e.g., Comment of the Antitrust Division of the Department of Justice, Docket Nos. PTO-P-2022-0027- 0001, PTO-P-2022-0032-0001 (Jan. 31, 2023), <https://www.justice.gov/atr/page/file/1567941/download>; Submission of the United States to the Competition Committee of the Organisation for Economic Cooperation and Development, *Disruptive Innovations in Legal Services* (June 13, 2016); Letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (Apr. 27, 2007 and June 21, 2006); Letter from the Justice Department and the FTC to the Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass’n (Dec. 16, 2004). For the Division’s letters regarding the practice of law, see U.S. DEP’T OF JUSTICE, *Comments to States and Other Organizations*, <https://www.justice.gov/atr/comments-states-and-other-organizations> (last updated Jan. 9, 2023).

¹⁰ Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Hawaii State Judiciary, *Comments on Proposed Definition of the Practice of Law* (Jan. 25, 2008), <https://www.justice.gov/atr/comments-proposed-definition-practice-law>.

¹¹ See, e.g., Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Task Force of the Model Definition of the Practice of Law, American Bar Ass’n, *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law* (Dec. 20, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf> (reaffirming that consumers generally benefit from lawyer-non-lawyer competition in the provision of certain legal-related services); Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Kansas Bar Ass’n, *Comments on Kansas Bar Association’s Proposed Definition of the Practice of Law* (Feb. 4, 2005), <https://www.justice.gov/atr/comments-kansas-bar-associations-proposed-definition-practice-law> (same); Letter from the Fed. Trade Comm’n and the U.S. Dep’t of Justice to the Montana Supreme Court, *Comments on Proposed Revisions to the Rules on the Unauthorized Practice of Law* (Apr. 17, 2009), <https://www.justice.gov/atr/comments-proposed-revisions-rules-unauthorized-practice-law> (same).

¹² See *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986).

¹³ California Business and Professions Code, § 6400 et seq. (2019).

¹⁴ *Id.*; see also Letter from Rob Van to Assembly Member Chen, *AB 690(Chen): Legal Document Assistants and Unlawful Detainer Assistants SPONSOR/SUPPORT* (Mar. 7, 2023),

Like LDAs, UDAs provide limited assistance to individuals seeking to represent themselves, however UDAs are only permitted to assist in the defense of an unlawful detainer claim or action, including any bankruptcy petition that may affect the unlawful detainer claim or action.¹⁵ Unlawful detainer actions occur when a landlord seeks to have a tenant evicted and/or pay rent that is owed.¹⁶

LDAs and UDAs align with California’s longstanding practice of limiting unduly restrictive definitions of “the unauthorized practice of law.” Despite California’s leadership in this area, its legal system is still straining to meet the needs of its population. The California State Bar’s 2019 study on the California Justice Gap (“Justice Gap Study”) highlighted that 55 percent of all Californians experienced at least one civil legal problem in their household, but nearly 70 percent of these individuals did not receive legal assistance.¹⁷ This issue is particularly acute for California’s low-income population: only 29 percent of low-income Californians sought legal help for the legal issues that they experienced.¹⁸ Of these legal issues, housing is often the most common for low-income Californians. Problems relating to housing is the most common issue reported to legal aid, and housing issues represented over 1/5 of all cases closed by legal aid organizations in California in 2018.¹⁹ Legal aid organizations cannot meet this demand. State Bar-funded legal aid organizations fully serve only 30 percent of eligible civil legal problems reported to them by low-income Californians. These findings show that there is more work to be done to facilitate access to justice in California.

Qualified practitioners who are not lawyers can help to bridge this significant justice gap by helping consumers perform tasks such as filling out and filing important legal forms, or assisting consumers with unlawful detainer claims or actions. Though this work is ministerial in nature, it is critical for many Californians. The Justice Gap Study also noted that for those Californians who did receive legal help for their problems, 34 percent received this help in the form of filling out documents or forms, and 21 percent of this help was focused on problems related to housing.²⁰ For consumers who are unsure of how to fill out often confusing legal forms, LDAs provide a low-cost alternative to other, often prohibitively expensive, forms of legal assistance.

Unduly broad definitions of the practice of law impose significant competitive costs on consumers, workers, small businesses, and innovation. Continuing the LDA and

<https://www.calda.org/resources/Documents/AB%20690-CALDA-Sponsor-v.1.pdf>.

¹⁵ California Business and Professions Code, § 6400(a) (2019).

¹⁶ Sacramento County, County Clerk/Recorder, *Unlawful Detainer Assistant*, <https://ccr.saccounty.gov/Pages/UDA.aspx#:~:text=An%20unlawful%20detainer%20action%20is%20a%20court%20process,a%20UDA%2C%20contact%20the%20Department%20of%20Consumer%20Affairs.>

¹⁷ The State Bar of California, *The California Justice Gap: Measuring the Unmet Civil Legal Needs of Californians* 8 (2019), <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Report.pdf>.

¹⁸ *Id.*

¹⁹ *Id.* at 43-44.

²⁰ *Id.* at 36, 44.

UDA programs would help to promote and protect competition in the market for legal services by expanding the pool of available service providers. Such an expansion could benefit consumers by lowering costs and increasing access to more providers of legal-related services. The LDA and UDA programs also benefit workers by lifting restrictive barriers to employment.

Allowing qualified practitioners who are not lawyers to continue their work would protect consumers from the often-harmful consequences of being forced to handle certain legal tasks on their own. In particular, it would allow more California consumers seeking legal assistance – who might otherwise be forced to forego legal representation altogether – the ability to secure assistance from lower-cost non-lawyer service providers. Access to affordable legal assistance remains a significant challenge for many California residents who face civil legal issues: concerns about the cost of legal help was one of the most common reason that Californians cited for not seeking legal help.²¹ LDAs can provide a low-cost alternative to hiring an attorney for legal paperwork, and often require a one-time fee that is significantly lower than most attorneys.²² UDAs can provide similar cost savings to individuals needing services in unlawful detainer cases.

Alongside harm to consumers, undue restrictions on the practice of law can undermine opportunities for many workers. In contrast, allowing adequately-trained service providers who are not lawyers to offer certain legal services as LDAs will continue to spur job creation and encourage competition among employers of legal services providers. To date, there are thousands of LDAs practicing in California, providing further proof that LDAs will not only allow for lower-cost legal assistance to California’s population, but will also encourage job creation.

Given these benefits, prohibitions on the unauthorized practice of law, particularly as applied to LDAs and UDAs in California, should be narrowly tailored and based on a clear showing of actual consumer harm. The inquiry into the public interest involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also considering the aforementioned benefits that accrue to consumers when lawyers and non-lawyers compete.

In light of these considerations, the Antitrust Division encourages the California State Legislature to adopt California AB 690 to preserve competition in services for which the knowledge of a skill of a lawyer is not required.

²¹ *Id.* at 7.

²² See California Association of Legal Document Assistants, *What is a Legal Document Assistant*, [https://calda.org/What-is-a-Legal-Document-Assistant-\(LDA\)#Advantage](https://calda.org/What-is-a-Legal-Document-Assistant-(LDA)#Advantage).

Sincerely,

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