

# 'UPL' Lawyer Welfare Revisited

BY GEORGE C. LEEF

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**T**HE TWENTY-FIFTH ANNIVERSARY issue of *Regulation* included a number of articles that discussed successes in the battle against regulation that stifles competition and restricts consumer choice. One field where there has been little advance against such regulation, however, is in the market for legal services. At best, there has only been a series of undecided skirmishes against anti-competitive "unauthorized practice of law" (UPL) prohibitions that compel consumers to deal with state-licensed attorneys for common transactions. Bar associations remain steadfastly dedicated to protecting what they view as the lawyers' domain — which is to say, anything even remotely connected with legal documents or proceedings.

**Real estate opportunities** Real estate transactions have long been a battleground between lawyers, who want to be included in all transactions, and consumers, realtors, title companies, and lenders who would often prefer to handle transactions without the added expense of a lawyer. In many states, the parties to a real estate deal are free to employ lawyers if they think it wise, but are equally free to consummate it without them. State bar associations, claiming that the public needs the expertise that only lawyers can provide, are pushing for requirements that real estate closings be done with legal representation, not lay closing services.

The contention that consumers need to have lawyers involved in most all real estate transactions for their own good was dealt a severe blow with the publication of Oklahoma University law professor Joyce Palomar's 1999 article "The War Between Attorneys and Realtors: Empirical Evidence Says 'Cease Fire?'" Palomar studied the records of real estate transactions in five states that mandate the employment of lawyers for closings and five states where closings are usually done without a lawyer. She found that both lawyers and non-lawyers occasionally made mistakes that resulted in costs to the consumer, but the difference in error rates was very small and did not justify granting bar members a legal monopoly on closings. Palomar concluded,

The public does not bear a sufficient risk from lay provision of real estate settlement services to warrant a blanket prohibition of those services under the auspices of preventing unauthorized practice of law. Unless they can provide data showing significant harm to the public, it

will be difficult for the practicing bar to look anything other than proprietary or self-protective when insisting that only attorneys should be permitted to draft instruments and close residential real estate transactions.

Unfortunately, those findings have not deterred the bar associations' efforts to secure more work for their members.

**North Carolina** In 2001, the North Carolina state bar issued two "ethics" rulings that further restricted real estate closings in an already restrictive state. Rule 2001-4 required that a licensed attorney be physically present at all real estate closings, and Rule 2001-8 placed real estate refinancings under the "practice of law" umbrella and therefore required a lawyer's involvement. The first rule created a substantial inconvenience for transactors, especially those in the more remote areas of the state; the second established a lucrative new source of revenue for lawyers.

The Federal Trade Commission and the Department of Justice's Antitrust Division have weighed in against the new North Carolina rules. In a December 2001 letter to the state bar's ethics committee, the two federal agencies argued that it should drop the rules, in part because it failed to show that any harm had come to consumers from either real estate closings conducted by lay associates or from real estate refinancings that were done without a lawyer. The federal agencies noted that a lawyer's involvement would not necessarily lead to any increased protection for the owner, and that it was the job of the government to enforce the laws, not the organized bar.

In the face of federal opposition, the North Carolina bar decided to further study the rules. At the time of this writing, no action has been taken on them.

**How far will the feds go?** But what would the FTC and the Antitrust Division do if the North Carolina bar decides to enforce the rules? Does the Sherman Act give the federal government the ability to block state bar associations' efforts to stifle competition? The answer to those questions is uncertain.

In previous cases where the FTC and Antitrust Division have voiced public opposition to anticompetitive rules of this sort, in New Jersey and Virginia, the rules were defeated. In New Jersey, the state's Supreme Court refused to uphold a "lawyers only" rule for closings, finding that the public interest was better served by open competition. In Virginia, the proposed rule was defeated by the state legislature. Spokesmen for the federal agencies decline to say what they might do if the North Carolina rules are not withdrawn.

**And elsewhere....** Bar associations have also been active in Kentucky and Rhode Island, seeking to choke off competi-

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tion from lay closing services. In 1999, the Kentucky bar association's board of governors issued opinion KBA U-58, which declared real estate closings to be the "practice of law." The opinion reversed a 1981 opinion that allowed lay closing services to compete with attorneys. The FTC and Antitrust Division stated their opposition to the rule in a letter to the board, making the familiar (and sound) arguments that the elimination of non-lawyer competition would tend to raise the cost of real estate transactions without giving consumers any better service. The Kentucky Supreme Court has yet to issue a final determination in the matter.

In Rhode Island, lawyers have gone to the legislature in an effort to escape federal challenges. A bill introduced in March of 2002, H.7462, would require that lawyers represent buyers in almost all aspects of the real estate closing process. As in North Carolina, the legislation would extend the reach of the UPL prohibition to real estate refinancings. The FTC and Antitrust Division have expressed their opposition to the bill in a letter to Rhode Island legislative leaders, but all involved know that the Sherman Act does not prohibit anticompetitive actions taken by the state in favor of various interests. The bill remains in the House Judiciary Committee at this time.

In Arizona, the state bar has long wanted to change the generally laissez-faire approach that the Copper State takes toward legal services. The Arizona legislature declined to reenact the UPL statute when it sunsetted in 1986, allowing for the emergence of numerous legal clinics staffed mostly with paralegals and former law office employees who know how to prepare many of the common sorts of legal documents people need,

and do so at lower prices than what lawyers usually charge. Guilds never like laissez-faire, and the Arizona bar has tried to get the legislature to return to the days when consumers were not free to shop around for the services they desire. So far, the lawyers have not persuaded the elected representatives of the people.

Thus, the Arizona bar has adopted a different strategy. Last April, it petitioned the state's Supreme Court for a judicial decree that would change the Arizona Rules of Court so as to put all the document preparation services out of business. Giving the usual consumer protection argument, the state bar claimed that there had been more than 400 complaints over unauthorized practice. Upon close inspection by members of the Arizona Association of Independent Paralegals along with legal representation provided by the Institute for Justice, it turned out that only nine of

those were complaints against non-lawyers alleging any harm as a result of the services. Because they had not been investigated, it was not known whether there was merit to any of those complaints.

When word of the Arizona bar's proposal became public, there was a considerable outcry that evidently caused the bar association to retreat from its initial position. Under a tentative agreement worked out among representatives of the bar, Supreme Court, and paralegal community, the Court would create a licensing board that would allow independent paralegals and others to operate if they pass an examination and meet certain education requirements. The licensing requirement does preserve a semblance of competition for the time being, but it is a step away from the ideals of free entry into the market and reservation of the use of legal sanctions exclusively for those who perpetrate fraud or cause harm through incompetence.

The good news is that, across the nation, the Iron Curtain of UPL is showing a few cracks. The bad news is that it looks like it will continue to stand for a long time. **R**

## READINGS

- "Lawyer Fees Too High?" by George C. Leef. *Regulation*, Vol. 20, No. 4 (Winter 1997).
- "The War Between Attorneys and Realtors: Empirical Evidence Says 'Cease Fire?'" by Joyce Palomar. *Connecticut Law Review*, Vol. 31, No. 2 (Winter 1998).

# The Dawn of a New Spectrum Policy?

BY ADAM THIERER

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**I**N WHAT MAY BE A WATERSHED MOMENT IN the history of American telecommunications policy, the Federal Communications Commission's Spectrum Policy Task Force recently released its eagerly awaited report and proposed nothing less than a revolution in federal spectrum management. The task force was established by FCC chairman Michael Powell in June 2002 to explore improvements in spectrum management and conduct the first-ever comprehensive review of spectrum policy at the agency. The resulting report not only does an excellent job of laying out the problems associated with federal management of the electromagnetic spectrum, it also outlines a refreshingly bold set of policy recommendations to correct the problems associated with nearly a century's worth of central planning in wireless telecommunications.

The report begins by acknowledging, "The time is ripe for spectrum policy reform. Increasing demand for spectrum-based services and devices is straining longstanding and outmoded spectrum policies." It notes that the FCC's traditional "command-and-control approach" to spectrum management is the primary cause of the regulatory failure because that approach has imposed significant restrictions on spectrum use and users.

**Exclusivity or a commons?** The task force goes on to suggest a bold vision for governing spectrum in the future that has as its cornerstone the principle of flexible use. The report notes that there are two ways to achieve the goal of increased flexibility: through exclusive-use rights or by way of a "commons" model of governance.

Under an exclusive-use model, spectrum holders would be granted clearly defined rights and have the ability to use or sell their spectrum however they wish. That is really just a good old-fashion private property rights regime for spectrum allocation, even though the FCC does not call it that. By contrast, the commons model would allow users to employ frequency-hopping technologies to scan the spectrum for unused frequencies. Using smart antennas, software-defined radios, and mesh networks, spectrum users would increasingly be able to simultaneously operate alongside other users if "overlay" or "underlay" rights are permitted for low-power, non-interfering devices and transmissions.

**A new debate** The intellectual battle between adherents to the property rights and commons models of spectrum gov-

ernance has been a refreshing telecommunications debate for two reasons. First, at the heart of both models is a desire to promote increased flexibility, innovation, and efficient use of the spectrum resource. More important, both groups generally agree that the current command-and-control system is a complete failure and must be replaced. Indeed, both commons and property rights proponents question the continuing need for the FCC in this process at all. Second, and perhaps because of those preceding points, this war of ideas has not been characterized by the rancor typically witnessed in other telecom industry disputes. Advocates of both models have been willing to listen to one another, take seriously the criticisms of the other side, and even integrate some of their suggestions into each other's models.

There is good reason for them to do so. Ultimately, the future of spectrum governance cannot come down to an either/or choice between the two models; rather, it must reflect a synthesis of the two schools of thought. Property rights proponents are correct to stress the important benefits of exclusive use in the

spectrum resource because many users want the freedom to own, sublease, combine, or sell spectrum on their own terms. Moreover, many current incumbent users of the spectrum will argue that they have de facto rights in their spectrum licenses and should be granted unconditional property rights anyway.

On the other hand, the commons crowd is correct in stressing the importance of preserving certain portions of the spectrum for shared, nonexclusive use by companies and consumers. Such shared use could take one of two forms. First, government could designate (or, better yet, purchase at auction) certain bands of spectrum for commons use, much as it purchases large portions of land for public parks and opens those areas to common use. In addition, overlay and underlay areas should be allowed throughout the spectrum as long as users do not interfere with other users. That is a quite practical solution, as such "easements" already exist in some bands of the spectrum, but many other underutilized portions could be opened up for such homesteading. Finally, it is important to acknowledge that private spectrum owners will likely contract with independent users to create commons areas within their exclusive allocations. Just as shopping mall owners lease store or sidewalk space to third parties, so too will private spectrum band managers sublease portions of their property for other uses, including commons areas.

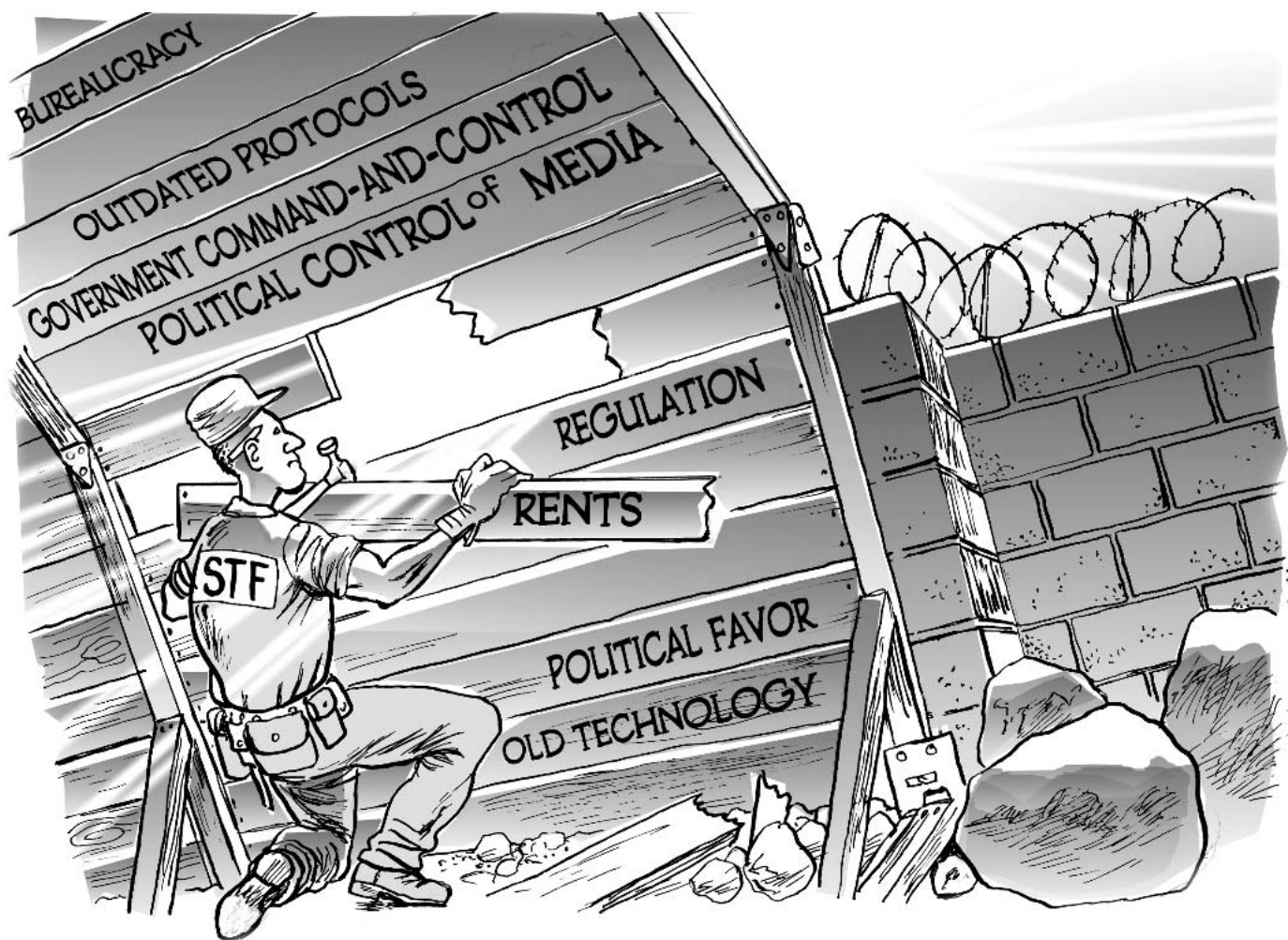
**Rapid transition** Now that the Spectrum Task Force has done such an outstanding job of laying out the problem

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**The Spectrum Task Force report and the new OPP study constitute an important legacy of the Bush FCC.**

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and some potential solutions, the next logical question is when and how policymakers will respond. Ironically, another remarkable report issued by the FCC the same day as the task force report may offer a first step. In a new working paper entitled “A Proposal for a Rapid Transition to Market Allocation of Spectrum,” authors Evan Kwerel and John Williams of the FCC’s Office of Plans and Policy outline an ingenious scheme to expedite the transition to a spectrum free market. Kwerel and Williams, who have done pioneering work on spectrum policy at the FCC, propose to auction off untapped or underutilized spectrum while encouraging incumbent licensees who control large swaths of spectrum to put their holdings on the auction block. Although incumbents would have the right to opt out of the auction entirely, if they put their spectrum on the block they would have the ability to buy back that spectrum and gain complete and immediate operational flexibility. If they do not put it up for auction, flexible use would be denied for five years. They would also have the right to accept the highest bid for their spectrum and just walk away. For incumbents, such a scheme would help reveal the market price of spectrum and give them an idea of what the true opportunity costs of holding that spectrum really are. For others desiring more spectrum, the process would finally give them a chance to get their hands on it.

**Sea change** Even if the FCC takes no more action on this issue, the Spectrum Task Force report and the new OPP study would likely constitute an important legacy of the Bush administration’s FCC. But there is good reason to believe that the agency will take action; it has already taken several other important steps on that front, and its leaders remain committed to the task of spectrum reform. For example, in a recent speech, Chairman Powell argued, “Today’s marketplace demands that we provide license holders with greater flexibility to respond to consumer wants, market realities, and national needs without first having to ask for the FCC’s permission. I believe license holders should be granted the maximum flexibility to use — or allow others to use — the spectrum (within technical constraints) to provide any services demanded by the public.” During the Cato Institute’s annual Technology & Society conference last fall, FCC commissioner Kathleen Abernathy delivered a sweeping set of remarks on spectrum reform that mirrored the task force report’s findings.

It would have been unthinkable for an FCC official to say such things just 10 years ago. This is a stunning sea change in opinion on federal spectrum management. The FCC, and the Spectrum Task Force in particular, deserves high praise for this ground-breaking report and breathtaking set of policy recommendations. **R**