IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

OPINION

v.

14-cv-513-wmc

THE MORTGAGE LAW GROUP, LLP,
CONSUMER FIRST LEGAL GROUP, LLC,
THOMAS G. MACEY, JEFFERY J. ALEMAN,
JASON E. SEARNS and HAROLD E. STAFFORD,

Defendants.

In its August 31st scheduling order, this court granted the parties' request to further brief two matters: (1) the legal definition of the practice of law in the states of Georgia, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina and Wisconsin; and (2) the requirements for limited liability partnerships in Wisconsin and Nevada. (Dkt. #199, at 8.) In doing so, the court explained that it may not resolve any of the parties' remaining disputes on these matters before trial; rather, if either party wanted a pretrial ruling on any particular standard or issue, that party should explain why resolution of the dispute was necessary and how it would help to narrow the issues for trial. *Id.*

The court has now considered the supplemental briefs submitted by the parties in response to its order. (Dkt. ##211-13.) For the reasons set forth below, the court again concludes that resolution of the parties' disputes with respect to both issues will require

factual findings and legal analysis that the court cannot perform until after hearing all of the evidence at trial. Even so, the court will attempt to give further guidance to the parties as to both matters.

A. Disputed State Definitions of the Practice of Law

The parties' arguments regarding the ten remaining disputed legal definitions for the practice of law relate primarily to whether the relevant state standards apply to the ultimate facts in this case, which is a determination that cannot be made until hearing the evidence at trial. *See, e.g.*, *In re UPL Advisory Opinion 2003-1*, 280 Ga. 121, 123, 623 S.E.2d 464, 465 (2005) (Although debt mediation by non-attorneys amounted to unauthorized practice of law "under specific facts of this case," "determination of what constitutes the practice of law in this state must be decided on a fact-specific inquiry."); *Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc.*, No. Civ. A. 96-2746-C, 13 Mass. L. Rptr. 633, 2001 WL 669280, at *5 (Mass. Super. June 5, 2001) ("Whether a particular activity constitutes the practice of law is fact specific."). Neither side in this case has explained why it is necessary, much less how it is even possible, for this court to resolve these fact-specific inquiries before trial.

Complicating matters in particular is plaintiff's attempt to narrow the scope of what qualifies as the practice of law for *attorneys* by citing case law that discusses what is and what is not the unauthorized practice of law for *non-attorneys*. While the parties agree that if an activity constitutes the unauthorized practice of law when performed by a non-

attorney, it necessarily constitutes the practice of law when performed by an attorney, the reverse is not necessarily true. Said another way, and contrary to plaintiff's contention, it may not follow that activities that do not qualify as the practice of law when performed by non-attorneys necessarily do not constitute the practice of law when performed by attorneys.[1]

Indeed, there may be a number of services that lay people may legally provide (such as completing certain forms) without practicing law, but that fall within the scope of the practice of law when an attorney performs them. *E.g.*, *Toms v. Lawyers Mut. Liab. Ins. Co.*, 104 N.C. App. 88, 95, 408 S.E.2d 206, 210 (1991) ("An attorney often undertakes to perform services in a professional capacity that a non-attorney could also legally perform."); *State ex rel. Nebraska State Bar Ass'n v. Butterfield*, 172 Neb. 645, 649, 111 N.W.2d 543, 546 (1961) ("In determining what constitutes the practice of law, it is the character of the act and not the place where the act is performed that is the controlling factor," but "[w]here one is generally known in a community as a lawyer, it might well be impossible to divorce two occupations closely related."). *Cf. In re Bott*, 462 Mass. 430, 436, 969 N.E.2d 155, 160–61 (2012) ("We do not agree that . . . any activity becomes the practice of law solely because it is performed by a lawyer, but do agree that there may be circumstances where

[1] Arguably, this definition might make more sense as a matter of policy – in that the purpose of statute and regulations is to prevent denigrating services that are free from other entities, even though performed by non-lawyers – but this is *not* what the exception says. Rather than excluding services that can *only* be provided by licensed attorneys, it excepts "legal services" generally.

work that does not constitute the practice of law when engaged in by non-lawyers may qualify as legal work that a disbarred or suspended lawyer is precluded from performing.").

Even though the court is unable to reach a final decision regarding the parties' disputes about the definition of the practice of law in certain states without a more fulsome record, it offers the following as further guidance to the parties as to how the court will approach this matter at trial. A review of the state standards at issue in this case shows that they all have some core principles in common. Indeed, the American Bar Association formed a Task Force on the Model Definition of the Practice of Law in 2002 to develop a model definition of the practice of law with the goal of providing the public with better access to legal services and providing a basis for effective enforcement of unauthorized practice of law statutes. http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html (last visited Mar. 6, 2017). Although only a few states have adopted the model definition, the task force recommendations provide useful guidance in applying the standard for the practice of law in individual states.[2]

Subsection (a) of the proposed model definition defines the "practice of law" as "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." *Id.* The

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[2] This is especially true in the case of a national company, if trying to offer legal services that qualify for a national exemption consistent with federal law. *See* Rubenfeld, Jed, *State Takeover Legislation and the Commerce Clause: The "Foreign" Corporations Problem*, 36 Cleveland State Law Review 355, 370-75 (1988) (discussing choice-of-law uncertainty as it relates to state regulation of corporations and specifically takeovers).

application of legal principles and judgment to a particular set of facts is a fundamental inquiry in each state's practice of law jurisprudence. Subsection (c) of the model definition provides examples of activities that satisfy this standard presuming that a person is practicing law when engaging in any of the following conduct on behalf of another:

> (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
> (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
> (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
> (4) Negotiating legal rights or responsibilities on behalf of a person.

Id.

Although the parties are welcome to disabuse the court of its impression, the court is unaware any state definition that would not comport with the above definition. Accordingly, it would appear to provide a good starting point for the parties and the court in determining whether the local attorneys were engaged in the practice of law at the time they were providing services for defendants' customers. While the parties may point to persuasive authority to the contrary, the court will, therefore, start with a similar presumption as to whether the local attorneys in this case were engaged in the "practice of law."

B. LLC Partnership Requirements under Nevada and Wisconsin Law

In its April 21st opinion and order on summary judgment, this court also noted that plaintiff had asserted, but failed to develop any meaningful argument that TMLG and

CFLG did not have "legally effective affiliations" with its local attorneys in Nevada or Wisconsin under the laws governing limited liability corporations in those states. (Dkt. #187 at 16-17.) Because the parties seem to dispute the requirements for limited liability partnerships (LLCs) in Wisconsin and Nevada, this court asked for further briefing on this matter as well. As the court noted in its August 31, 2016 order, these partnership requirements *may* be relevant because defendants allege that the law licenses and activities of the local Class B attorneys are attributable to The Mortgage Law Group and Consumer First Legal Group based on the fact that the local attorneys are "members" of the LLCs.

From the parties' subsequent submissions, it appears that they do not dispute what the requirements are for LLCs in Nevada or Wisconsin, but rather disagree whether the specific terms of TMLG's and CFLG's partnership agreements, and the circumstances under which defendants executed those agreements with Class B attorneys in Nevada and Wisconsin, satisfy those requirements. Although the court reserves as to whether any of this is material to the parties' present dispute, the remaining, fact-specific questions again seem best left for resolution after trial, once the court has had the opportunity to hear all the evidence and arguments presented by the parties. Accordingly, resolution of the

parties' disputes concerning the legal definitions of the practice of law and requirements for limited liability corporations must both await trial.

Entered this 10th day of March, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge