1994

Delivery of Legal Services to Ordinary Americans

Roger C. Cramton

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DELIVERY OF LEGAL SERVICES TO ORDINARY AMERICANS*

Roger C. Cramton†

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* This paper was prepared for the National Institute on the Profession of Law in the
21st Century, Case Western Reserve University School of Law, Cleveland, Ohio, June 1-3,
1993. A portion of the material in it is reworked, with permission, from an earlier article,
Roger C. Cramton, Mandatory Pro Bono, 19 HOFSTRA L. REV. 1113 (1991), and the
ETHICS OF LAWYERING (2d ed. 1994). The paper, which has been delayed in publication,
discusses developments through August, 1993.

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author has benefited from helpful comments on an earlier draft from Stephen Gillers,
Geoffrey Hazard, Thomas Morgan, Deborah Rhode and Charles Wolfram. None of them,
of course, are responsible for my views or errors.

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I. INTRODUCTION

A. Access to Justice and Litigiousness

Is there too much or too little access to justice in the United States? Are lawyers the problem of or the solution to the contemporary problems of access and litigiousness? In 1983, Derek Bok, former dean of the Harvard Law School and then president of Harvard University, expressed widely-held views in a broad critique of the American legal system, the legal profession, and legal education.¹ “The legal system,” Bok said, is “grossly inequitable and

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¹ Derek C. Bok, A Flawed System of Law Practice and Training, 33 J. LEGAL
inefficient. There is far too much law for those who can afford it and far too little for those who cannot. Legal rules and procedures, he argued, are unclear and unnecessarily complex; lawyers are too numerous and too litigious; legal uncertainty and conflict, combined with overelaborate procedures, fuel more (and more complex) regulation and litigation, resulting in social expenditures on legal services that have grown to about $80 billion annually. The excessive cost and delay have harmful effects on everyone: The well-to-do are forced to pay higher transaction costs, and the poor and middle class are denied effective access to justice. Bok urged a combined program of simplification of law (delegalization) and enlarged access, cautioning that either, by itself, will only make things worse. Society, he asserted, needs simpler procedures and fewer rules which are "more fundamental, better understood, and more widely enforced throughout the society." Simultaneously, new forms of delivery of legal services could provide access to justice to the poor and the middle class at reasonable cost and quality.

EDUC. 570 (1983).

2. Id. at 571.

3. Id. Bok lamented that the wastefulness of our legal system "attracts an unusually large proportion of the exceptionally gifted" college graduates:

   The net result is a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit. Far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more able high school principals and teachers.

   A nation's values and problems are mirrored in the ways in which it uses its ablest people. As the Japanese [who have fewer lawyers] put it, "Engineers make the pie grow larger; lawyers only decide how to carve it up."

Id. at 573-74.

4. For 1980, the gross national product of the legal profession in the United States was estimated at about $30 billion. Lloyd N. Cutler, Conflicts of Interest, 30 EMORY L.J. 1015, 1016 (1981) (rough estimate by the author arrived at by adding the compensation of all lawyers with that of their support staffs). Ten years later they are probably closer to $80 billion. In 1987, the services of lawyers in private practice (not all lawyers) added $62.3 million to the economy. Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 J. LAW & SOC. INQUIRY 431, 435 (1989).

5. Bok, supra note 1, at 579-80.

6. Many of the same themes developed by Bok were forcefully presented by President Jimmy Carter, speaking to the Los Angeles County Bar Association in 1978:

   We have the heaviest concentration of lawyers on earth three times as many as are in England, four times as many as are in West Germany, twenty-one times as many as there are in Japan. We have more litigation, but I
Others echo some of Bok's critique without necessarily sharing his proposed cures. Aleksandr Solzhenitsyn, criticizing the West's reliance on legal forms and requirements, stated that over-emphasis on "the letter of the law" erodes moral values, creating "an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses." Former Vice President Quayle, speaking in 1991 to the American Bar Association (ABA) in support of a battery of proposals designed to improve civil justice, asked: "Does America

am not sure that we have more justice. No resources of talent and training in our own society, even including the medical care, [are] more wastefully or unfairly distributed than legal skills.

Ninety percent of our lawyers serve 10 percent of our people. We are over-lawyered and under-represented.

Excessive litigation and legal featherbedding are encouraged.

[The organized bar has opposed efforts [that would make legal services more competitive and more widely available].

...Too often, the amount of justice that a person gets depends on the amount of money that he or she can pay. Access to justice must not depend on economic status, and it must not be thwarted by arbitrary procedural rules.

[We must] make the adversary system less necessary for the daily lives of most Americans—and more efficient when it must be used. By resorting to litigation at the drop of a hat, by regarding the adversary system as an end in itself, we have made justice more cumbersome, more expensive, and less equal than it ought to be.

Those of us—Presidents and lawyers—who enjoy privilege, power, and influence in our society can be called to harsh account for the ways we are using this power. Our hierarchy of privilege in this Nation, based not on birth but on social and economic status, tends to insulate some of us from the problems faced by the average American. The natural tendency for all of us is to ignore what does not touch us directly. The natural temptation when dealing with the law is to ensure that whatever is legal is just.


7. Aleksandr I. Solzhenitsyn, Commencement Address at Harvard University (June 8, 1978), in A WORLD SPLIT A PART, at 17, 19 (Irma Ilovayshaya Alberta trans., 1978); cf. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977) ("The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. In Hell there will be nothing but law, and due process will be meticulously observed.").

The head of the National Association of Manufacturers has argued that:

The excessive legalization of American society manifested in the presence of too much law, too many lawyers, excessive expenditure on legal services, too much litigation, an obsessively contentious population enthralled with adversary combat, and an intrusive activist judiciary—[has resulted in] a concomitant erosion of community, decline of self-reliance, and atrophy of informal self-regulatory mechanisms.

Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. REV. 3, 4-5 (1986).
really need 70% of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually? Is it right that people with disputes come up against staggering expense and delay? Allegations that lawyers bring frivolous suits, increase health care costs, stifle innovation in pharmaceuticals and other products, and hamper the U.S. economy in world economic competition were debated in the 1992 presidential election.

The underlying issues are important, complex, and highly controverted. The argument that American society is excessively litigious and over-lawyered is challenged by leaders of the bar and by a substantial group of legal scholars. Marc Galanter's studies of available historical and comparative data on the volume and frequency of litigation demonstrate that patterns of litigation vary over time and place, but that current figures in the United States are not markedly different from those of the American past or of other countries with a similar legal system. Recent decades have shown, however, an increase in the volume, complexity, length, and cost of high-stakes litigation, especially in the federal courts.

The critical question is whether the benefits of current litigation practices outweigh their costs. Americans resort to courts because other mechanisms of social control like family, church, and neighborhood have lost some of their effectiveness. Some matters that other countries handle without adjudication, such as compensa-

8. Dan Quayle, Isn't Our Legal System in Need of Reform?, LEGAL TIMES, Aug. 19, 1991, at 9-10. Quayle's facts and proposals were immediately attacked by leaders of the bar. See David Margolick, Address by Quayle on Justice Proposals Irks Bar Association, Unsettles Lawyers, N.Y. TIMES, Aug. 14, 1991, at A1, A14. Quayle's data was effectively challenged by Marc Galanter, Pick a Number, Any Number, AM. LAW., April 1992, at 82-86. Although cross-cultural comparisons in determining the number of "lawyers" are fraught with difficulty, a more accurate estimate would be that the United States employs about 35% of the world's lawyers, not 70%. Id. at 82.

9. For a good survey of this subject, see Thomas D. Rowe, Jr., Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation, 1989 DUKE L.J. 824 (discussing the issues surrounding litigation explosion and various alternatives).

10. See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 5 (1983) (denying that a litigation explosion has occurred and arguing that contemporary disputing is a conservative adaption to changing conditions); Galanter, supra note 7, at 7-8, 10 ("Civil court filings are [not] dramatically higher than in the recent past" and are comparable to those of countries with similar legal systems; settlement rates remain high; and the greatest single sources of increased filings are divorce cases in state courts and social security cases in federal courts, which are not brought because people are "enamored of litigation or beguiled by lawyers.")
tion for accidental injuries, are left to courts in the United States. The unwillingness or inability of other branches of government to deal decisively with social problems including abortion, deficit spending, or conditions in schools or prisons relegates problems to the courts or encourages efforts to do so. The diffusion of authority among federal, state, and local governments adds complexity, uncertainty, and opportunities for forum-shopping.

But are these aspects of American society vices or virtues? An alternative vision converts what critics view as vices into virtues. Governmental authority is diffused in order that liberty may flourish. The complex blend of reliance on private economic activity and public regulation is designed to provide opportunity and material well-being. The quest for equality in a society characterized by racial, ethnic, and religious pluralism centers on the pursuit of individual legal rights. The quest for accountability presses for fair procedures and better outcomes in private and public institutions. From this point of view, justice through law is a distinctive American virtue rather than a vice. Those who share this vision point to problems of access and conclude that America is underlawyered rather than overlawyered, or at least that the distribution of legal services is badly skewed. Lawrence Friedman summarizes the intangible and immeasurable benefits of litigation: "[S]ocial justice; expanded opportunities for women and minorities, expansion of civil liberties, fair procedures within institutions, limits on government... Who would deny that these are significant gains? Whether they are worth the costs is a question that models and equations cannot answer."

11. Deborah Rhode argues that determining whether a particular claim is frivolous turns on normative judgments. See DEBORAH L. RHODE, JUSTICE AND GENDER (1989). In 1976, a prominent legal educator, then president of the Legal Services Corporation, stated that sex discrimination suits against Little Leagues were an example of "legal pollution" that endangered the legal system. Thomas Ehrlich, Legal Pollution, N.Y. TIMES, Feb. 8, 1976, at 17. But gender stereotyping in the provision of athletic opportunities in a society that takes sports so seriously raises important social and legal issues. RHODE, supra, at 300-304.

12. Lawrence M. Friedman, Litigation in Society, 15 ANN. REV. SOC. 17, 27 (1989). Marc Galanter states that the "consternation about litigation" is partly due to the accountability to public standards fostered by litigation:

The sense of being held to account has multiplied far more than cases or trials, for it depends. not on the direct imposition of court orders, but on the communication of messages about what courts might do. Law as a system of symbols has expanded; information about law and its workings is more widely and vividly circulated to more educated and receptive audiences. The [former] predominance of cases enforcing market relations has given way to...
The purpose here is not to resolve the unanswerable questions posed by the differing attitudes concerning the American reliance on law, lawyers, and litigation, but to put more specific and perhaps answerable questions against the backdrop of the larger normative controversy. Who uses the services of lawyers? Do users receive services of adequate quality at reasonable cost? Are some important "legal needs" left unserved by current patterns of availability and distribution? How, why, and at what cost can unserved needs be met?13

This paper addresses these questions in one of the two major sectors of the legal services market—services directed to individual clients. The other sector of the profession, namely services directed to corporate and wealthy clients, encounters a somewhat different array of problems and potential solutions. The corporate sector is not discussed in this Paper.

Part I of the Paper summarizes background considerations. Part II deals with more specific issues concerning the legal services available to ordinary Americans. Part III states the values of professionalism that guide the author's evaluation of specific proposals for change. Part IV outlines a series of recommendations. Readers interested in the evaluative portion of this paper should turn immediately to part III (professional values that serve as my criteria for judgment) and part IV (my personal list of desirable changes).

B. "Two Hemispheres" of Lawyering

Traditional legal ethics and bar ideology present an image of a unified profession composed of professional equals. This myth of professional unity, competence, and equality builds on the 19th century tradition of the all-competent generalist lawyer whose clients were almost entirely private individuals. It is reinforced by rules of admissions, ethics, and bar discipline applicable to all lawyers. Yet, the structure of contemporary law practice resembles two large hemispheres with modest overlap.14 The legal profession...
is highly stratified and has a relatively clear status hierarchy. Variation within the profession is best accounted for, not by the type of legal services rendered, but by the social and economic character of clients.

The profession is organized in two hemispheres: lawyers who serve individuals and those who serve corporate clients. Corporate lawyers, who have fewer clients each year than those representing individuals, are often engaged in "symbol manipulation;" those who represent individuals are more often involved in "people persuasion." Because lawyers respond to the interests and demands of their clients, "the nature of the clients served primarily determines the structure of social differentiation. . ." Fields of practice that serve large corporate clients, such as securities, corporate tax, antitrust, and banking, are at the top of the profession's prestige structure, while those serving individual clients such as divorce, landlord and tenant, debt collection, and criminal defense are at the bottom. Lawyers who serve the core economic values of American society are accorded more prestige than those who are people-oriented or cause-oriented.

The structural divide between individual-client service and corporate representation affects the tasks that lawyers perform, the recruitment and retention of clients, and the fee arrangements. Because the pattern of lawyer-client relationships tends to vary along the hemispheric divide, ethical problems take a somewhat different form. A number of empirical studies conclude that large-firm corporate lawyers wield relatively little influence over their powerful, informed, and wealthy clients. Lawyers in this sector of the profession tend to view themselves as technicians who do what their clients want.


16. Id. at 83. Id. at 127-34.
On the other hand, studies of lawyers who deal with personal-plight practice (representation of individuals who face a legal problem and who have had little or no prior experience with lawyers or the legal system) emphasize the power and authority that lawyers exercise over clients in those sectors of practice.\textsuperscript{19} Lower-status practitioners provide the vast majority of legal services needed by ordinary Americans. They also have the best socio-economic connections to the potential clients of moderate means. These practitioners also have the least margin of profit for providing charitable or semi-charitable services.

The juxtaposition of these differing findings suggests that rules of professional conduct should differentiate between sectors of practice. The rules should adopt a client-protective ethic for lawyers serving predominantly individuals and small businesses (unsophisticated clients) and a lawyer—and society—protecting ethic for lawyers serving large corporations and their managers.\textsuperscript{20} In one hemisphere of the profession, where lawyers are dealing with informed, experienced, and well-to-do clients, ethics rules would seek to protect lawyer autonomy so that lawyers would be permitted or required to be something other than the client's "mouthpiece" or "hired gun." Simultaneously, ethics rules in the personal-plight sector would seek to protect clients against lawyer overreaching. Differences in the context of practice suggest that different regulatory approaches and sanctions are required in different areas of legal practice to assure efficient compliance while protecting the independence of lawyers.\textsuperscript{21}

This organizational structure, of course, rests on rough-hewn tendencies rather than sharply etched divisions. Lawyers and clients in both sectors of the profession share common problems; and


\textsuperscript{20} See Ted Schneyer, Some Sympathy for the Hired Gun, 41 J. LEGAL EDUC. 11, 22-27 (1991) (arguing for the abandonment of the distinction between the hired gun and the moral activist through a discussion of neutrality and partisanship).

\textsuperscript{21} See David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 801 (1992) (arguing that a system of multiple controls is efficient and adaptable to professional independence).
many practice contexts fall into an intermediate position (e.g., representation of small businesses). Yet, the “two-hemispheres concept” reinforces the desirability of considering separately the delivery of legal services to middle class and poor individuals.

C. Production and Distribution of Legal Services

The legal profession is a service industry engaged in the production and distribution of legal services. This suggests an analysis at the outset of factors affecting the availability, cost, and quality of legal services in the United States. A market analysis must consider both the demand for and the supply of legal services.

1. Demand: Public’s Use of Legal Services

Major corporations encounter few problems in obtaining adequate legal services. They are experienced users of legal services and may choose who and how service is provided from a wide array of individual lawyers, outside law firms, and inside staff counsel. Market forces operate fairly well in this sector of the legal services industry, although corporations may complain about legal costs and others may complain that too many legal resources are devoted to corporations.

Ordinary Americans, however, face more difficulties. A major American Bar Foundation (ABF) study, conducted in 1974 and updated in 1989, reports that over two-thirds of the adult population consult a lawyer at least once in a lifetime. For most Americans, the exposure to lawyers is very infrequent. One-third have never consulted a lawyer, and more than another third have consulted a lawyer on only one matter. Only about 10% of Americans report professional exposure to three or more lawyers during their lifetimes.


23. CURRAN & SPAULDING, supra note 22, at 79. The percent of adults ever having used legal services rose from 64 percent in 1974 to 72 percent in 1989. As of 1989, 39 percent of adults have used legal services within the prior three-year period. Curran, supra note 22, at 57.

24. CURRAN & SPAULDING, supra note 22, at 80-81.
Lawyer use increased between 1974 and 1989; most of the increase occurred among persons over the age of 40. High income groups use lawyers with greater frequency than lower income groups: 49% of adults in the top quintile of the income scale had consulted lawyers in the three years prior to 1989, but only 27% of adults in the lowest ten percent used legal services during the same period.

The ABF studies also attempt to explore the prevailing conception of an unfulfilled need for legal services. Is there a vast, untapped demand for legal services that is not being handled for one reason or another? Some of the possible reasons for unserved need are: (1) individuals lack information about the legal character of a problem or the value of a lawyer’s help in dealing with it; (2) they do not know how to find a lawyer qualified to handle the problem; (3) they believe they cannot afford a lawyer’s help; (4) they lack the resources to pay even a small or reasonable legal fee; and, perhaps most important, (5) lay persons fear lawyers and legal proceedings, with attendant loss of control over their own lives.

The ABF studies provide some confirmation of the hypothesis of unfulfilled need. Individuals report that only a portion of their “legal problems” are taken to lawyers, a percentage that is highly variable. For example, 1 percent of job discrimination problems are taken to a lawyer; 10% of tort problems; 36% of real property

26. _Id._ at 65.
27. “Finding the right lawyer” is the fifth most-frequent reason for not consulting a lawyer (6 percent of total responses). _Id._ at 82. “The overwhelming majority of persons considering using legal services turn to friends and relatives for advice and help in choosing a lawyer. Almost 10% rely on advertisements and yellow pages.” _Id._ at 59.
28. Curran reports that “[c]ost remains a significant element in the decision to seek legal assistance. Those considering consulting a lawyer are most likely to refrain from doing so in the case of consumer and marital problems.” _Id._ at 59. Cost is the second most-frequent reason given for not consulting a lawyer (22 percent of total reasons). _Id._ at 82.
29. The 1989 ABF report concludes that “[c]urrent income remains the principal way in which lawyers’ services are financed by all income groups. Forty-two percent of those of limited means pay for lawyers’ service out of current income or by borrowing.” _Id._ at 60.
30. The findings of the ABF study on “under-litigation” of tort problems have been dramatically confirmed in the field of medical malpractice by findings of the Harvard Medical Practice Study. See PAUL C. WEILER ET AL., _A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION_ 69-76 (1993) (slightly more than seven patients in survey group suffered a negligent adverse effect for every patient who filed a tort claim).
problems; and 73% of estate planning problems (wills). The four largest categories of work actually taken to lawyers by individuals involve real property, estate planning, marital problems, and torts, in that order. Variations in lawyer use are affected by demographic factors such as income (those of higher income report more property and estate planning problems), sex (incidence of torts is greater for men but women are somewhat more likely to consult a lawyer), and race (minorities are more likely to consult lawyers for tort problems but in general use lawyers less than whites).

Other efforts to measure the public's legal needs show that the subjective experience of grievance is quite common, 31 that some grievances are much more likely to be pursued than others, 32 and that low-income households eligible for publicly funded civil legal assistance report many grievances for which lawyers were not consulted but would have been helpful. 33

The time and energy of lawyers is primarily devoted to relatively well-to-do individuals, small businesses, and large organizations. 34 Lawyers in private practice spend only a small portion of their time in the representation of low-income clients. 35 Only about 4,000 lawyers work for the legal services organizations that provide free civil legal assistance to eligible poor people. The Council for Public Interest Law reports that in 1989 there were

31. See Richard E. Miller & Austin Sant, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & SOC’Y REV. 525, 536, 540, 543 (1981) (reporting that 40 percent of randomly selected households experienced a grievance involving $1,000 or more during a three-year period; 79 percent of those experiencing a grievance made a claim and 68 percent obtained some recovery, but only 11 percent filed a lawsuit).


33. The Spangenberg Group, Inc., National Survey of The Civil Legal Needs of the Poor, in TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENT OF THE POOR & PUBLIC GENERALLY 37 (ABA Consortium on Legal Services for the Public, 1989) (finding that 80% of the legal problems reported by a sample of households with income of 125% of poverty level or below did not involve legal services). Principal reasons for not consulting a lawyer were cost (28 percent) and lack of knowledge about how to obtain assistance (17.5 percent). Id. at 34.

34. The major exceptions are substantial personal injury claims likely to produce an award from which the lawyer’s contingent fee may be paid and situations in which a fee-shifting statute will compensate the lawyer for a prevailing plaintiff.

35. See JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 101-02 (1978) (estimating that only about 10 percent of the effort of those lawyers who represent individual clients is devoted to those with incomes in the bottom one-third of the population).
200 tax-exempt non-profit groups that devoted a substantial portion of their resources to the representation of previously unrepresented interests on matters of public policy, but these groups employed only about 1000 lawyers. Thus, less than 1% of U.S. lawyers are engaged full time in representing poor people or otherwise unrepresented interests in civil matters. Social advocacy litigation which attempts to vindicate the collective interests of low-income groups such as prisoners, welfare recipients, and victims of institutional discrimination is largely dependent on the efforts of this small band of public interest lawyers.

2. Supply of Legal Services

Regulation of the supply of legal services takes a number of forms: (1) direct regulation of access to the profession (admission requirements such as legal education, bar examination, and character-and-fitness scrutiny); (2) the prohibition on the practice of law by nonlawyers (unauthorized practice); (3) restraints on the flow of information about legal services (restrictions on lawyer advertising and solicitation of legal business); (4) restrictions on the form of delivery, such as limitations on group legal services, nonlawyer participation in or ownership of law firms, and dual practice restrictions; and, finally, (5) a variety of particularized regulations such as the local admission and local counsel requirements that restrict multistate practice by licensed attorneys and the prohibition of many forms of pro bono practice by lawyers who are federal employees.

3. Market Imperfections in Delivery of Legal Services

Prohibitions against the unauthorized practice of law prevent those who are not admitted to the bar in each state from engaging in the “practice of law.” Is the resulting state-based professional monopoly in the best interests of society generally or is it merely a tactic by which the legal profession seeks to protect its own turf? Both conservative economists and Marxist analysts view much of the profession’s regulation of itself (usually through the instrumentality of the highest court of a state) as designed to enhance the incomes and status of lawyers. Milton Friedman, for example,

36. See generally NAN ARON, LIBERTY AND JUSTICE FOR ALL, PUBLIC INTEREST LAW IN THE 1980’S AND BEYOND (1989) (discussing the recent history of public interest law and the persons and institutions who practice it).
37. Id. at 34.
argues that fears that consumers are incapable of making choices for themselves are paternalistic and unsound; registration or certification are adequate to meet information barriers. Friedman "find[s] it difficult to see any case for which licensure [e.g., exclusion of competitors] rather than certification can be justified." Restraints on competition have adverse effects on the quality, variety, and cost of services. Innovation is reduced and the flow of information impeded. And, almost inevitably, the producer group will dominate occupational licensing at the expense of the public.

Persistence of occupational licensing and continued public support for some types of regulation of legal and medical services have stimulated economic arguments in defense of at least some occupational regulation. The principal arguments that will be considered in the course of this paper are:

*Information imperfections in the legal services market* may lead to consumer harm or a debasement of the quality of service.

- Some consumers of legal services may need to be protected against their own ignorance. They may be harmed as a result of information deficiencies that are costly or impossible to correct. Individuals who have no experience with lawyers and are involved in a personal plight, such as physical injury, matrimonial breakup, or a criminal charge, lack information about choosing or supervising a lawyer. The gap between the client's information and that of the lawyer requires the client to make a leap of faith, trusting that the lawyer is competent and honest. Professional regulation seeks to justify the client's trust by assuring a minimal level of integrity and performance.

- If consumers cannot differentiate between high-quality and low-quality legal services, producers will not be compensated for the higher cost of high-quality service. Information asymmetry may result in a "market for lemons" because producers are forced to make price and quality reductions that lead to the sale of only cheap products or

38. **Milton Friedman, Capitalism and Freedom** 148-49 (1962). Registration, the most minimal form of regulation, requires practitioners to register and meet minimal requirements, such as amenability to process; certification, based on attainment of educational or qualification standards, permits a practitioner to hold herself out as being certified. Neither registration nor certification prohibits unregistered or uncertified individuals from performing the activity. *Id.* at 144.

39. *Id.* at 149.
low-quality service and the market shrinking.\textsuperscript{40} The problem may be overcome by certification, advertising, or other measures that remedy the typical consumer's information deficiencies. Alternatively, a regulatory regime may define performance standards and provide adequate incentives for lawyers to invest time, education, and resources in providing quality services.\textsuperscript{41}

\textit{Neighborhood effects (externalities)} of sufficient size and frequency may justify governmental intervention. Even if it is paternalistic and undesirable to deny consumers the freedom to choose the type of service they want, costs to third persons or to the public generally may justify regulation. If an unlicensed and incompetent person builds a bridge or skyscraper that collapses, huge costs are imposed on others. After-the-fact remedies, such as negligence law, may not prevent a sufficient number of such incidents. In the context of legal services, externalities come into play most obviously when the issue is representation in litigation, which involves the interests of the court, opposing parties, and the public in just and efficient resolution of disputes. Regulation of advocates may serve those goals.

Finally, \textit{free rider} problems may support some governmental intervention. Free riders are those who benefit from collective goods without contributing to their payment. In a sense, the public trust created by the profession's scheme of entry regulation and control of conduct is a collective good of the profession or the public. \textit{"[A]bsent effective regulatory structures, individual attorneys will have inadequate economic incentives to avoid cheating; they can benefit as free riders from the bar's general reputation without adhering to the standards that maintain it."}\textsuperscript{42}


\textsuperscript{42} RHODE & LUBAN, \textit{supra} note 13, at 647.
How serious are these market imperfections? Are they applicable to all sectors of law practice or only a few? Would certification of lawyers be a satisfactory alternative to exclusive licensing? Would provision of public information about the practice and qualifications of lawyers solve the information problem? Why not rely solely on moral suasion and peer pressure from within the profession? Or is the current regulatory regime, including exclusive licensing, necessary? These are among the issues that will be addressed.

II. LEGAL SERVICES FOR ORDINARY AMERICANS

A. Pervasive and Recurring Problems

Ordinary Americans want legal services made available to them at reasonable cost by lawyers who are competent, diligent, trustworthy, and loyal. This section reviews issues relating to the competence, availability, and trustworthiness of the personal-plight or individual-services sector of the legal profession. Special emphasis is given to the possibility that increased competition within the legal profession and with non-lawyer service providers would increase the availability and variety of provided services. The focus is exclusively on civil legal assistance; the special problems in the criminal justice field are left to others.

1. Competence and Diligence

Preventive measures to ensure that clients receive competent legal services include bar admission requirements and continuing legal education obligations. In general, seven years of higher education, including graduation from one of the 176 law schools approved by the ABA, are required in order to qualify for admission to the bar in American states. Bar examinations, which have been strengthened over the years, are designed to test legal ability and knowledge.

Reactive measures, which are also intended to have a deterrent effect, include professional discipline, civil liability for negligence (legal malpractice), and sanctions administered by a tribunal in which a lawyer is litigating (e.g., Rule 11 sanctions, contempt).

a. Effectiveness of preventive measures

There is no evidence that the American legal profession is less competent or diligent today than in the past. Several factors suggest the contrary. Legal education, on the average, has improved dramatically since 1950. Although quality differences within legal education continue, the range of difference from top to bottom has narrowed substantially. Schools at the middle and bottom of the quality spectrum have improved enormously in faculty size, faculty accomplishments, student-faculty ratio, breadth of program, and resources. Continuing legal education has spread its influence and increased its quality during the same period.

Selectivity in recruitment to the profession has also raised the intellectual calibre of the profession as a whole. During the 1970s and early 1980s, legal education attracted a large portion of highly qualified college graduates, including more than forty percent of Rhodes Scholars and Phi Beta Kappa graduates. The larger demand for legal education allowed many more law schools to be selective in their admissions. The intellectual qualifications of this cadre of new entrants, who now constitute over one-half of all practicing lawyers, were higher than at any earlier time since law school became the major form of preparation for practice. Although college grades, test scores, and other academic criteria do not exhaust the relevant criteria, they do result in a contemporary profession that is generally intelligent, energetic, and ambitious.

The steady increase in de facto specialization by lawyers suggests that clients generally have been served by lawyers who were more competent to perform the particular task than formerly was the case. The possible trade-off, in a more specialized and fragmented professional world, is that the wise judgment of the broadly experienced legal counselor may be less frequently encountered.

b. Effectiveness of reactive measures

Professional discipline plays only a minor role in assuring competence. Although Model Rule 1.1 states “[a] lawyer shall provide competent representation to a client,” discipline for incompetence is exceptional. The disciplinary process limits itself primarily to intentional wrongdoing by lawyers. Competence becomes an

44. See Roger C. Cramton, LAWYER COMPETENCE AND THE LAW SCHOOLS, 4 U. ARK. LITTLE ROCK L.J. 1, 6 (1981).
45. Bok, supra note 1, at 573.
issue only if repeated and egregious in nature or when combined with other serious misconduct. The disciplinary process would need to be transformed and expanded to deal effectively with instances of incompetent representation.

Unlike discipline, legal malpractice liability has emerged as a form of accountability that polices the profession and protects consumers. Some years ago the judiciary provided lawyers with a more protective legal regime than that in which physicians were required to practice. But the gap has been closing rapidly in recent years. Lawyers of means must insure themselves against malpractice liability as prudent protection against potential calamity. The risk-management efforts of malpractice insurers and the growing costs to lawyers of adequate coverage provide incentives that generally benefit consumers by deterring careless lawyering.

Fears of malpractice liability, often exaggerated in the same way that physicians exaggerate their malpractice exposure, have important effects on contemporary law practice. Liability for negligence buttresses quality-control ideas that are also engendered by professional and reputational concerns. These effects are especially powerful in partnership practice where the economic well-being of all may turn on the lack of care of a single lawyer. Concerns about malpractice liability exercised a powerful shaping influence in the drafting of the Model Rules because of fears that disciplinary standards would be treated by courts as liability standards. Recent decisions holding lawyers liable to non-clients for negligent misrepresentation and fraud have led to higher malpractice rates and strong expressions of professional concern.

Neither the profession nor the state requires lawyers to carry malpractice coverage (malpractice insurance is required in one or two jurisdictions). A significant number of lawyers, especially those

46. See Susan R. Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 GEO. L.J. 705, 716 & n.75 (1981) (examining the efficiency of the bar disciplinary process and suggesting alternative competency controls). Court opinions often state that it is inappropriate to impose discipline for conduct that amounts “only” to negligent malpractice. See, e.g., Florida Bar v. Neale, 384 So.2d 1264, 1265 (Fla. 1980); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. 3-110(A) (1993) (limiting discipline to situations in which a lawyer “intentionally, recklessly, or repeatedly fail[s] to perform legal services with competence”).

47. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 209-27 (1986) (surveying the substantive law of legal malpractice liability and providing citations to relevant authorities and articles). An introductory section collects materials discussing the rationale of this form of accountability to clients, the growth in legal malpractice cases and awards, and the preventive efforts of malpractice insurers. Id. at 206-09.
struggling to make a living in handling small matters for individual clients, have neither malpractice coverage nor substantial personal assets that could be called upon to satisfy a malpractice judgment. Whether malpractice insurance should be required, and in what form and amount, is an issue that deserves the attention of the bar and the public.

2. Cost

During the 20th century, the cost of legal services has been affected by increased legal complexity, specialization, development of technology, and increasing entry costs. Specialists command larger incomes and technology is expensive, but cost increases due to these factors are partially or totally offset by gains in efficiency. Greater legal complexity, caused in part by the overload of intricate and often conflicting statutory, regulatory, and decisional law, has created demand for legal services and added to the expense of individual matters. Finally, the increasing costs of becoming a lawyer, discussed below, have added a substantial amount, perhaps $20 per billable hour, to legal fees.

The ABA's efforts to assure the competence of new entrants have had the effect of increasing the cost as well as the quality of legal education. When the opportunity costs of foregone income are taken into account, the investment in human capital presently required to become a lawyer amounts to at least $100,000.48 Thus amount is less than is required to establish many small businesses, but does reflect a substantial investment on the part of the new lawyer. Because entry costs become part of the cost structure of the profession, average hourly fees or other charges reflect these costs.

A serious question, infrequently discussed, is whether the required preparation and its cost are essential in all areas of law practice. Some types of routine client service, such as sales of residences, simple wills, and uncontested divorces, may not require lawyers who are as thoroughly educated and as costly as lawyers

48. Roger C. Cramton, The Trouble with Lawyers (and Law Schools), 35 J. LEGAL EDUC. 359, 364 n.15 (1985). For a discussion of the costs of legal education, see John R. Kramer, in PROCEEDINGS OF THE NATIONAL CONFERENCE ON LEGAL EDUCATION FOR A CHANGING PROFESSION 93, 94 (Kathleen S. Grove ed., March 25-27, 1988) (law school tuition has increased much faster than the consumer price index; most of the increased revenues have gone to increased faculty salaries and expanded administrative staffs rather than to increase the number of faculty or expansion of the educational program).
are today. If these and other areas are opened to competition from other service providers, a market test of price and quality would be provided.

3. Availability

Are legal services of reasonable cost, quality, and variety available to those other than the rich? The subject is a complex one that relates to virtually everything discussed in this paper. For those who can pay reasonable charges, a competitive marketplace for legal services offers the potential of providing services that consumers want at prices they are willing to pay. Part C, below, considers some current restrictions on competition in legal services. For those who are unable to meet even reasonable charges, other mechanisms are necessary to provide free or reduced-fee service. Two major devices, mandatory pro bono and publicly funded civil legal assistance, are considered in parts D and E, below.

4. Trust, Loyalty and Integrity

a. Asymmetry of information and the "necessity-for-trust" argument

The linchpin of the arguments supporting the exclusive professional license is the claim that the lawyer-client relationship is an asymmetric one: Clients cannot adequately evaluate the quality of the service, and consequently they must trust those they consult. It is this theory, generally, that overcomes the strong presumption in economics that occupational licensing is a form of cartel activity that restrains trade to the disadvantage of consumers and the public.

Indeed, much of the specific content of former and current professional self-regulation falls neatly within the economist's catalog of anticompetitive practices: entry restrictions that protect incumbents against new competition; market-division strategies that limit the competition of lawyers with one another; and restraints

49. Current entry restrictions in American states generally include all of the following: (1) a college degree or three years of college study; (2) graduation from an ABA-approved law school; (3) passage of a bar examination; and (4) approval by the bar's character and fitness committee. See AMERICAN BAR ASSOCIATION & NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1992-93 (1992) (containing a listing of the bar admission requirements of each state). Admission to practice in United States District Courts is dependent upon admission to the bar of the state in which the court sits.

50. A classic example is the division of the profession in England into solicitors, who
on price and service. Minimum fee schedules and the total prohibition of advertising are examples of prior professional practices that are now viewed as unreasonably limiting price and service competition.

The necessity-for-trust claim involves both a theoretical argument and a factual predicate. The theoretical argument is derived from the branch of welfare economics that considers deficiencies in information on the part of some market participants as an externality or market imperfection. As previously indicated, the argument is that, since consumers cannot evaluate the quality of legal services, they have no basis for choosing high-quality producers rather than those of lower quality. If this is the case, the argument continues, high-quality producers have no way of assuring the additional compensation that their higher quality of service is worth
deal with clients, and barristers, who try cases. Although this requirement assures that litigants are represented by lawyers who are professionally chosen, and results in a small and tightly-knit bar that is very responsive to the judiciary and to peer influence, the client is required to hire at least two lawyers for each litigated matter and members of each professional group are prevented from competing with those in the other. A further informal practice applicable to the most highly qualified group of barristers, those who have been made "QCs," requires a junior barrister to assist, insuring that three lawyers will be required to be in attendance at all times. The Thatcher government challenged some of these restraints in 1988 and modest reforms are emerging. See Professionals Under Attack, LONDON TIMES, Mar. 13, 1988, at A5.

In the United States, the major current restrictions of this type relate to: (1) form of practice (sharing legal fees with a nonlawyer or practicing with non-lawyers or in an organization with nonlawyer owners); see MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990); (2) unauthorized practice; see id. at Rule 5.5; and (3) the surviving restrictions on lawyer advertising and solicitation of legal services (e.g., some states discourage ads by requiring disclaimers while others prohibit some types of radio and television advertising, especially those involving endorsements, dramatizations, or symbolic appeals); see id. Rules 7.1-7.5.

51. Professional codes limit the range of permitted lawyer-client fee arrangements, id. at Rule 1.5, regulate referral arrangements and fees, id. at Rule 1.5(e), regulate transactions, such as loans, between lawyer and client, id. at Rules 1.7-1.8, and require that communication between lawyers for represented parties be conducted only through the lawyer representing the other party, id. at Rule 4.2.

52. Minimum fee schedules were struck down in Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975), as violative of federal antitrust policy which extended to "anticompetitive conduct by lawyers." Truthful advertisements about the availability and terms of sale of routine legal services were included with the ambit of the commercial speech protected by the First Amendment in Bates v. State Bar, 433 U.S. 350, 380-82 (1977). A series of subsequent decisions has extended the permissible arena of lawyer advertising. See, e.g., Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 478-80 (1988) (court rule prohibiting advertising appeals by mail to those known to have a specific legal problem violated the First Amendment). But areas of uncertainty remain, especially in connection with the use of radio and television advertising.

53. See supra text accompanying notes 38-41.
(and perhaps costs). The socially undesirable result, given the importance to the public of quality in the provision of justice, is that high-quality producers will be driven from the market or forced to reduce the quality of their services. Neither clients nor the public receive the higher quality of legal services which they want and would be willing to pay for if they could differentiate the quality of service offered by individual lawyers.

Under this theory, accepted today by a substantial number of economists, it is the social desirability of encouraging high-quality producers that may justify self-regulation, some degree of exclusive licensing, or other professional privileges. Special privileges are granted so that the average competence, trustworthiness, and public spiritedness of lawyers will be increased to approximately what they would be if the market imperfection did not exist, i.e., if clients were fully informed and could evaluate the quality of legal services.

Even if the theory is sound, however, its factual predicate must be demonstrated rather than taken for granted. Are clients able to evaluate reasonably well, even if not perfectly, the quality of legal services they want or require? The answer, in all probability, is not a global "yes" or "no," but a more qualified response based on the relative plausibility of the information-asymmetry argument in different practice contexts. The necessity-for-trust claim, I believe, is generally stronger in medicine than in law, partly because the information gap between doctor and patient is wider than it is in law and partly because patients are typically sick individuals who are less able to remedy their information deficiencies. In the practice of law, however, the strength of the necessity-for-trust claim is highly variable depending upon the context of practice.

Does self-regulation assure a trustworthy profession? Are lawyers more or less trustworthy than they were in the past? No one knows. Instances of professional discipline involving breaches of trust have increased somewhat over time; but this change probably reflects the larger size of the profession and more vigorous disciplinary enforcement. Professional discipline has increased markedly in its sophistication and magnitude, as professional staffs have supplemented the volunteer efforts of practicing lawyers. Special

54. See generally Eric H. Steele & Raymond T. Nimmer, Lawyers, Clients, and Professional Regulation, 1976 AM. B. FOUND. RES. J. 917 (analyzing historical patterns of disciplinary enforcement, types of complaints brought, and attitudes of disciplinary staff, lawyers, and clients toward the disciplinary process).
efforts to deal with embezzlement from clients through insurance and client security fund measures are common, although these measures are limited and generally insufficient to meet the magnitude of the problem. Finally, the organized profession for the first time is mounting programs to deal with the serious and continuing problem of lawyer incompetence caused by substance abuse (alcohol and drugs) or mental illness.

b. Trust in personal-plight practice

The strongest case for acceptance of the necessity-for-trust claim in law is the instance of personal-plight practice involving a client who is indigent, uneducated, and in legal trouble for the first time. Limited resources impair the client's ability to gather information, which may be costly; limited education stands in the way of some forms of client self-help; and lack of prior exposure to lawyers and the legal system means that the client lacks the kind of accumulated on-the-job experience characteristic of some "jailhouse lawyers." In personal-plight situations (e.g., a criminal charge, a personal injury, or threatened loss of employment or property) a lay person faces legal "trouble," often for the first time. An important interest must be placed in the hands of a professional who is familiar with what the lay person perceives as the intricate and fearful mysteries of the law. Finding a lawyer, putting oneself in the lawyer's hands, communicating with this strange being—all of this to the client may be difficult and frightening and involves an uncomfortable loss of control.55

The asymmetry of information and power in this situation may justify social efforts to increase the competence of the typical lawyer the client retains and to warrant the trust that is necessarily reposed in this lawyer. At the extreme, if the client is indigent and the case cannot be pursued on a contingent-fee arrangement, the client's choice of lawyer is virtually non-existent: The client generally will be stuck with the lawyer that a court or legal services

55. See Robert A. Burt, Conflict and Trust Between Attorney and Client, 69 GEO. L.J. 1015 (1981) (arguing that although the legal profession pretends that harmony and trust are characteristic of the lawyer-client relationship, a degree of fear, suspicion, and distrust is inevitable in the relationship; lawyers should learn to recognize the problem and deal with it more openly); see also DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 96 (1974) (emphasizing the conflict between the lawyer's interest in obtaining a quick settlement and the client's interest in a larger recovery: "a quick settlement is often in the lawyer's financial interest, while waiting the insurer out is often in the client's financial interest").
office assigns to handle the case.

Even in areas of personal-plight practice, however, the assumption that clients are uninformed, ignorant, and powerless should be examined rather than taken for granted. Some clients may be able to inform themselves efficiently about needed legal services by self-help (a variety of published guides are available to assist consumers in most routine legal transactions). Others may get reliable assistance from voluntary or commercial organizations (consumer groups, labor unions, etc.). In other important sectors of personal-plight representation, institutional representatives or practices may provide effective assistance in choosing and then supervising a high-quality lawyer. In health care, for example, the increased attention that employers, health insurers, and other third-party payers of medical care give to the selection, price, and quality of service that is provided by physicians, hospitals, and other health-care organizations generally serves consumer interests.

In the personal-injury field in the United States, the combination of a contingent fee with a referral fee may serve a similar function of remedying the client’s deficiency in information. The typical scenario is as follows: An injured claimant with a reasonably good case retains, on a contingent-fee basis, a local lawyer who is not a trial specialist competent to handle the particular matter. This lawyer has an incentive to refer the case to a highly competent specialist since that will produce the largest return for both client and lawyer (the referring lawyer generally receives one-third of the one-third contingent fee for serving as a vehicle of communication with the client and bringing to bear the expert information on selection of a lawyer that the client lacks). Although there is state-by-state variation in the extent to which a referral fee is permitted, the clear movement in American legal ethics is to allow the referral fee providing the client is informed and the referring lawyer remains accountable to the client for what

56. See David Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454 (examining the justification for paternalism and their implications in the legal profession); see also Rosenthal, supra note 55 (a study of the relationship between personal injury clients and their lawyers); Mark Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. PA. L. Rev. 41 (1979) (proposing a theory of informed consent which would consider the interests of the client, the lawyer, and society).
57. See Paul R. Starr, The Social Transformation of American Medicine 441 (1982) (asserting that comprehensive prepayment plans, such as HMOs, have resulted in cost savings and improvements in efficiency).
is done.\textsuperscript{58}

The individual client who seeks relatively routine legal services may be protected by the emphasis placed on reputation and quality by law firms and legal clinics specializing in these areas of activity. Even though repeat business from the same individual may be unlikely (e.g., a second divorce), further business is gained by word-of-mouth spread from former clients and buttressed by the general reputation for quality that the firm has in the community. The use of trade-name advertising by statewide, regional, or national legal clinics is designed in large part to create the kind of consumer confidence in the quality of the service that retailers such as Sears attempt to create and maintain in the sale of goods. If the profession eases (or is forced to ease) present restrictions on form of practice, the development of national organizations engaged in delivery of routine legal services to the middle class (e.g., sale of a house, drafting of a simple will) may reduce the information asymmetry.\textsuperscript{59} In these and other situations, the free market may operate reasonably well, although not perfectly.

Assumptions about power, authority, and control in the lawyer-client relationship have an important bearing on how doubts on this

\textsuperscript{58} Model Rule of Professional Conduct 1.5(e) permits a referring lawyer and a trial specialist:

\begin{quote}
To divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.
\end{quote}

issue should be resolved. If clients are viewed as generally lacking in sophistication, unable to identify their own best interests and incapable of assisting the lawyer in the choice of legal strategies, then the professional monopoly and extensive lawyer control over the content of regulation become more justifiable. But the model of the lawyer-client relationship then tends to become one of a dominant lawyer and a subordinate client. The lawyer identifies the client interest that the lawyer is to advance and makes all of the decisions concerning the means employed to reach this objective. The danger here is abusive paternalism, in which the lawyer’s convenience and self-interest (1) influence the identification of the client’s objective (“a personal-injury client is only interested in the amount of recovery”), (2) control the choice of tactical strategies, and (3) direct the ultimate settlement or trial of the case. Professional rules give the lawyer special responsibility for the choice of tactics; and control of the flow of information may allow the lawyer to influence (if not control) the decision whether or not to settle. Many theorists and some empirical evidence support the argument that clients, when fully informed, can participate effectively in the handling of their cases and that doing so results in greater client satisfaction and better results. In any event, assumptions that are made concerning the client’s ability to choose and evaluate a lawyer are closely related to those made concerning the client’s ability to make decisions during the course of representation.

Perhaps it is relevant here, as in the unauthorized practice field, that professional claims that harm to clients will flow from any relaxation of professional prerogatives are made only by lawyers

60. See materials cited supra notes 55-56.
61. See Luban, supra note 56, at 59; Rosenthal, supra note 55; William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 30, 52-59 (arguing that the experience and self-interest of lawyers leads them to impute objectives to clients).
62. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1990) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation [with some exceptions] . . . , and shall consult with the client as to the means by which they are to be pursued ”). “In questions of means,” the comment adds, “the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Id. at cmt. 1.
63. See Rosenthal, supra note 55.
64. Id. at 38-41 (clients who participated extensively in their personal-injury cases obtained better results).
and not by clients. The legal profession repeatedly asserts that, because clients cannot evaluate what lawyers have to offer, clients should be protected against their own ignorance. Because of the tendencies of groups to delude themselves that something that is in their self-interest is also in the public interest, skepticism is warranted concerning the extent of the scope of necessity-to-trust argument.

The necessity-for-trust argument also raises difficult, perhaps unanswerable, questions of what we mean when we talk about "quality" in legal services. Clearly, outcomes cannot be the sole determinant, since in close cases someone must lose—the best advocacy may be on behalf of a cause that loses or achieves less than the client hoped. Similarly, efficiency criteria, although important, cannot be the sole arbiter of quality. Lawyers, like other professionals, tend to judge quality in terms of professional notions involving the intellectual or legal facet of a particular case (the quality of the advocacy given the state of available legal materials and arguments); consumers, on the other hand, give larger

65. See Barlow Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?, 1980 AM. B. FOUND. RES. J. 159 (concluding that the legal profession's traditional unauthorized practice position can be explained by two assumptions made by lawyers; either they fear open competition or they do not believe that the public can make intelligent decisions); Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1 (1981) (primarily an empirical study of contemporary bar association enforcement of unauthorized practice prohibitions).

66. A major study of the advantages and disadvantages of various methods of providing legal services to poor persons (e.g., comparing staff attorney systems to judicare approaches utilizing private practitioners) explored relevant factors such as cost, outcomes, and client satisfaction, but found a direct approach to "quality" very elusive. LEGAL SERVICES CORP., THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES 126-27 (1980). See Douglas E. Rosenthal, Evaluating the Competence of Lawyers, 11 LAW & SOC'Y REV. 257 (1976) (discussing the difficulties of evaluating the competence of lawyers). Deborah L. Rhode, The Rhetoric of Professional Reform, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 448-50 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed. 1988), argues that legal representation is very difficult to evaluate in after-the-fact proceedings, such as professional-discipline or malpractice cases, because of difficulties of proof and uncertainty about standards. Formal proceedings tend to be limited to cases of egregious conduct. If after-the-fact assessment is difficult, she argues, prospective screening of lawyers at entry or thereafter is even more difficult. "These regulatory problems reintroduce more fundamental questions about the meaning of professionalism. If we can't adequately define it, measure it, screen for it, prepare for it or monitor it, what is the 'it' that justifies the bar's claims to economic monopoly and regulatory autonomy?" Id. at 504.

67. Studies of the structure of prestige and status in various professions, including law, suggest that professions value most the complex cognitive tasks in which the special
weight to other matters when their satisfaction with their lawyers is measured (e.g., "he didn't return my phone calls"). Lawyers as well as laymen have difficulty evaluating the quality of legal services. Possible differences in the norms each group would apply in determining quality must also be considered, lest the profession fall back solely on its own ideas of what is good for clients.

My conclusion is that the necessity-for-trust claim is weaker than generally supposed. The argument has some continuing justification in some contexts of personal-plight practice, but it does not provide a strong, across-the-board justification for professional privileges.

c. Sexual relationship with clients

A growing body of case law deals with sexual relations between a lawyer and an individual client during the course of representation. In Drucker's Case a lawyer was suspended for two years for sexual relations with a divorce client who suffered from an anxiety disorder; the court held that the lawyer's conduct violated Model Rule 1.7(b) (conflict with the lawyer's own interests), Model Rule 1.8(b) (use of client information to disadvantage the

knowledge and skill of the profession is most deeply engaged. That usually means a “pure” task in which messy human emotions are removed. The specialist who handles complex problems referred by other specialists is at the top of the prestige structure in all professions. See Andrew Abbott, Status and Status Strain in the Professions, 86 AM. J. SOC. 819, 819-25 (1981) (discussing the different statuses that professionals and nonprofessionals assign to various professions). The “lawyer’s lawyer” who deals in specialized regulatory problems for impersonal corporate clients is most highly regarded; the practitioner dealing with the messy realities of individual divorces is near the bottom (although the recent increase in complexity in property fights in the divorce field is leading to some reassessment). See also Marvin W. Mindes, Trickster, Hero, Helper: A Report on the Lawyer Image, 1982 AM. B. FOUND. RES. J. 177, 211-12 (finding that lawyers believe that clients want a shrewd and aggressive lawyer, while clients want a helpful lawyer).

68. See Barbara A. Curran, Surveying the Legal Needs of the Public: What the Public Wants and Expects in the Lawyer-Client Relationship, in LAW IN A CYNICAL SOCIETY: OPINION AND LAW IN THE 1980’s 107-19 (Dale Gibson & Janet K. Baldwin eds., 1985) (discussing empirical studies of client desires). Clients, Curran reports, want a lawyer who is (1) responsive and committed to them; (2) has integrity; (3) is competent; and (4) charges a reasonable fee. Clients value most of all a personalized lawyer-client relationship and measure it by the lawyer's responsiveness to them: “attentiveness, capacity and willingness to communicate, and respect for the client's intelligence and judgment.” Id. at 109.


70. 577 A.2d 1198, 1203 (N.H. 1990).
client), and Model Rule 1.14(a) (failure to maintain a normal lawyer-client relationship with an impaired client). In In re Marriage of Kantar\textsuperscript{71} required a hearing of a divorce client's charges that her lawyer's $15,000 bill for services rendered included time spent in sexual liaisons. In People v. Gibbons\textsuperscript{72} a criminal defense lawyer, who represented both a woman and her husband, initiated a sexual relationship with the female client; the lawyer, who had also engaged in other misconduct, was disbarred on conflict-of-interest grounds.

Although the number of reported discipline complaints involving sexual contact is relatively small,\textsuperscript{73} a low report rate is characteristic of sexual harassment. Studies of psychotherapists' sexual involvement with patients reveal that 12% of psychotherapists nationwide report sexual contact with patients despite a flat professional prohibition.\textsuperscript{74} Although Arnold Becker, the philandering divorce lawyer of L.A. Law, may not be typical, accumulating evidence suggests that sexual relationships between lawyers and divorce clients occur quite frequently Whenever a client is vulnerable or in distress, possibilities of manipulation and exploitation abound.

A 1992 ABA ethics opinion reviews the ethics rules that may be violated by a sexual relationship with an individual client during the course of representation.\textsuperscript{75} First, the lawyer may breach fiduciary obligations to the client if the sexual relationship results from the client's dependence and vulnerability or the lawyer's manipulation of the client's trust.\textsuperscript{76} Second, a lawyer's independent professional judgment may be lost due to sexual involvement with a client.\textsuperscript{77} Third, a prohibited conflict with the lawyer's own interest results if that interest impairs or materially limits the representation.\textsuperscript{78} Finally, client confidences are protected by the attorney-client privilege only when communications are made for the purpose of receiving legal advice, imperiling statements made during a sexual relationship. The opinion advises lawyers to refrain from

\textsuperscript{72} 685 P.2d 168, 175 (Colo. 1984).
\textsuperscript{73} See Linda M. Jorgenson & Pamela K. Sutherland, Lawyer-Client Sexual Contact: State Bars Polled, NAT'L L.J., June 15, 1992, at 26, 26 (only 90 complaints filed in 47 responding states).
\textsuperscript{74} Id. at 27.
\textsuperscript{76} MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b), 1.8(a) & (b), & 1.14(a).
\textsuperscript{77} See id. at Rule 2.1 (1990).
\textsuperscript{78} Id. at Rule 1.7(b).
sexual relationships with clients. If such a relationship occurs and impairs the lawyer’s representation, a disciplinary violation has occurred.

Many lawyers and legislators argue that requiring a client to prove that the sexual relationship impaired the lawyer’s representation poses too high a burden on the client. Proposals for per se bans on sexual relationships with individual clients are under consideration in several states. California was the first state thus far to adopt a rule. As proposed by the state bar, the rule contained a rebuttable presumption that lawyers who have sexual relations with clients have provided impaired representation. However, the presumption was removed by the California Supreme Court when it adopted the rule. As adopted, the rule appears to require little, if anything, not already required by existing law.

A subsequent New York rule bans sexual relations between a matrimonial lawyer and client.

A per se rule imposing discipline whenever a lawyer has sex during the course of the professional relationship with an individual client, at least when the sexual relationship does not preexist the lawyer-client relationship, has much to be said for it. Opponents of a per se rule argue that existing ethics provisions deal satisfactorily with the problem, sexual harassment charges and damage actions against lawyers will be encouraged, and privacy and autonomy interests of lawyers will be impaired. But the constitutional

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79. Legislative resolutions in California and Illinois have requested the state supreme court to adopt a professional rule dealing with lawyer-client sexual relationships. A proposed rule in Oregon was defeated by a close vote of the Oregon state bar in May 1991. See Don J. DeBenedictis, Sex-With-Client Ban Fails, A.B.A. J., Feb. 1992, at 24.

80. Rule 3-120(B) of the California Rules of Professional Conduct provides that members of the California bar shall not:

1. Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
3. Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 3-120(B) (1993).

81. All of the proposed rules provide exceptions for sexual relationships with spouses or that preexisted the representation. Some would apply only to non-business clients. The proposed rules generally would have no application to sexual relationships with agents of a corporate or organizational client.

right of privacy does not prevent reasonable regulation of lawyer behavior that generally involves overreaching or abuse of clients who are to a degree troubled and dependent.\textsuperscript{83} A prohibition would not restrict a lawyer's sexual relationships, but only require that the lawyer withdraw from representation before commencing a sexual relationship.

B. A Taxonomy of Reform Proposals

A number of studies and surveys reveal that ordinary Americans encounter legal problems on which a lawyer would be useful and desired, but the individuals lack the information or means to pay the full cost of the desired legal services. Is meeting these unserved needs an important social objective? If so, how might the unserved needs be met?

Alternative prescriptions for meeting these unserved needs include: (1) the simplification or modification of legal rules or processes so that individuals could handle their own problems; (2) substitution of simpler and cheaper procedures, such as alternative dispute resolution; (3) increased competition in the provision of legal or alternative services; and (4) provision of free or reduced-fee service either by private practitioners (mandatory pro bono) or by publicly-funded arrangements.

1. Delegalization and Simplification

The simplification or modification of legal rules or processes so that individuals could handle their own problems offers the promise of allowing the solution of problems without the intervention of lawyers or legal proceedings, or in proceedings so simple that lay people can handle them on their own. This approach, often referred to as "delegalization," is favored by Derek Bok and other commentators because it reduces the need for legal intervention by substituting an alternative regime.

Drastic simplification of transactions or events that now require the use of lawyers, such as probate of wills, sale of houses, and divorces, might reduce the need for lawyers for millions of routine matters. Simpler statutes and regulations written in "plain English" might more readily be followed without resort to professional ad-

vice. Changes in substantive law would also eliminate the need for lawyers and lawsuits. An example of such a change is the substitution of national health care for most personal injury and accident losses. Examples can be multiplied endlessly.

All of these proposals are highly controversial. In each case the legal profession tends to resist substantive or procedural change, whether out of concern for the substantive or procedural rights that would be sacrificed or out of economic self-interest or both. In each area lawyers opposing change (e.g., probate lawyers opposing simplified probate or personal injury lawyers opposing no-fault compensation plans) are joined by powerful economic and social interests (e.g., insurance companies and health care providers who oppose health-care and compensation proposals that would affect their interests).

Delegalization and simplification, in our political culture, are usually associated with relegating various issues to the private market. Consumer advocates rightly are disturbed by this alternative because it leaves the typical consumer at the mercy of those who have technical knowledge but not a disinterested position. The alternative approach would be one that relied on public programs and public administration: government-run programs of national health care, education, and administrative supervision. The American political climate during the last 25 years, however, has become unreceptive to publicly-administered programs of social intervention and we lack traditions of a strong, expert, and politically neutral civil service to administer them. The choices, therefore, tend to be limited to reliance on the private market and to subsidized replicas of that market.

2. Substituting Simpler and Cheaper Procedures (ADR)

A second set of reform proposals seeks to reduce the cost of legal services and court proceedings by handing them more efficiently. Alternative dispute resolution (ADR) is a favorite proposal. Frank Sander, for example, proposes extensive use of ADR techniques in a multi-door courtroom, with some official deciding which technique, or series of techniques, are appropriate for a particular dispute.\(^{84}\) Repetitive and routinized adjudicatory func-

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84. See Frank E.A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 130-31 (1976) (arguing for the use of different dispute resolution processes depending on several factors); see also Stephen B. Goldberg et al., Dispute Resolution (1992); Symposium, Alternative Dispute Resolution in the Law Curriculum, 34 J. LEGAL EDUC. 229
tions would be handled by procedures less cumbersome than normal adjudication. Most cases, even the complex ones, would be disposed of in arbitration or mediation stages that would precede the trial stage. Economies of scale in court-annexed disposition of disputes provides private and public benefits.

Skeptics respond that the efficiency gains will occur only if the parties waive constitutional rights or the procedures deal effectively with intractable procedural dilemmas. Others attack the fundamental premises of ADR. Owen Fiss, for example, argues that social values inherent in judicial declaration of public norms are sacrificed by substitution of more informal processes of private settlement. Richard Abel and others worry that compulsory ADR will be confined in practice primarily to poor people, resulting in second-class justice for those who are already deprived.

3. Increased Competition

Another way to reduce the cost of legal services, favored by a number of commentators, involves deregulation of the practice of law. Increased competition within the legal profession and with nonlawyer service providers, it is argued, would lower the cost of routine legal services and make them more available to the public at acceptable levels of quality. This approach would eliminate the professional monopoly and the remaining restrictions on form of


85. See Paul D. Carrington, 'Civil Procedure and Alternative Dispute Resolution,' 34 J. LEGAL EDUC. 298 (1984) (arguing that alternative dispute resolution has three goals: delegalization of social norms, deprofessionalization of the law, and informalization of legal processes, each posing new academic issues in civil procedure).


88. See W. Clark Durant, 'Maximizing Access to Justice: A Challenge to the Legal Profession,' in LEGAL ETHICS 832-40 (Deborah L. Rhode & David Luban eds., 1992). Durant, then chairman of the board of the Legal Services Corporation, called for replacement of the Corporation by deregulation of the legal profession:

The overall effect of this system created and operated by lawyers is to limit entry into the profession, to discourage competition, to increase prices, delays and costs and ultimately to deny access to justice for the poor, for all of us. The legal cartel's heaviest burden falls on the poor. They are denied choices and access. They are denied advocates and opportunities.

Id. at 838.
practice. Nonlawyers would be able to compete with lawyers in the provision of legal services by delivering services directly to clients (with a possible exception for representation of criminal defendants) or by employing various combinations of lawyers and paralegals to perform legal tasks on a high-volume, low-cost basis. Judge Richard Posner also favors the deregulation of legal education: individuals should be able to sit for bar examinations without attending accredited law schools, a change that would require law schools to justify their costs in a free market—costs that now are built into the cost of legal services.\footnote{Richard A. Posner, The Uncertain Future of Legal Education, Speech Before the Association of American Law Schools' Annual Meeting (Jan. 5, 1991), in NAT'L L.J. Jan. 21, 1991, at 4, 4. Posner stated that legal education "has been distorted and quite possibly distended by state regulation." Further, "[l]aw schools have a 'captive audience, insulating [them] from a true market test of the value of the services they provide. The students recognize that they are paying for a credential, rather than for an education." Id.}

The role of increased competition in the delivery of legal services is considered in part C, below, with special attention to narrowing the prohibition on unauthorized practice of law and eliminating the current form-of-practice restrictions found in professional codes.

\section*{4. Provision of Free or Reduced-Fee Service}

A fourth set of prescriptions is designed to expand the availability of free or subsidized legal services. What can be done to ensure that people who have legal needs but lack resources can obtain the services of a competent lawyer? The principal methods of providing poor people with needed legal services are voluntary or mandatory pro bono representation by lawyers and publicly-financed civil legal assistance. These proposals are considered in parts D and E, below.

\section*{C. More Competition from Within and Without}

The advent of lawyer advertising with the \textit{Bates} decision in 1977\footnote{Bates v. State Bar, 433 U.S. 350, 380-82 (1977) (finding truthful advertisements about routine legal services are protected commercial speech).} signalled a more competitive environment within the legal profession. A highly competitive milieu for most sectors of law practice flows from today's conditions: a large and increasing number of lawyers in all sectors of practice; the decline of legal and traditional restraints against business-getting; an increasingly aggressive attitude by law firms in attracting new clients and retaining
old ones; and economic incentives that reward business-getting.

Lawyer advertising and solicitation are not considered in detail at this point because this once controversial area has evolved into a fairly stable field governed by a few general propositions: First, a lawyer, subject only to a few exceptions, may solicit business by any communication that is not misleading or untruthful. Second, in-person solicitation of individuals, especially those in a troubled or hurt condition, is prohibited if the lawyer’s motive is pecuniary in character, but personalized mail solicitation is permissible. Third, television or other advertising that is symbolic or emotive in character may be subject to somewhat greater regulatory control.91

Competition from within the profession is primarily restricted today by the state-based system of regulating lawyers. Discussion of emerging issues in multistate practice, primarily affecting lawyers in the corporate sector, are not considered in this paper. The assumption here is that the marketplace for legal services to individuals is and will continue to be a highly competitive one. The pressure today is to relax or to abandon the current restrictions on non-lawyer providers.

1. Competition from Outside Providers: Scope of Professional Monopoly

In the United States many tasks of a more or less legal nature may be undertaken only by a lawyer. Statutes, court rules and judicial decisions restrict “the practice of law” to lawyers duly admitted in the jurisdiction. The only general exception to the professional monopoly of law practice is that persons who are directly affected may undertake to handle their own legal problems by arguing their own cases, writing their own wills or copying out their own deeds—a right of self-representation.92 The current sta-
tus and justification of the law of unauthorized practice are examined here.93

Until the 20th century, the doctrine of unauthorized practice of law meant only that a nonlawyer could not appear in court to represent another person. Courts enforced the doctrine mainly by regulating who could enter an appearance in litigation. Outside the courthouse, nonlawyers freely performed tasks (e.g., title searches and will drafting) that today would be called the unauthorized practice of law. A vigorous and expansive doctrine of unauthorized practice can be seen in incipient form by the turn of the century but did not fully appear upon the American scene until sometime after the First World War. During the Depression, economic pressures on the bar and a social environment that was more hospitable to occupational licensing led to more vigorous enforcement of the expanded doctrine by unauthorized practice committees in virtually every state. During this period, the present scope of unauthorized practice became embodied in judicial decisions that also state the modern rationale of the doctrine: protection of consumers from their own ignorance.

After judicial decisions had established broad parameters of unauthorized practice, the organized bar, beginning in the 1930s, negotiated treaties with organized groups of competitors that had the effect of dividing the market for services in areas reserved for lawyers, on the one hand, and accountants, architects, claims adjusters, collection agencies, liability insurance companies, lawbook publishers, professional engineers, realtors, title companies, trust companies, and social workers, on the other. The growth of the consumer movement and the evolution of federal antitrust law brought an end to this market division strategy. The Goldfarb decision in 1975, 94 striking down the bar’s suggested minimum fee schedules on federal antitrust law grounds, made it clear that anticompetitive activity by bar associations was subject to the federal antitrust laws. Subsequently, lower court decisions and the initiation of a federal challenge led to retrenchment and reorganiza-

93. The best general accounts of the bar’s attempts to suppress unauthorized practice of law are Christensen, supra note 65 (tracing the development of the unauthorized practice of law in the United States and recurrent challenges arising from it) and Rhode, supra note 65 (primarily an empirical study of contemporary bar association enforcement practice).

tion of unauthorized practice activity. The interprofessional treaties were abandoned because of fears of antitrust liability, a number of states disbanded their unauthorized practice committees, and, in other states, activity was narrowed and channeled through the state supreme court. The statutory and common-law prohibitions against unauthorized practice, however, continue in force.

Lay assistance in the provision of routine legal services (e.g., divorces, wills, and consumer bankruptcies) has been a major field of contest during recent decades. Earlier efforts to restrict the availability of self-help materials to members of the public foundered on first amendment grounds. The battle ground then shifted to lay assistance in filling out and filing legal forms, as in the Brumbaugh95 and Furman96 cases in Florida.

Defining the activities which constitute the "practice of law," if the term is not limited to representation in formal proceedings before courts of general jurisdiction, quickly becomes a broad issue of public policy. What activities carried on by lawyers should be protected against outside competition? Court decisions use ad hoc circular reasoning in defining "the practice of law." The most common formulation is the "professional judgment" test: Is the activity one in which a lawyer's presumed special training and skills are relevant?97 A matter has legal ramifications requiring a lawyer's involvement only when it involves "difficult or doubtful legal questions."98 The actual boundaries, however, appear to be more responsive to political and economic realities than to efforts at principled line-drawing under these vague tests.99

95. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) (holding that a lay secretarial service could provide divorce forms but not assist customers in filling them out).
96. Florida Bar v. Furman, 451 So. 2d 808, 815 (Fla. 1984) (finding contempt for violation of court order barring a former legal secretary from providing oral advice in connection with provision of divorce forms to persons seeking an uncontested divorce). The Furman case is discussed in RHODE & LUBAN, supra note 13, at 734-38.
97. EC 3-5 of the Model Code of Professional Responsibility, after stating that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law," then provides a functional (but circular) definition: It is the "practice of law" when the "professional judgment of a lawyer" is called for in relating "the general body and philosophy of law to a specific legal problem of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1969). The context suggests that this determination is to be made in the light of public interest considerations, i.e., the sphere of exclusion is to be determined by the purposes to be served.
99. Potential clients, particularly those of lower and middle socio-economic status, fear
The location of the boundaries is the product of the ebb and flow of interaction between the organized bar and competing service-providers, state law as formulated by state courts, constitutional law as formulated by the Supreme Court, inter-professional detente, and market forces. In Florida and Colorado, for example, the bar associations have been fairly aggressive, whereas in other jurisdictions they have been nearly dormant or, as in California, active but on the defensive. In general, state courts act only in response to bar association initiatives. When state courts have been asked to suppress activity as unauthorized practice of law, they have in general sided with the bar's position.

Professor Deborah Rhode and some other commentators argue that the current enforcement of unauthorized practice restrictions raises significant due process and First Amendment questions.\textsuperscript{100} The prohibition, she argues, is unduly vague and threatens in an overbroad fashion self-representation and other first amendment interests. To date, the Supreme Court has rejected these claims.\textsuperscript{101} In the typical injunction proceeding, the vagueness problem is reduced because the initial order is one that enjoins specific behavior. The injunctive remedy also deprives the nonlawyer of a lay jury that might be more sympathetic than a lawyer-judge to lay competition.

Representation of parties in litigation in courts of general jurisdiction is the strongest case for the lawyer's professional monopoly. An unbroken tradition, flowing from the exclusive right of the English barrister to represent parties in high courts, is backed by functional arguments. The intricacies of court procedure and trial tactics, essential to protect clients from serious harm, suggest the desirability of confining representation to skilled advocates. The settlement and disposition of cases in an orderly and efficient manner is facilitated when a relatively small group of professional representatives deal with judges and each other on a regular basis.

\textsuperscript{100} Rhode, \textit{supra} note 65, at 48-74 (analyzing the enforcement of the unauthorized practice of law).

\textsuperscript{101} See \textit{Furman v. Florida Bar}, 444 U.S. 1061 (1980). In \textit{Furman}, the Court dismissed an appeal in a divorce-advice case for want of a substantial federal question despite the contention that such result violated First Amendment rights to disseminate and receive information. The commercial speech doctrine, however, does protect distribution of self-help materials.
In short, efficiency and justice concerns support the professional monopoly in the litigation context.

The possibility of permitting anyone to represent another before a tribunal poses more difficulties than does permitting anyone to draft a document. The hypothesized, deliberate choice by a client of a nonlawyer for advice whether to sign a lease may result in economic loss to the client through improper counseling, but in most instances, it will be a loss to the client alone. However, the choice of one not trained to appear before a tribunal involves costs that must be borne by others—costs to the tribunal itself and to the other litigants. At a time when many are calling for a specialized trial bar because of allegedly inadequate lawyer performance, a move in the opposite direction to permit anyone to try cases for others seems of dubious viability. ¹⁰²

Even in the adjudicatory realm, however, statutes or custom carve out some exceptions for lower tribunals (e.g., justice of the peace courts, small claims courts) or for some administrative tribunals. In most of these situations, the losing party is entitled to a de novo trial or further hearing before a constitutional court, in which nonlawyers will be forbidden from appearing on behalf of others. Representation before tribunals has been an area of lively contest between interests such as consumer groups and lawyers. State statutes or agency rules that have attempted to broaden the power of nonlawyers to represent others in agency proceedings have been struck down as a violation of the exclusive, inherent power of the state’s highest court to regulate the practice of law. ¹⁰³ The integrity of “judicial power,” however, is not really threatened by legislative choices of this type.

The American law of unauthorized practice goes well beyond that of the remainder of the common-law world in extending the prohibition to out-of-court legal services. Because law is such an


omnipresent reality in today's world, it is impossible for individuals in hundreds of endeavors to carry on their work without dealing with "the law." Consider the police officer patrolling a neighborhood beat, the small business filing its tax return, the buyer or seller of a residential home, the consumer dealing with an aggressive finance company or collection agency, or the spouse considering a no-fault divorce. Each of these individuals may consult a lawyer, but many of them may seek or get advice from nonlawyers: The police officer from a nonlawyer supervisor, the small business from an accountant, the home buyer from a realtor, the consumer from a consumer group, and the spouse from a self-help kit or a Rosemary Furman.

The current law of unauthorized practice goes too far in seeking to protect consumers from competitive services provided by nonlawyers. Consumer groups and ratings can guide consumers in choosing services. Malpractice liability is likely to provide greater protection than professional controls applied to lawyers. The organized bar, while claiming that consumers must be protected from their own inability to judge the quality of the services offered, fails to provide assurance that the lawyers whom consumers will otherwise be required to consult have the necessary competence and integrity. The higher costs of limiting service to lawyers means that consumers forego any assistance for many ordinary, but troublesome problems.

The organized bar largely acquiesces in activities carried on by powerful occupational groups, such as accountants in providing tax advice or realtors in real estate transactions. The bar's efforts to enforce unauthorized practice restrictions are strongest in situations in which unorganized individuals, such as Rosemary Furman, seek to perform activities that are of considerable economic importance to general practitioners, such as divorces, personal bankruptcies, and probate of wills. These activities involve legal complexity similar in range to those carried on by accountants or realtors. The only major difference between tax advice or real estate transactions is that simple divorces, bankruptcies, andprobate involve court filings, however routine in character.

Jerome Carlin's empirical study of solo practitioners in Chicago concluded:

Most matters that reach the individual practitioner—the small residential closing, the simple uncontested divorce, drawing up a will or probating a small estate, routine fil-
ings for a small business, negotiating a personal injury claim, or collecting on a debt—do not require very much technical knowledge, and what technical problems there are generally simplified by the use of standardized forms and procedures. [Moreover, clients in these areas are] unwilling to pay for the kind of legal advice or product that would give fullest rein to the individual practitioner’s abilities. As a result, the legal work of the individual lawyer is, in most instances, reduced to a fairly routine, clerical-bookkeeping job—the very kind of job which many nonlawyers and lay organizations are as well, if not better, equipped to handle than the lawyer. [M]uch of this work should probably be handled by lay organizations. This does not necessarily mean eliminating the lawyer, but, as in the case of the title company, transferring the job from the private lawyer to the house counsel [assisted by clerks and paralegals].

On the other hand, Professors Ehrlich and Schwartz argue that these conclusions rest on supposition rather than solid evidence. They ask for studies that will show, for example, whether the displacement of the solo lawyer by title insurance companies is more efficient, or merely the substitution of a new and more costly monopoly (e.g., that of title insurance companies) for that of lawyers. They urge studies that would “indicate the relative costs and benefits of lawyer and nonlawyer representation, and a comparison of lawyer costs for services in fields where ‘lay’ competition is not permitted.”

Professor Rhode’s comprehensive study of the enforcement of unauthorized practice regulation concludes that the burden of proof and persuasion rests on the legal profession to justify its monopoly, rather than on actual or potential competitors:

105. Senate Comm. on the Judiciary, 93d Cong., 2d Sess., supra note 102, at 305.
106. Rhode, supra note 65, at 94-99. Rhode’s empirical study finds the following: Prosecutors rarely bring criminal charges of unauthorized practice; nearly all complaints emanate from the organized bar rather than from consumers of legal services; the bar’s enforcement efforts primarily take the less visible forms of pressure, negotiation, and threat, followed occasionally by injunction proceedings against recalcitrant competitors; and the bulk of the enforcement effort (three-quarters of all investigations and 68% of reported cases) involves lay form preparation and related advice.
Invoking standards that are conclusory, circular, or both, courts have typically inquired only whether challenged activity calls for "legal" skills, not whether lay practitioners in fact possess them. At every level of enforcement, the consumer's need for protection has been proclaimed rather than proven.

... Absent evidence of significant injuries resulting from lay assistance, individuals should be entitled to determine the cost and quality of legal services that best meet their needs. Where there are demonstrable grounds for paternalism, it should emanate from institutions other than the organized bar [which has such a strong self-interest in a broad sphere of professional monopoly].

2. Competition from Legal Assistants and Paralegals

Many law firms operate a high volume practice in such matters as divorce, real estate closings, workers' compensation claims, and bankruptcy. In these firms, and in legal services organizations representing the poor, intake and basic work is done by paralegals, with lawyers involved only as necessary. Nonlawyer competitors of lawyers frequently complain that law firms engaged in the same activities do so with extensive use of nonlawyers (legal secretaries, legal assistants and paralegals) who are given very limited supervision by lawyers. The bar's response is that professional codes require supervision and make the supervising lawyer responsible for an employee's breach of fiduciary or other obligations.

The dramatic growth in the use of legal assistants and paralegals in recent decades has suggested to some that these individuals should be licensed by the state after demonstration of competence through education, examination, or other credentialing. The

107. Id. at 97-99.
108. See THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 258 (Philip B. Heyman & Lance Liebman eds., 1988) (detailing Raul Lovett's workers' compensation and personal injury practice). A description of the high-volume practice of a legal clinic relying on extensive advertising is also included in the same volume. Id. at 49.
109. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1983). The Comment to M.R. 5.3 states: "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."
ABA has developed standards for legal assistant training programs and accredits particular programs as complying with its standards. A few states have developed licensing programs that are related to bar admission activities. Is it desirable to extend credentialing into this area? Should these developments be under the control of the legal profession or independent from the bar? The issues are not dissimilar to those involving the relationship of physicians to other health care occupations, such as nursing.

The most controversial aspect of the 1986 report of the ABA Commission on Professionalism was some language dealing with paraprofessional competition under the innocuous heading that lawyers should “[e]ncourage innovative methods which simplify and make less expensive the rendering of legal services.” Lawyers, the report stated, “should have to compete with properly licensed paraprofessionals” in “certain real estate closings, the drafting of simple wills, and selected tax services” if “clients of ordinary means are to be served at all.”

The report further stated that “it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law . . . Lawyer resistance to [inroads on lawyer exclusivity] for selfish reasons only brings discredit on the profession.” These sentences in the Commission’s report provoked a violent, critical reaction from lawyers and local bar groups. In California, however, where lay persons have been actively engaged in providing services in a number of these areas, the bar is studying the possibility of licensing these paralegal activities.

3. Form-of-Practice Restrictions

Model Rule 5.4 forbids a lawyer to “form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law,” forbids a lawyer to “share legal fees with a nonlawyer,” and states that a “lawyer shall not practice with or in the form of a professional corporation or association if . . .

111. Id.
112. Id.
nonlawyer owns any interest therein . . . a nonlawyer is a corporate director or officer thereof; or . . . a nonlawyer has the right to direct or control the professional judgment of a lawyer." The Comment states that "[t]hese limitations are to protect the lawyer's professional independence of judgment."

Should nonlawyers be prohibited from investing in, managing, and profiting from companies that provide legal services? Critics of form-of-practice restrictions argue that the legal services market would benefit from enlarged competition and increased investment. Allowing accounting firms, banks, insurance companies, or retailers to diversify into legal services would serve that purpose. On the other hand, especially when legal services are combined with another business activity, such as the provision of banking or insurance services, legal advice may be distorted by the desire to sell these other services. The policy question is whether professional discipline or malpractice exposure of lawyer and nonlawyer participants who violated professional standards (e.g., breach of confidentiality or conflict of interest) would provide sufficient protection to consumers of service providers owned or managed by nonlawyers.

Restrictions on the ownership and management of organizations providing legal services to the public have important implications for the cost, variety, and availability of legal services to middle-class Americans. For a time, the organized bar strongly opposed any group legal service arrangements on the grounds that impermissible solicitation was involved. When court decisions required abandonment of this position, the bar retreated to rules requir-

114. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a), (b) & (d) (1990).
115. Id. at Rule 5.4 cmt. The provisions of M.R. 5.4 are drawn from, and substantially replicate, DR 3-102(A), DR 3-103(A) and DR 5-107(C) of the Model Code, and may be traced back to Canon 33 of the Canons of Professional Ethics.
116. For criticism of M.R. 5.4, see Stephen Gillers, What We Talked About When We Talked About Ethics: A Critical View of the Model Rules, 46 OHIO ST. L.J. 243, 266-69 (1985). Gillers argues that M.R. 5.4 serves the interests of established firms, with accumulated capital and clientele, rather than the interests of lawyers generally, especially younger lawyers who would benefit from increased opportunities in salaried employment; it also harms consumers by suppressing competition in the supply of services.
117. See United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971) ("The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 8 (1964) ("The First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal
ing "open panels" and lawyer control. Again forced to retreat from this position, the profession became more hospitable to group legal service plans but steadfastly opposed relaxation of requirements that organizations delivering legal services be limited in ownership and control to members of the bar. The specter of national retailers, insurance companies and major banks, among others, offering legal services generally, or to their customers through multiple offices, continues to alarm the profession. Form-of-practice restrictions, such as those embodied in Model Rule 5.4, are the profession's barrier to these forms of competition.

Provision of legal services by organizations owned or managed by non-lawyers presents a variety of standard professional responsibility problems. The lawyers who actually perform the legal work generally are selected or employed by the organizers of the plan. Will the independent judgment of the lawyer in serving a client

advice and for recommending specific lawyers And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.

118. In general, as with lawyer advertising, the ABA and state bar associations have attempted to prohibit or restrict arrangements for group legal services, while the Supreme Court has forced the bar to accommodate them. Yet, the profession has not been monolithic in opposition—important elements of ABA leadership have seen group legal services as a vital part of the long-term future of the legal profession because of their potential role in expanding the demand for legal services. Despite bar opposition, group and prepaid plans grew rapidly, reaching an estimated 15 million Americans by the mid-1980s. Emily Counic, Guardian Angels' of the Law: Prepaid Legal Services Take Wing, NAT'L L.J., Nov. 17, 1986, at 1, 1. Much of the growth was due to the recognition of lawyer advertising, beginning with the Bates decision in 1977, and changes in federal law that made group and prepaid plans attractive as an employment-related fringe benefit.

119. For discussion of the ABA's grudging response to the constitutional decisions requiring recognition of group legal services plans, see WOLFRAM, supra note 47, § 16.5.5. The 1969 Model Code limited lawyer participation in group legal service plans to those operated by a nonprofit organization that used "open panels" of lawyers (under an "open panel" a plan member is entitled to choose a lawyer from the private bar; under a "closed panel," a member is restricted to a staff lawyer or a group of lawyers selected by the plan). Wolfram states that a 1974 amendment to DR 2-103 "seemed to place the ABA Code at odds with the Supreme Court's earlier decision, in 1967, in United Mine Workers v. Illinois State Bar, [389 U.S. 217 (1967)] in which the Court had held that states were required to permit unions to offer closed-panel representation to members who wished to litigate worker compensation claims." Id. § 16.5, at 913. Wolfram concludes that the "general hostility to group legal service plans [that] bristles through the technical language of the amended Code is difficult to comprehend except as arising from parochial economic interests of lawyers who might be put at a competitive disadvantage by group legal service plans." Id. § 16.5 at 915.
through the plan be distorted or controlled by the interests of the operator of the plan? The same possibilities are present whenever a third person selects and pays a client’s lawyer (e.g., a liability insurer providing a defense to an insured) or whenever an organization hires staff lawyers (e.g., corporate legal staff). Second, group legal services plans often rely on advertising, raising the same issues involved in other advertising of legal services. Should an insurance company be permitted to call or solicit members of the public to enroll in a prepaid legal services plan in the same manner in which those companies merchandise life and health insurance to the public? Third, many plans employ nonlawyers to administer plans and to perform paralegal functions. Use of non-lawyer staff may constitute the unauthorized practice of law.

Underlying all of these issues is one of competition with general practitioners in the provision of legal services to ordinary Americans. Hostility to group legal services comes primarily from bar leaders representing the interests of general practitioners who are the lawyers primarily threatened by competition from group legal services plans (e.g., the loss of work-injury cases handled by a union plan).

The Kutak Commission’s draft of what became Model Rule 5.4 eliminated the form-of-practice requirements restricting group legal services. Under the proposal, a lawyer could be employed by any organization engaged in the delivery of legal services as long as the organization respected a lawyer’s professional judgment, protected client confidential information, avoided impermissible advertising or solicitation, and charged only fees reasonable in amount. The Commission’s proposal, however, was dropped from the Model Rules by the ABA House of Delegates at the last minute. Professor Geoffrey Hazard, the reporter for the Kutak Commission, reports: “During the debate someone asked if [the Kutak] proposal would allow Sears Roebuck to open a law office. When they found out it would, that was the end of the debate.”

Model Rule 5.4 (and its Model Code antecedents) assumes that lay managers of a legal services organization will be tempted, more than are lawyer managers, to interfere with the professional relationships of employed lawyers when it is profitable to do so and that the problem is so serious that a prophylactic rule prohibiting lay management is necessary. These assumptions are questionable.

at best. After-the-fact remedies for violation of professional standards (e.g., discipline, malpractice liability, and court sanctions) will provide sufficient protection to consumers.

D. Mandatory Pro Bono

This section and the one that follows consider the role of mandatory pro bono and publicly-funded legal assistance in meeting the unmet needs of ordinary Americans, especially poor people.

What is the scope of the problem? No one knows the proportion of the legal needs of the poor that are now going unmet. The federally-funded national legal services program meets a portion of the need, although funding cuts since 1981 have reduced the program from over 6000 total lawyers to about 4000 nationwide. Efforts to encourage and support private bar involvement in local legal services programs have met with some success. Various studies show that most lawyers do participate in some pro bono work, but much of that time is directed toward activities that build relations with other lawyers, such as bar association work, or work that is designed to attract clients, such as free or reduced-fee work for local charities.121

Poor people have many needs and the pursuit of legal claims with the help of lawyers may be less important than other needs, such as housing, education, and employment. Social resources are finite and other programs and benefits for poor people compete with the provision of lawyers. Moreover, legal services are different from other professional services in two respects: First, because equality in their provision is important (the adversary system operates best when both parties have advocates of equal skill and resources), it is argued that poor or limited services carry some negatives and limited benefits.122 Second, the availability to one party of subsidized legal services imposes costs on other persons,

121. Although most lawyers donate some free services, little of it involves the representation of indigents. Jim Miskiewicz, Mandatory Pro Bono Won't Disappear, NAT'L L.J., Mar. 23, 1987, at 1. Some reports indicate that as many as 16 percent of lawyers participate in pro bono services for the poor, but other studies report that only about 6 percent of lawyer time is pro bono, much of it devoted to charities rather than poor people. See the materials cited in Roger C. Cramton, Mandatory Pro Bono, 19 HOFSTRA L. REV. 1113, 1121, 1124 (1991) (citing materials indicating the amount of pro bono work which lawyers do).
122. Richard Abel, Legal Services, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 417, 417 (Geoffrey C. Hazard, Jr., & Deborah L. Rhode eds., 2d ed., 1988) (Unlike health care and other services, "the services of a lawyer are valuable only if they are roughly equal, in quality and quantity, to the services possessed by adversaries.").
who are forced to hire lawyers to defend their interests, and on the
public.

If all needs cannot be met because of either cost or substantive
deficiency, who should decide what needs will be met? In Europe,
where a right to civil legal assistance is generally recognized, its
actual provision is restricted by mechanisms designed to screen out
nonmeritorious claims and by severe restrictions on the fees law-
yers earn in handling matters that survive the screening pro-
cess.123

If some specific needs should be met, perhaps because they
enable poor people to take control over their own lives, does it
follow that law, lawyers, and litigation are the best or most desir-
able approach?

1. A Constitutional Right to Civil Legal Assistance?

After the Warren Court held in the Gideon case that due pro-
cess "cannot be realized if the poor man charged with crime has to
face his accusers without a lawyer to assist him,"124 it seemed
possible that a similar right might be recognized for civil matters.
The high water mark of this development was Boddie v. Connecti-
cut,125 in which the Court, on due process grounds, struck down a
state statute requiring prepayment of a $45 filing fee by divorce
plaintiffs. Boddie was subsequently narrowed to situations where
judicial process provided the only means for vindicating a funda-
mental interest126 and was then displaced by a balancing-of-factors
approach in Lassiter v. Department of Social Services.127

In Lassiter the Court held that a state's failure to appoint coun-
sel for an indigent, imprisoned mother, before terminating her
parental rights to custody of her minor child as an unfit parent, did
not violate due process.128 The Court's three-part balancing pro-
cess, carried over from other due process cases, considers (1) the

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123. See Earl Johnson, Jr., The Right to Counsel in Civil Cases: An International Per-
civil legal assistance in Europe).
126. See Ortwein v. Schwab, 410 U.S. 656, 661 (1973) (upholding a $25 filing fee to
obtain state court appellate review of a state agency's reduction of welfare benefits); Unit-
ed States v. Kras, 409 U.S. 434, 446 (1973) (holding that bankruptcy is not a fundamen-
tal interest).
128. Id. at 33-34.
private interests at stake, (2) the government's interests, and (3) the extent of the risk that the claimed procedural right, here the absence of publicly-provided counsel, will lead to erroneous results in the litigation. Four dissenting justices asserted that termination of parental rights involves a more important interest than is involved in many misdemeanor cases. They also argued that appointment of counsel is particularly important for a fair adjudication of cases of this type, which involve the application of an imprecise standard in formal adversarial proceedings in which the opposing party, the state, is represented. As the dissenters predicted, few situations under Lassiter's balancing-of-interests approach turn out to require the appointment of counsel in civil cases. States are free to provide counsel to indigents in civil cases, either generally or in specific categories of cases, but with limited exceptions, have not done so.

David Luban argues that the premises of the American political system require the provision of counsel to indigents in important civil matters, and especially in civil enforcement proceedings against a poor person. Equality before the law is a fundamental principle embodied in constitutional text. Its effective implementation requires access to the legal system, which in turn is dependent upon the assistance of lawyers. In Luban's view, the failure to provide counsel impairs the legitimacy of government.

Geoffrey Hazard states some of the reasons why "[t]he notion that due process meant lawyer-assisted process never took hold in civil matters:"

129. Id.
130. Id. at 35-60 (Blackmun, J., & Stevens, J., dissenting).
131. Id.
132. See United States v. Bobart Travel Agency, 699 F.2d 618, 620-21 (2d Cir. 1983) (requiring the appointment of counsel for civil contempt charges that may lead to imprisonment); Salas v. Cortez, 593 P.2d 226, 239 (Cal.) (employing Lassiter's balancing approach and holding that a man defending a paternity charge is entitled to appointed counsel), cert. denied, 440 U.S. 900 (1979).
133. In Payne v. Superior Court, 553 P.2d 565, 573 (Cal. 1976), a prisoner seeking to defend a civil action was held entitled to appointed counsel. Payne was reaffirmed in Yarbrough v. Superior Court, 702 P.2d 583, 589 (Cal. 1985) (expressing a hope that the legislature would provide funding for representation that otherwise depended on appointed counsel serving without compensation).
134. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 237-66 (1988) (arguing that equality-of-rights-not-fortunes is a basic legitimation right of society and its denial undermines the legitimacy of the system and may generate a right of resistance).
For one thing, there was a long tradition, exemplified in workman’s compensation proceedings, juvenile court, and small claims, that legal dispute resolution could be more just, more expeditious and less expensive if lawyers were kept out. For another thing, in civil cases there was no apparatus of legal assistance provided by the state to assist one side, as was provided for the prosecution in criminal cases.

There was a more fundamental difficulty in fixing the provision of civil legal aid. The measure of necessary legal aid in criminal cases was the quantum provided the prosecution. There was no similar measure for civil legal aid. To provide a lawyer to an indigent civil grievant was in effect to confer a subsidy in the amount of nuisance settlement value to beneficiaries arbitrarily selected in terms of income or wealth and self-selecting in terms of disposition to litigate. Implicitly recognizing this, the courts were willing to say that due process required legal aid only in narrowly limited civil categories. In other civil matters, provision of legal aid would have to remain dependent on someone’s exercise of discretion to calibrate demand with supply.¹³⁶

In the absence of any constitutional entitlement, provision of counsel to indigents in civil matters depends upon the volunteered services of lawyers, judicial actions appointing lawyers for indigents, and legislative provision of subsidized legal services.

2. Professional Obligation to Represent Poor People

The bar has long recognized some kind of an obligation on the part of its members to represent persons who need legal services but cannot afford them. Various rationales are offered. One is that a lawyer, as an officer of the court, has a concern that justice be done, and that representing an indigent person who requires legal assistance is an obvious way to act upon this concern. Another rationale is that the bar has a monopoly of law practice, and as a monopolist, it should reallocate some of its monopoly profits to a manifest public need that is related to the monopoly. A third rationale is that representation of the poor is a special kind of continuing legal education that exposes the lawyer to the realities of jus-

¹³⁶. Id. at 219-20.
Volunteered services may have worked reasonably well in small-town America at an earlier time. Lawyers were general practitioners who had contacts with a wide range of people in their communities. A poor person who came to a lawyer’s office with a substantial and meritorious legal problem may have had a decent chance of getting necessary help. A competent general practitioner could tell a meritorious case when he saw it, especially if he was free to decline it. Toward the end of the 19th century, the face-to-face character of American society gave way in urban centers. During the 20th century, legal practice became increasingly specialized in character. Absent institutional arrangements channeling willing lawyers to needy clients, volunteered efforts proved ineffective.

Lawyers have embodied their aspirations concerning access to justice in their codes of professional ethics, but have not stated them in mandatory terms. The wording of Model Rule 6.1 reflects an explicit rejection of earlier drafts which mandated 40 hours per year of pro bono service from each lawyer. A February 1993 amendment to the ABA’s recommended Model Rule 6.1 moves in the direction of specificity by urging 50 hours per year of pro bono service, primarily in a form benefiting poor people. Mandatory pro bono proposals have arisen in states and localities with increasing frequency since the 1980s, partly stimulated by cutbacks in federal funding of the Legal Services Corporation. Thus far, state-wide proposals have been defeated or tabled after extensive discussion.

137. For discussions of the “pro bono” obligation see Barlow F. Christensen, The Lawyer’s Pro Bono Publico Responsibility, 1981 AM. B. FOUND. RES. J. 1 (discussing the origin and continuing existence of the lawyer’s pro bono responsibility); Geoffrey C. Hazard, Jr., The Lawyer’s Pro Bono Obligation, 1981 A.B.A. PROC. 2D NAT’L CONF. ON LEGAL SERVICES & THE PUBLIC 100 (discussing whether lawyers should have a legal duty to perform pro bono work); David L. Shapiro, The Enigma of the Lawyer’s Duty to Serve, 55 N.Y.U. L. REV. 735 (1980) (analyzing the history of the lawyer’s public service requirement, and exploring economic and policy objections to the imposition of an enforceable service obligation).


139. For discussion of mandatory pro bono proposals, see LUBAN, supra note 134, at 240-89 (1988); Michael Millemann, Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question, 49 MD. L. REV. 18 (1990) (analyzing the history of mandatory pro bono, proposing mandatory pro bono in the United States, and analyzing objections to mandatory pro bono); Steven B. Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 CARDOZO L. REV. 255 (1981) (reacting to the ABA’s inclusion of mandatory pro bono in the discussion draft of the Model Rules of Professional Con-
Because supporters and critics of mandatory pro bono often agree on overall objectives, yet disagree vehemently about the details of implementation, consideration of a concrete proposal is desirable. In 1990, a committee appointed by the chief judge of the New York Court of Appeals proposed that the courts adopt rules compelling New York lawyers to donate 40 hours every two years to advance the legal needs of the poor. The mandatory pro bono proposal contained the following details: Law firms could credit the excess hours of some firm lawyers to meet the obligations of others. Lawyers in small firms of less than ten lawyers could satisfy their obligation by paying $1,000 each, in lieu of time, to support legal services for the poor. A third alternative permits law firms or unaffiliated lawyers to hire an attorney to discharge their collective obligation to devote time.

The proposal, like mandatory pro bono plans elsewhere, divided the New York bar. Most bar associations opposed it, but individual lawyers and a few bar associations supported it. The Association of the Bar of the City of New York, which is representative of New York City’s largest firms, “reluctantly” but forcefully endorsed the proposal as essential to meet a ‘desperate’ need. In light of this mixed reaction, Chief Judge Wachtler postponed action on the report in the hope that the stimulus it provided to voluntary pro bono would suffice to meet the problem.

The argument for mandatory pro bono usually proceeds along the following lines: (1) There is an unmet need for vital legal services, especially on the part of poor people. (2) A lawyer is necessary for meaningful access to the justice system. (3) The American ideal of equal justice under law is undermined by lack of access to justice. (4) Although voluntary pro bono is commendable, it has proven insufficient, even when supplemented by modest public funds in the form of the national legal services program. Therefore, (6) lawyers must satisfy the unmet need with mandated services, at least until other alternatives, such as adequate provision of publicly-funded services, are put in place.

Even if one accepts the premises of this argument, making the

141. Symposium on Mandatory Pro Bono, supra note 139, at 1115.
142. For a more extended argument, see LUBAN, supra note 134, at 267-89.
obligation of lawyers to represent the poor a legal duty, as distinct from an ethical exhortation, encounters opposition based on a number of legal, moral, and practical grounds.

The legal objections rest on various constitutional provisions, including freedom of speech and association, the takings clause, equal protection, and involuntary servitude. The legal arguments have generally been rejected in the context in which they have the largest force: Court-appointment programs which require an appointed lawyer to devote a substantial amount of time to handling a particular matter. The imposition of a modest annual pro bono obligation on lawyers who are extensively regulated and have an exclusive license to practice is hard to perceive as involuntary servitude.

If the lawyer is given a great deal of choice concerning how the required service is performed, as is the case in most mandatory proposals, a claim that free speech and associational rights are impaired is also difficult to maintain. Whether mandatory pro bono is wise or desirable is perhaps a more important inquiry than whether it passes constitutional muster.

143. See Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 705-11 (D.C. Cir. 1984) (ruling that compulsory appointment of lawyers for uncompensated representation of parents in child neglect and parental termination cases was not a taking; but case remanded for a further hearing on an equal protection claim arising out of limitation of that obligation to juvenile defenders); United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) (deciding that compulsory appointment of a lawyer not a taking), cert. denied, 382 U.S. 978 (1965); United States v. Shackney, 333 F.2d 475, 485-87 (2d Cir. 1964) (holding that only physical restraint or legal confinement constitutes involuntary servitude). But see DeLisio v. Alaska Superior Court, 740 P.2d 437, 439 (Alaska 1987) (court appointment was a temporary taking requiring just compensation); State ex rel. Scott v. Roper, 688 S.W.2d 757, 764-69 (Mo. 1985) (suggesting that uncompensated service presents a constitutional question). See generally Shapiro, supra note 137, at 765 (arguing that compelling a lawyer to represent a particular client or to assert certain positions is "more troublesome than a tax in dollars"); Bruce A. Green, Note, Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance, 81 COLUM. L. REV. 366 (1981) (discussing the constitutionality of mandatory court appointment of lawyers in civil cases).

144. Although the practice of law is a property interest protected by the due process clause of the Fourteenth Amendment, Konigsberg v. State Bar, 353 U.S. 252 (1957), a requirement that a relatively small number of hours be devoted to public service each year is supported by the bar's historic tradition of response to court appointment and falls short of a "taking."

145. In Mallard v. United States Dist. Court, 490 U.S. 296 (1989), the Court did not reach constitutional issues relating to a federal-court assignment program. In Mallard, the Court held, 5-4, that the federal statute empowering a federal judge to "request" an attorney to represent an indigent in a civil case did not create a legally binding obligation on the part of the attorney. Id. at 301. Justice Brennan's opinion for the majority acknowledged the tradition that members of the bar have an obligation to represent indigents, Id.
The moral objections to mandatory pro bono are that mandated service intrudes on personal autonomy; that it converts a gift of volunteered services into the duty of a compelled exaction, thus depriving the actor of the moral significance of the gift of service;146 and that in application it tends to be regressive and inequitable, falling with a heavier hand on the less affluent and less successful lawyers.

The principal practical objections to mandatory pro-bono rest on concerns about the quality and efficiency of mandated services (a feasibility concern, discussed in the next paragraph); the burdensome problems of administration and enforcement; the discouragement of charitable and bar association work if they are excluded from the required pro bono category, as in the New York proposal; and, finally, a concern that, if adopted in only one jurisdiction, lawyers in that state will be adversely affected vis-a-vis their competitors in other states. A pro bono obligation imposed on New York lawyers, for example, will operate essentially as a tax on legal services, putting New York lawyers in a less favorable position with respect to clients who can go elsewhere for legal services to either national law firms or lawyers in nearby states.

The problem of feasibility asks whether, for example, an office lawyer engaged in bond debenture work may be an effective advocate for poor people.147 The law in which poor people typically

146. Moral philosophers and economists have debated whether the provision of blood for transfusions may best be met exclusively by voluntary donation (as in the United Kingdom) or by purchase as well as gift. Richard Titmuss's comparative study concludes that the British approach, forbidding the development of a market for blood, fosters "the gift relationship" and is more effective in providing blood, while the more commercial approach in the United States results in chronic shortages. RICHARD TITMUS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (studying the scientific, social, economic, and ethical issues involved in the procurement of human blood). See Peter Singer, Altruism and Commerce: A Defense of Titmuss Against Arrow, 2 Phil. & Pub. Aff. 312 (1973) (defending Titmuss against some of Arrow's criticisms while also comparing voluntary and commercial means of obtaining blood). But see Kenneth Arrow, Gifts and Exchanges, 1 Phil. & Pub. Aff. 343 (1972) (reflecting on Titmuss's theory that the allocation of goods and services is not accomplished entirely by exchange). The altruistic impulse is also the target of President Bush's frequent references to "a thousand points of light."

147. Some observers believe that the costs of arranging and supervising pro bono oppor-
become involved is a set of highly technical subjects with which most lawyers are unfamiliar. Most law schools do not teach these subjects, at least not in an integrated way. Representation of indigent criminal defendants requires familiarity with criminal law and its practice. Representation of poor people in disputes with a welfare department requires familiarity with a complicated body of federal and state law along with local administrative practice in administering that law. The law of landlord and tenant, which affects many poor people, is similarly complicated. From a political-economic viewpoint, most poor people exist in a semi-socialist regime in which their lives are continuously dependent on government regulation and discretion. Hence, in most localities, certainly in all major cities, a very sophisticated system would be required to provide that every lawyer be on call for whatever may be the legal needs of the poor. These difficulties would be less severe, however, if the law governing the poor were as central to the law school curriculum as is corporation law, constitutional law, or administrative law. As law school patterns stand, most lawyers enter the practice of law without a foundation in the subjects affecting the poor.

A related problem is equalizing the burden of service on all members of the bar. While the bar as a whole may have a monopoly of law practice, no single lawyer or law firm does. If the burden of discharging the collective responsibility were not equitably apportioned, widely disparate burdens would be involved. Lawyers who had undertaken to learn a specialty in the "law of the poor" would be particularly vulnerable, and that would create perverse incentives to remain unskilled in poverty law. The difficulties could be ameliorated if lawyers were required, through continuing legal education and practice, to maintain competence in some field of "poverty law." But these measures would be burdensome
and expensive. Provision of publicly-funded legal services for the poor provides a supplementary or alternative approach.

E. Publicly Funded Legal Services for Poor People

1. Development of Federal Legal Services Program

Legal Aid in various forms began around 1900, sometimes as self-help associations of worker and immigrant groups, sometimes as charities. Through the 1950s legal aid programs were funded almost entirely by charity and subscription of members of the bar. The programs usually had a small staff, often one person, assisted by volunteers and law students. The agencies were few in number, located almost exclusively in major cities, thinly funded, relatively passive, concentrating on individual cases and having the aura of a charity. In the 1960s, the Ford Foundation made legal aid a major undertaking and infused it with new money, new stature, and new assertiveness. In 1964, President Johnson’s Office of Economic Opportunity initiated funding for a quantum leap in civil legal assistance. The federal legal services program, discussed more fully below, originated in the OEO initiative.

The visionaries and activists who started the legal services movement in the turbulent 1960s had three missions in mind: (1) the individual client-service mission of traditional legal aid, (2) law reform and institutional change, and (3) empowering poor people by creating organized groups that might engage in direct action such as boycotts, demonstrations and political activity. The activists in the legal services movement were committed to the last two objectives and were critical of emphasis on the first. They deprecated individual-client assistance as “band-aid” work that failed to

See John R. Kramer, Law Schools and the Delivery of Legal Services—First, Do No Harm, in CIVIL JUSTICE: AN AGENDA FOR THE 1990s 45, 57 (1991) (“The best way to alter attorneys’ attitudes is from the ground up by instilling in law students a sense of the responsibilities they must shoulder when they become members of the bar.”).

150. For general and historical background, see generally EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES (1951) (discussing the status of legal aid, its history, its philosophy, and a look into the future); JEROME E. CARLIN ET AL., CIVIL JUSTICE AND THE POOR (1966) (examining issues relevant to the sociology of law); ELLIOT CHEATHAM, A LAWYER WHEN NEEDED (1963) (discussing their right to counsel in the United States); BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970) (studying the availability of legal services and making recommendations for changes); EARL JOHN-SON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974) (studying the political processes behind the Legal Services Program of the Office of Economic Opportunity); REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919) (analyzing law, poverty, and legal administration).
get at fundamental problems.\textsuperscript{151} They sought to direct the program's resources into social advocacy and organizational activity. The provision of lawyers for otherwise represented persons in dealing with public or private institutions resulted in numerous decisions requiring more elaborate procedure or establishing new substantive law. The ultimate objective—a substantial redistribution of societal wealth and power—proved to be too large and too politically controversial to be accomplished by lawyers through the mechanism of the courts.

The social reform potential visualized in the 1960s, for the federal legal assistance program excited hopes of reformers and fears of conservatives, both probably exaggerated. The result was a political struggle for control of the program, involving the organized bar at various levels, political action groups, factions in Congress, and various agencies in the Government. Broadly speaking, the reformers sought to make legal aid programs a vehicle for structural legal reform through test cases, class actions, and legislative activity, in such areas as housing, civil rights, education, women's rights, and regulation of the workplace. The conservatives sought to maintain legal aid as a service program for needy individuals in such traditional matters as child support and custody, landlord-tenant disputes, debtor-creditor disputes, and securing welfare benefits.\textsuperscript{152}

In 1974, a detente of sorts was reached. The federal legal services program was established on a permanent basis through the Legal Services Corporation Act.\textsuperscript{153} The statutory objectives are stated in politically neutral terms of "equal access to justice" and "high-quality legal assistance" for the poor.\textsuperscript{154} Political and organizational activities on the part of legal services lawyers are largely excluded by specific restrictions: a ban on political activity by

\begin{itemize}
  \item \textsuperscript{151} See Stephen Wexler, \textit{Practicing Law for Poor People}, 79 \textit{Yale L.J.} 1049, 1053 (1970) ("If all the lawyers in the country worked full time, they could not deal with even the articulated legal problems of the poor. In this setting the object of practicing poverty law must be to organize poor people, rather than to solve their legal problems.").
  \item \textsuperscript{152} See \textit{Carlin et al.}, \textit{supra} note 150 (stressing the need to broaden the kinds of services available to the poor); Geoffrey C. Hazard, Jr., \textit{Law Reforming in the Anti-Poverty Effort}, 37 \textit{U. Chi. L. Rev.} 242 (1970) (questioning whether the law-reform potential of litigation through the Legal Services Program is exaggerated); Geoffrey C. Hazard, Jr., \textit{Social Justice Through Civil Justice}, 36 \textit{U. Chi. L. Rev.} 699 (1969) (arguing that social reform is an unwise goal for the Legal Services Program).
  \item \textsuperscript{154} 42 U.S.C. § 2996 (1988).
\end{itemize}
lawyers in the field, a prohibition on participation in organizational activity (as distinct from legal advice concerning it) and procedural constraints on the use of class actions. These restrictions suggest that individual-client service and test-case litigation arising out of it constitute the central statutory mission.

The structure of the national program involves the Legal Services Corporation (LSC) as a funding agency for local programs that actually represent clients and deliver legal services. The Corporation is forbidden from providing legal services to eligible poor persons, but it has an uncertain amount of regulatory authority over the operation of the local programs. Restrictions on the matters that could be undertaken by the local programs were included in the original Act (e.g., abortion and school desegregation cases). These restrictions have since been modified, elaborated, and fought over, each time in highly political battles. Parallel struggles have occurred over the level of funding.

President Reagan was strongly against any reformist tendency in legal aid and favored abolishing the Legal Services Corporation. Major bar associations, led by the American Bar Association, along with various civil rights and other activist groups, held out for continuing the program. In the 1980s, the program continued on funding diminished by budget cuts and inflation. The federal legal services program has emerged with modest funding and a relatively traditional program, but on a more or less permanent basis. Periodic disputes over restrictions on program activities as well as funding levels are likely to recur.155

2. Recurring Policy Issues

a. Staff-attorney system vs. judicare

The United States is distinctive in that civil legal assistance to the poor is provided primarily by organizations that employ “poverty lawyers”—lawyers who are employed full time by local non-profit organizations engaged in delivering legal services to eligible poor persons (generally defined as persons whose household incomes are below 125% of the federal “poverty line”). In other

155. See Roger C. Cramton, Crisis in Legal Services for the Poor, 26 VILL. L. REV. 521 (1981) (exploring the debate over President Reagan’s proposed budget cuts for the Legal Services Program); Carne Menkel-Meadow, Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980s, 22 OSGOODE HALL L.J. 29 (1984) (expressing concern that governmental resistance to the provision of legal assistance for the poor has grown during the 1980s).
countries, eligible poor persons are referred to members of the private bar, who are then paid by the state at rates fixed by statute or regulation. The latter system, by analogy to Medicare, is referred to as "Judicare" in the United States.

The staff-attorney system, which is favored by most participants in the U.S. legal services movement, provides a cadre of lawyers who are intellectually and personally committed to serving the poor. The delivery of service may be organized so that clients are served by experienced specialists in various areas of poverty law, such as welfare, housing, or education. Further, the staff-attorney system permits more aggressive pursuit of institutional reform that benefits groups of poor people rather than merely an individual client.

Proponents of Judicare as a replacement of or an alternative to the staff-attorney system argue that the use of private lawyers permits a more normal lawyer-client relationship (the client chooses the lawyer and controls the objectives of the representation) and leads to greater client satisfaction. Some proponents favor Judicare for precisely the reasons that those enamored with law reform litigation prefer the staff attorney system: Judicare is more likely to stick to individual-client service. Studies performed by the Legal Service Corporation indicate that both systems are feasible, the existence of some staff component is essential in controlling costs, and the staff system offers a potential of having a larger impact on the legal rights and living conditions of eligible clients.

b. Who should be served?

The demand for free goods, even if their use involves time and inconvenience, is likely to exceed the available supply. The result is an inevitable rationing problem. Because lawyers cannot and will not be provided to all people who feel aggrieved and who lack the resources or capacity to seek relief on their own, someone must decide who will be served. Local legal services programs are re-

156. See Samuel J. Brakel, Judicare: Public Funds, Private Lawyers, and Poor People (1974) (presenting empirical evidence that experimental clients have been more satisfied with Judicare than with the staff-attorney system); Samuel J. Brakel, Styles of Delivery of Legal Services to the Poor: A Review Article, 1977 AM. B. FOUND. RES. J. 219 (1977) (criticizing the notion that staff-attorney systems are superior to Judicare and stressing the need to keep Judicare as an option).

quired to establish priorities after consultation with representatives of client groups, but it is generally recognized that staff lawyers play a large role in shaping and then administering priorities. The establishment of a priority in one area, such as public housing issues, may lead to refusing service in categories of other cases. A number of legal services programs, for example, refuse to accept divorce cases. Critics of the current program suggest more neutral principles, such as queuing, or some effort to replicate the private market, as with a voucher system or client copayments.158

Defenders of current arrangements rely on utilitarian arguments of triage: Because funding is so limited, scarce resources must be devoted to the most serious problems that will do the most good for poor people as a whole. This argument places group interests above the right of individuals to obtain access to justice to defend or enforce their legal rights. Inevitably, it places authority in staff lawyers who decide what cases to take and, in doing so and in handling the subsequent representation, make decisions as to what is in the best interests of poor people. Finally, it departs from the traditional lawyer-client relationship in ways that should be avoided if possible.

(1) Individuals are entitled to minimal legal service on vital matters. The United States at present fails to provide its poor citizens with a minimal access to justice. The Legal Services Corporation estimates that only about 20 percent of poor people needing legal help get it. Even if this figure is much exaggerated (many of those below the eligibility line have sufficient resources to pay the relatively low fees required for some routine legal services, such as an uncontested divorce), a much larger emphasis on caring for individuals in need is desirable. Perhaps we cannot afford to do so, but the problem appears to be one of mistaken social priorities. Given the political opposition to the current program, a gradual shift to one resembling the European model—reimbursing at low rates members of the

158. See Douglas J. Besharov, Introduction to Legal Services for the Poor: Time for Reform xiii, xiv-xvi (Douglas J. Besharov ed. 1990) (staff lawyers who dominate priority setting devote little effort to the problems associated with family breakdown, the most critical problem of poor people today; client copayments would force clients to choose among their needs); Marshall J. Breger, Legal Aid for the Poor: A Conceptual Analysis, 60 N.C. L. Rev. 281 (1982) (arguing that utilitarian justifications of a lawyer-centered rationing of service should be replaced by an individual-rights approach).
private bar who provide legal services on meritorious matters—is warranted. I do not make this argument as one of constitutional entitlement, but as a basic social provision that a legislature concerned with social justice should implement.159

(2) What are the interests of the poor? The “interests of the poor” are not easily determinable. The current view, resting on a claim that legal services lawyers know what these group interests are, is limited and elitist. The interests of the poor are complex and variegated. To assume the right to take steps on their behalf is paternalistic. It is not obvious that the highly educated, middle class lawyers who make those decisions on behalf of poor people are well qualified to do so. Moreover, the rewards and incentives within the legal services program flow from establishing new rights and procedures, though it is not clear in many cases whether legal victories on these matters really serve the interests of the poor as a whole. Thus, the systematic efforts of many legal services programs to convert residence in a subsidized public housing project into a legal right that can be terminated only by formal procedures is thought by many (perhaps most) residents of public housing projects to be harmful to their interests. Effective means of eliminating violent and drug-pushing tenants have been eliminated, with adverse results on the living environment. Similarly, successful efforts by legal services lawyers to require more elaborate procedures for school discipline are thought by many informed individuals to have worsened educational opportunities in central city public schools.

Evidence is lacking that the law reform and political action models of the legal services movement have actually produced beneficial results for poor people. Every action, such as increased enforcement of building codes in low-

159. See Breger, supra note 158. Breger argues, persuasively in my view, that the claims of poor people of access to justice are best protected through allocation and litigation procedures that give equal weight to each person’s complaint, not by procedures that turn on the group impact of a given poor person’s case. But see Marie A. Fallinger & Larry May, Litigating Against Poverty: Legal Services and Group Representation, 45 Ohio St. L.J. 1 (1984) (disputing Breger’s claim that access rights are more important than welfare rights).
income housing, leads to a counter action, such as reduction of the housing supply or increased rents. Although the strategy of the legal services movement—to use the courts to establish rights that would benefit poor people—was well-meaning, a high price in political support has been paid for dubious returns in the form of distributive justice.

(3) **Departure from a normal lawyer-client relationship.**
In most cases of private representation, there is no problem of identifying the client or who speaks for the client. If an individual is represented, that person decides on the objectives of the representation and, even as to tactics and methods, must be consulted. The client makes the decision whether or not to settle, determines how much should be expended on the representation and is free to discharge the lawyer at any time. The relationship is different with poor clients, who are more dependent on their lawyers and who have nowhere else to go for legal representation. When a lawyer is representing a corporation, identifying the client is more complicated if there is an internal fight for control. However, in the more usual situation in which the corporation is opposing third persons or the government, the managers of the corporation are in a position to make decisions concerning the direction, methods and cost of representation. In short, the private client is in charge, with the

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161. Once the attorney-client relationship has been formed, either by appointment of a court or, more likely, by acceptance of a case by a legal services office, the lawyer and client are essentially in a deadly embrace. The lawyer cannot easily withdraw from the representation; the client has no other choice other than the lawyer assigned. If personalities conflict, a legal services program may assign a different lawyer to the matter. The lawyer, who possesses superior information and skill and is balancing the interests of one client against those of others in what is usually a heavy caseload, is in control.

162. See Model Rules of Professional Conduct Rule 1.13 (1990) (stating that a lawyer for an organization represents the entity not its agents or employees). For discussion of the duties owed to a lawyer when the client (an organization) owes duties to
lawyer acting as the client’s agent.

The deployment of the scarce time of lawyers in a legal services office is a very different situation in which the private-representation analogy is not fully applicable. The private-representation analogy most fully applies when a legal services lawyer is representing an individual client in a matter that has few implications beyond the individual case, whether the matter is a divorce, a bankruptcy, or a welfare benefits problem. Even here, however, the priority-setting process may lead the program’s lawyers, who as a practical matter control the timing and outcomes of this process, to reject entire categories of cases, such as those dealing with family problems, in order to deal with what the lawyers feel are more fundamental problems of poor people. As staff lawyers develop specialized competencies, these priorities are resistant to change. Any candid discussion of client participation in the setting of priorities reflects the truth that no good method of reflecting the interests of all eligible clients in a service area has yet been devised.

Nor is it clear that there is any way to others (e.g., shareholders), see Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 GEO. J. LEGAL ETHICS 15 (1987).

163. See Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. REV. 1101 (1990). Tremblay argues that the legal services lawyer faces the dilemma of choosing between allegiance to the individual client and making choices and imposing limits that serve interests of groups of poor people. He states: “Legal services offices must engage in a form of triage, or ‘screening of [clients] to determine their priority for treatment [i.e., representation].’ They cannot allocate their services according to the usual method of price, so they must choose other means to decide between potentially eligible clients.” Id. at 1111 (citation omitted). See also MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 81-158 (1980) (discussing the allocation of services among clients).

164. Social programs tend to conform over time to the interests of the staff who run them. The legal services program has been criticized as a “lawyers’ program” run by lawyers. Empirical studies provide some support. See, e.g., JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION (1982).

165. Alan Houseman, one of the most experienced and knowledgeable observers of the legal services movement, has stated that client participation has not achieved its goals, and good solutions to the problem do not exist. Tremblay contends that legal services lawyers must make choices among their present clients in much the same fashion that they make choices among prospective clients. He states that “[t]he process of client representation is an elastic one; absent some control on demand, such as billing in the private sphere, the subsidized client will continue to compete with his fellow clients for the scarce time, energy, and funds available to his lawyer.” Tremblay, supra note 163, at 1115. Tremblay, a former legal services lawyer, defends the practical reality that “a legal services lawyer must make normative choices among her clients in distributing the scarce funds.” Id. at
replicate in the distribution of a public good the consumer sovereignty provided by free markets in goods and services.

When cases in a legal services program arise that raise larger issues, there is a temptation to shape the case, not to meet the interests of the individual client, but to raise the larger issue that, in the view of the program's lawyers, will advance the strategic interests of a class of poor people.\(^\text{166}\)

A lawyer for a private client must withdraw when faced with a conflict of interest between that client and other clients, but the legal services client has no other options and may be induced to consent to a more limited or representative litigation.\(^\text{167}\) The problem arises in selecting of cases and issues, framing the objectives of litigation, and deciding whether and on what terms to settle. At the extreme end of the spectrum is the class action in which the legal services lawyer may have constructed the legal theory, constituted the class, selected its representatives, and made all of the decisions along the way, including a decision to settle, that may not accord on the merits or in remedial aspects with the interests or desires of a majority of the represented class. Here, as in the kindred situation of representative suits brought on behalf of amorphous classes of shareholders or consumers, it is a fiction to think of the client class as being in control of the litigation.\(^\text{168}\) The lawyer for the class is primarily in charge, and the principal check comes from the requirement that the judge approve any settlement.

Thus, the analogy to private representation must take account of the fact that client control of litigation becomes suspect in legal services litigation involving broad issues; at the extreme of a class action seeking injunctive relief,

\footnotesize{1120. This proposition is conceded and defended by Luban and Tremblay. See Luban, supra note 134; Tremblay, supra note 163.

166. See Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (conflict between two groups of eligible clients simultaneously represented by a legal services organization resulted in disqualification of counsel).

167. See Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry."). See also Deborah L. Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982) (stressing the need for procedural reform to allow class action clients to have more control over the litigation).}
control by clients is usually fictitious. In those situations, the lawyer should be viewed as either lacking a client or as his or her own client.

Restructuring the legal services program to provide individual-care service through private lawyers, reimbursed by public funding at rates specified by regulation (e.g., so much for a personal bankruptcy or an uncontested divorce), would provide poor people with a relatively normal lawyer-client relationship. A staff-attorney component would remain to provide screening of cases for eligibility and merit, to refer cases to an appropriate private lawyer, to maintain quality control, and to provide payment. In addition, a central legal services organization in major cities or on a state-wide basis would provide necessary functions: (1) training for private lawyers who desire to give pro bono assistance on a part-time basis, and (2) back-up support on specialized poverty-law matters for private lawyers handling such cases.

c. Standard of service

Ordinary people who desire a lawyer to prepare a will, get a divorce, or facilitate a transaction must pay the customary charge of lawyers for that service. Numerous studies indicate that many of them forego the use of legal services because of cost, inconvenience, or fear of becoming involved in the legal machinery. Those with little choice, who are cast as defendants in a proceeding brought by someone else, reluctantly hire lawyers, but generally push them to handle the matter as cheaply as possible. The result is a world in which most people “lump it” on many legal matters and get low-cost or minimal representation on many others. That is the reality of the legal market place in which most private persons make their decisions.

The most ambitious vision of legal services for the poor, however, looks to the representation provided to wealthy individuals and large corporations in high-stakes matters as the appropriate analogy. Earl Johnson, who headed the OEO legal program in the 1960s, states that he learned what full-service lawyering for a client really meant from a partner at Covington & Burling who represented American Airlines in high-stakes matters. Poor people, Johnson concluded, are entitled to the same quality and extent of legal service that is provided to a wealthy client in a high-stakes
matter: aggressive advocacy at every stage, including appeals, representation in administrative and legislative proceedings, including lobbying, and use of representative or class actions when in the interest of the client. The implication is that eligible clients of publicly funded legal services offices are entitled to what only a few wealthy persons and large corporations actually receive: unrestricted full-service lawyering that leaves no stone unturned and is not as restrained by considerations of cost as would be true of lawyering for most other persons and entities.

The premises of Johnson's argument, however, are fallacious. Upper income people, let alone people of lesser means, do not employ a "full court press" in litigation except where it appears cost effective and often not even then. Such a commitment of legal services may be warranted where the existence of a wealthy organization is threatened, but it is not warranted, even with wealthy people, in a dispute over repairs on a Mercedes. A scheme of misdirected policy flows from a false assumption about what the non-poor do regarding use of legal services, which is then used as a predicate of a demand for equal treatment of the poor.

Moreover, if society was committed to giving the poor an income supplement equal in value to the "full court press" which is urged on their behalf by lawyers, why should it be provided in the form of lawyers' services rather than in the form of a welfare check?\(^{169}\) Individual poor persons would undoubtedly prefer the freedom of choosing how much they want to spend on legal services and other wants. Knowing that this is the case, providing assistance only in prescribed forms (i.e., lawyers, not money which poor people might use for their own purposes) is defended on the ground that the full court press in this case will rebound to the benefit of other poor people. But we are now back to the class-suit fallacy, in which optimistic, if not absurd, claims concerning its beneficial consequences are used to justify its use in the judicial arena. The class-suit strategy is appealing because it provides interesting employment for capable lawyers with an intense concern for

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\(^{169}\) Some critics of the federal legal services program argue that it is a lawyers' program that primarily benefits lawyers by providing interesting employment to a substantial number of politically concerned lawyers and requiring private interests who oppose the legal services lawyers to spend much larger amounts in hiring lawyers to defend their interests. In this view, the decision to provide poor people not with money but with lawyers is what the program is really about, a subsidy of lawyers. See Stephen Chapman, *The Rich Get Rich, and the Poor Get Lawyers*, THE NEW REPUBLIC, Sept. 24, 1977, at 9 (citing numerous benefits the legal services program creates for lawyers).
the poor. This is not the first time that a social benefit program has been captured by the professionals who administer it.

One caution is warranted. The stakes involved in some test cases or class actions clearly justify full-service lawyering. The aggregation of small, related claims may collectively constitute a major claim that justifies a substantial commitment of legal resources whether the case is pursued by a legal services lawyer without fee or by a class-action lawyer who anticipates a fee award from a successful action.

Other matters, however, present issues of proportionality and fairness as well as those of effectiveness that have already been discussed. A private litigant ordinarily will not pursue a $1,000 matter by expending more than some fraction of that amount on legal services. But a publicly funded lawyer is not similarly constrained in litigation on behalf of a poor client. As Gary Bellow and others have recognized, this fact confers substantial leverage on legal services lawyers in dealing with private persons and some leverage in dealing with government agencies. Because the costs of litigation from the point of view of a private person may be larger than the amount at stake, the possibility of extortionate settlements exists. A litigation strategy that targets a particular defendant is likely to impose costs that mandate an early settlement. The constraints on this behavior by legal services lawyers are the practical ones of heavy caseloads and limited staffs, constraints that advocates of full-service lawyering on behalf of the poor vigorously lament and want removed.

Shifting to a Judicare model would eliminate most of the fairness problems of disproportionality in civil legal assistance. Poor people would receive through state funding the same standard of service normally provided to middle-class and lower middle-class Americans who pay their own way.

d. Social advocacy vs. individual client service

The activist vision is one in which lawyers improve the lives of poor people by redistributing power to them so they can influence decisions that will affect them. Gary Bellow, for example, criticized the tendency of most legal service organizations to devote

170. See generally Breger, supra note 158 (concluding that the individual rights of clients should take precedence over utilitarian concerns for poor people as a group); Fallinger & May, supra note 159 (disputing Breger's contention that individual rights are more important than group welfare rights).
most of their effort to individual client service. Poorly trained and inexperienced lawyers were thrown into frustrating and tension-laden situations that resulted in minimal service and did little to ease the larger problems of the poor. The program's potential for social change, he argued, could not be achieved unless its priorities were reversed. Political organization of the poor would come first, followed by aggressive pursuit of strategic priorities that would apply maximum pressure in favor of institutional and legal changes that affect large numbers of poor people.

A massive expansion of minimal, routinized legal assistance throughout the low-income areas of the country, mediated by selective efforts at "law reform", is potentially a powerful system of social control, capable of defining and legitimating particular grievances and resolutions and ignoring others. Legal aid lawyers, unwilling or unable to respond to client concerns in ways which link them to a larger vision of social justice, can readily become purveyors of acquiescence and resignation among the people that they are seeking to help. Clients can be literally "taught" that their situations are natural, inevitable, or their own fault, and that dependence on professional advice and guidance is their only appropriate course of action; that is, legal assistance for the poor can become a bulwark of existing social arrangements. To echo a now familiar phrase, a profession that is not part of the solution can soon become part of the problem. The legal aid experience may soon be a troubling illustration of the modern homily.

David Luban provides an elaborate philosophical defense of a vision of politicized legal services. A specific example of the kind of services he favors graphically raises all the important ob-

172. Bellow, Turning Solutions, supra note 171, at 122. See also Katz, supra note 164. Katz's study of the legal services program in Chicago finds that during the 1970s "law reform" activities replaced an earlier emphasis on organization and community education. The result was what Katz calls the "legalization of poverty." Legal services lawyers helped create government programs for the poor that were professionally administered, confined by formal procedures, and limited by rules and standards. Poverty lawyers became poverty managers, reinforcing the segregation of the poor as a social class by the state.
173. See Luban, supra note 134.
ecisions to politicized public interest law practice:

The center’s lawyers manipulated clients, took sides in a dispute within the client community (over whether the development should be built in an integrated neighborhood), spent public money to take a partisan stand on several divisive and politically controversial issues, switched from a general legal services practice to a politicized legal campaign, and used the courts to take control of a political institution. All of these are highly debateable tactics.174

Luban argues that successful law reform solves the problems of many poor people at once and is, therefore, the most efficient use of scarce legal resources. He concedes that manipulation and control of clients by lawyers are sometimes involved, but states that “[n]o one succeeds in politics without getting his hands dirty”175 Moreover, the people and groups served by the lawyer’s political use of legal machinery are aware of what is going on. Their free and mutual commitment to the lawyer’s cause justifies the unusual degree of lawyer control. Winning the battle in the courts rather than in the legislatures does not violate democratic principles because the courts are intervening on behalf of groups that are under-represented in the legislatures. Luban concludes that public interest lawyers, by helping “fragmented constituencies to organize themselves, serve the highest goal of democracy: to engage citizens in responsible deliberation about the ends of action.”176

Luban’s argument may have some force when applied to the litigation activities of privately-funded interest groups such as the NAACP, the Sierra Club, Planned Parenthood, or a trade association interested in a particular matter. The use of a representative action or test case to raise a larger question which many persons have an insufficient interest to litigate avoids free-rider problems and prevents under-enforcement of the law. Even in this context, however, the supposed under-representation of the various groups in legislative bodies does not justify countering political injustice with another injustice. “Democracy” is being used in a very special sense when interest groups within the larger society rely on unac-

174. Id. at 297-98. Luban’s example purports to be derived from a specific case involving Greater Boston Legal Services, but I do not believe his hypothetical accurately reflects the attitudes or conduct of lawyers in those cases.
175. Id. at 322.
176. Id. at xxv.
countable, life-tenured officials (federal judges) for social change. Whatever the limitations, the constitutional assignment of legislative authority to the elected representatives of the people has much to be said for it, especially when weighed against the shortcomings of alternatives.

One need not reach these issues of judicial activism, however, to conclude that publicly-funded legal services raise very different social and political issues than the voluntary and private activities of private groups that resort to the courts for legal vindication. Why should the general taxpayer support this partisan political activity?

The critical fact is that Congress has not appropriated funds for the purpose of organizing “fragmented” and otherwise unrepresented groups of poor people for political action or to support test-case manipulation of clients on behalf of the social activism of legal services lawyers. The Legal Services Corporation Act \(^{177}\) prohibits such activity and permits grants only for the purposes of “furnishing legal assistance to eligible clients.” \(^{178}\) The legal assistance is to provide “equal access to the system of justice,” be of “high quality,” and must be “kept free from the influence of or use . . . of political pressures.” \(^{179}\) Legal services lawyers are commanded to “protect the best interests of their clients” in accordance with “the high standards of the legal profession.” \(^{180}\) The substantive restrictions included in the Act and the procedural constraints on the use of class actions reinforce the political neutrality of the basic scheme.

III. CRITERIA FOR JUDGMENT: THE VALUES OF “PROFESSIONALISM”

Proposed changes in the regulatory framework that governs the practice of law cannot be evaluated in the absence of criteria for evaluation. Any statement of evaluative criteria involves essentially normative judgments. If these value judgments are to be generally accepted, they must be rooted in the basic values of the American political and legal traditions.

\(^{178}\) For a discussion of the Legal Services Corporation Act and its legislative history, see Warren E. George, Development of the Legal Services Corporation, 61 CORNELL L. REV. 681 (1976).
The approach in this Paper rests on three basic assumptions. First, lawyer professionalism, if properly understood, provides meaning to those who work as lawyers, provides benefits to their clients, and serves public goals of facilitation of private ordering, conformance to law, and just resolution of disputes. Second, the benefits of professionalism are diminished and may be transformed into liabilities by the tendency of a professional group to delude itself into believing that what serves its interests also serves the interests of others and of society generally. Third, the ideology of professionalism, if it arises out of and is supported by the realities of practice, is important because it can inspire and influence the way lawyers organize their practices and understand their everyday life. Ideal visions of lawyering and the lawyer's role are not merely rhetorical rationalizations of bar leaders but affect, and are affected by, daily practice. 181

This section first describes the traditional understanding of "professionalism" expressed by leaders of the organized bar during the 20th century. It then outlines modifications of the traditional understanding that are necessary to meet today's conditions and those to be expected in the 21st century.

A. Traditional Understanding of "Professionalism"

The terms "profession" and "professionalism" are elastic terms that are hard to define. 182 Under modern usage in the West, "profession" generally refers to a social construct consisting of a set of ideas that give a group of workers and the special community in which they work a collective identity 183 A profession involves


182. As occupational groups other than the three historic learned "professions"—law, medicine and the clergy—claim the honorific connotations of these terms, the question of what distinguishes a "profession" from any group of workers has engaged sociologists. See Eliot Freidson, The Theory of Professions: State of the Art, in THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS 19 (Robert Dingwall & Philip Lewis eds., 1983) (arguing that a profession is not a generic concept, rather, it changes with historical context); Wilbert E. Moore, The Professions: Roles and Rules (1970) (arguing that professionalism should be measured on a scale of attributes, such as occupation, organization, education, service orientation, and autonomy); Harold L. Wilensky, The Professionalization of Everyone?, 70 AM. J. SOC. 137 (1964) (arguing that traditional professionalism emphasizes autonomous expertise and the service ideal).

183. William J. Goode, Community Within a Community: The Professions, 22 AM. SOC.
work that is done for a living and that involves a serious and long-term commitment. Its practice requires the possession and application of esoteric knowledge and the making of complex judgments. The required basic knowledge is acquired over time and with difficulty during a period of preparation that normally involves a certification by professional elders.

The common bonds of language, preparation, and group association create a sense of group self-identity. These collegial qualities amount to a form of self-regulation, carried on through professional organizations, and usually involving some delegation by the state of lawmaking authority. The special privilege of self-regulation is justified because the group claims special expertise in the provision of a basic social good, recognized as such by the community (health in the case of physicians, justice or dispute resolution in the case of lawyers) and to do so for the maximum benefit of those served and for the public good, even if at the expense of the professional's economic advantage.

Finally, the relationship between a professional and her client is a significant relationship of trust. The client resorts to the professional when and because the client feels inadequate and the professional proposes to remedy this inadequacy. Commonly, there is an imbalance of information, skill, and authority between the client and the professional.

Professionalism provides a variety of rewards to members of the profession. Intrinsic rewards include the satisfactions of utilizing esoteric knowledge to make complex judgments; employing the

REV. 194. 194 (1957). Goode states that:

Each profession is a community without physical locus by virtue of these characteristics: (1) Its members are bound by a sense of identity. (2) Once in it, few leave, so that it is a terminal or continuing status for the most part. (3) Its members share values in common. (4) Its role definitions vis-à-vis both members and non-members are agreed upon and are the same for all members. (5) Within the areas of communal action there is a common language, which is understood only partially by outsiders. (6) The Community has power over its members. (7) Its limits are reasonably clear, though they are not physical and geographical, but social. (8) Though it does not produce the next generation biologically, it does so socially through its control over the selection of professional trainees, and through its training processes it sends these recruits through an adult socialization process.

Id. (citation omitted).

184. This and the following paragraphs draw on a definition of "profession" from various sources. See THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 296-297 (1987); supra notes 181-83.
of craft to achieve immediately recognizable results;\textsuperscript{185} service to and personal interaction with those requiring professional services; and professional colleagueship (a special pleasure for those working in the company of other congenial and high-quality professionals). Extrinsic rewards (the privileges of professional status) include: exclusive license to carry on certain activities;\textsuperscript{186} high social status; substantial social power and influence;\textsuperscript{187} and, relative to other occupations, high income.\textsuperscript{188}

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\textsuperscript{185} Excellence in technical performance is at the center of the professional ethic. William F. May argues that skill, under this ethic, is not just a means to an end, but a critical part of "the interior experience of the professional who finds meaning in performance per se." \textit{William F. May, The Physician's Covenant: Images of the Healer in Medical Ethics} 87 (1983). Critics of the professional as technician, May argues, "do not reckon with that professional ideal for which the result of a deed fades in significance before the beauty of the deed itself." \textit{Id.} at 88. See also James R. Elkins, \textit{Ethics: Professionalism, Craft, and Failure}, 73 Ky. L.J. 937 (1985).

\textsuperscript{186} A statute or court rule in virtually every state provides that persons not admitted to the bar in that jurisdiction may not engage in the practice of law (except that persons directly affected may undertake to handle their own legal problems). See the discussion of unauthorized practice of law, \textit{supra} notes 92-113 and accompanying text.

\textsuperscript{187} Supporters as well as critics of the legal profession usually assume that lawyers exercise considerable influence over their clients and, because of their central role in the creation and application of governmental authority, in society generally. A more skeptical view, founded on some empirical study, is that of John P. Heinz, who argues that the legal profession, "either as a collectivity or as a set of individuals and firms, appears to lack the power necessary to establish and enforce its own norms." \textit{John P. Heinz, The Power of Lawyers}, 17 Ga. L. Rev. 891, 911 (1983). Heinz further states that

\begin{quote}
the norms that govern the legal profession—that organize the social structure of the profession, that determine which lawyers will serve which clients, and that define who gets what legal services—come from without rather than from within the bar.
\end{quote}

[T]he prestige of the legal profession, the influence of lawyers on their clients, and the collective political action of lawyers do not often bring about an allocation of the society's scarce resources that differs in any substantial way from the distribution that would have been willed by the lawyers' clients or by the polity apart from that prestige, influence, or action.

\textit{Id.}

\textsuperscript{188} Comprehensive and reliable data concerning the average income of lawyers or the distribution of lawyers on an income scale is not available. Extremely high annual incomes of over $1 million are reported for lawyers in a small number of highly profitable, major firms and for very successful plaintiffs' personal-injury lawyers. Altman Weil & Pensa, a management consulting firm, issues periodic reports of average incomes of partners and associates in the large number of established firms that participate in its studies. In 1992, the average cash income of firm lawyers was $124,231. Don J. DeBenedictis, \textit{Growing Pains}, A.B.A. J., Mar. 1993, at 54 (citing Altman Weil & Pensa, \textit{The 1992 Survey of Law Firm Economics}). The average income of all lawyers was $83,487 in 1990. \textit{Les Krantz, The Jobs Rated Almanac} 180 (2d ed. 1992). Law graduates who begin employment in the highest paying sector of the profession (large law firms in New
The quid pro quo for these professional privileges is found in the ideal of professionalism: The “exercise of the learned skills of lawyering for the maximum benefit of clients in particular and the public good in general even if at the expense of the attorney’s economic advantage.” The policies of professional associations and practice organizations should be designed to give maximum support and encouragement to individual efforts to realize that ideal in everyday practice.

Laments by bar leaders and prominent lawyers over the “commercialism” of the bar and “declining professionalism” have been staples of professional discourse throughout the 20th century. Changes in the structure and organization of law practice, however, triggered discussion of “declining professionalism” in the 1980s that, to many observers, seemed more pervasive than that in prior decades. Yet, the underlying premises of professionalism were continuations of earlier themes: (1) a cognitive claim that the practice of the law requires knowledge and judgment that laypersons are unable to evaluate; (2) an organizational claim that, because clients must make a leap of faith in relying on their lawyers, the profession must regulate itself; and (3) a moral claim that the profession’s internalized belief system, reinforced by professional self-regulation, will lead individual lawyers to put the interests of clients and of the public ahead of their own interests.

The Report of the American Bar Association Commission on Professionalism (Stanley Report) reflects these claims in its definitions of lawyer professionalism: Roscoe Pound’s description

York City) receive more than $80,000 plus bonuses and fringe benefits. On the other hand, many solo practitioners at the margins of the profession are reported to have modest or low incomes. See Eric Freedman, Michigan Bar Survey Sings Economic Blues, Nat’l L.J., Oct. 21, 1985, at 3 (reporting that 43% of Michigan solo practitioners had incomes in 1984 of less than $20,000).

189. Elliot Friedson, Memorandum to ABA Commission on Professionalism on Definition of Professionalism 10 (Oct. 8, 1985) (on file with author and the Case Western Reserve Law Review).

190. Id.

191. See Raymon L. Solomon, Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession, supra note 181, at 144 (describing five separate crises of lawyer professionalism during the years studied).

of professionalism as the pursuit "of a learned art in the spirit of a public service."

and a more elaborate definition, supplied by Commission member and sociologist Eliot Freidson, stressing the difficulty clients have in evaluating the quality of legal services and the need for collective self-regulation to protect clients.

The bar's emphasis on self-regulation is supported by the conceptual framework of "lawyer independence." Political independence has both an individual and collective aspect: Individual lawyers are to be independent from both the clients and the state so that they can mediate between the two and not be openly identified with either; the bar, as a collective, is to abstain from partisan politics. Independence from the state helps preserve the rights of individuals against state oppression; independence from the factional interests of clients prevents lawyers from being identified with particular causes, enables them to undertake unpopular ones, and allows a lawyer's personal conscience and awareness of public interests to limit what is done on behalf of clients. These aspects of professional independence are meritorious and should be preserved.

Independence also has an economic aspect—protection from market competition—that is more problematic in today's world. Under the traditional approach, the legal monopoly over the prac-


193. STANLEY REPORT, supra note 192, at 10 (quoting Roscoe Pound).

194. The Freidson definition of professionalism reads:

[A profession is an] occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments.
2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and
4. That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.

STANLEY REPORT, supra note 192, at 10 (citation omitted).

195. See Solomon, supra note 191, at 144, 146-47 (arguing that individual lawyers must be politically independent of clients and that the bar must also abstain from politics).

tice of law is justified by the need to protect clients from unqualified or dishonest practitioners. It also provides a standard of living that permits a lawyer to provide legal services on a pro bono basis to those who cannot afford to pay. Control by the bar over the training, admission, and discipline of lawyers encourages the creation and maintenance of a profession composed of individuals who put the interests of clients and of the public above the lawyer's own interests. The moral claim that self-regulation will produce public-spirited practitioners reflects the ideal that the market ethic of profit maximization ("commercialism") be subordinated to the interests of client and public.

B. A Modern Vision of "Professionalism"

Today's problem, reflected only obscurely in the laments concerning declining professionalism, is that changes in social conditions have eroded and transformed the traditional claims of lawyer professionalism. They must be recast if the profession is to adapt to the realities of the 21st century.

The cognitive claim that only lawyers could understand and evaluate legal services has always been only a partial truth. But the claim has been undermined since the 1960s by general social trends, such as the post-Vietnam and post-Watergate distrust of authority figures and established institutions. The consumer and environmental movements rest in part upon the idea that experts cannot be fully trusted and that important values cannot be left entirely in their hands. Market forces, civil liability trends, and consumer regulation are all mechanisms for making experts and specialists more accountable to consumers. The general acceptance of the informed-consent idea as a central aspect of a good professional relationship is merely one of the ways the principle of accountability affects lawyers.

Intellectual trends in the law schools have operated in the same direction since they have spread doubt as to whether law is an autonomous discipline. This notion, a false one in extreme forms, is bolstered by the fact that legal knowledge, unlike medical knowledge, is not science-based. Law is a normative business, involving social, political, and business judgments. Legal realism has spread this insight to nonlawyers who demand that they be

more fully consulted about the ends and means of representation.

The organizational claim that the legal profession is a band of brothers has suffered a similar fate. The brothers are no longer so brotherly in three separate senses. First, white male Caucasians have been joined by many sisters, blacks, and by other ethnic and cultural minorities. Second, trust and civility in adversary representation has been replaced by costly and harsh negotiation and litigation tactics uncontrollable by either peer pressure or professional discipline. Third, de facto specialization accentuates heterogeneity and discord. Individual lawyers know more and more about less and less; they have more in common with other specialists than with lawyers generally. Specialization has also endangered independence from clients by relating lawyers on a continuing basis with particular client interests (e.g., a products liability lawyer prosecuting or defending tobacco claims). Unlike medical specialties which are defined by natural characteristics of the field of knowledge (e.g., cardiology, dealing with the cardiovascular system) and skill functions (e.g., surgery relating to the heart), lawyers are primarily defined by the activities and interests of their clients and tend to assume the attitudes and values of the clients they regularly serve.

The moral claim that the special privileges of lawyers are justified because lawyers act in furtherance of client and public goals and not in the interest of self or the profession also has less credibility today. G. B. Shaw’s dictum that “all professionals are a conspiracy against the laity” has spread from economists and sociologists to a large part of the general public. Here again, the contemporary distrust of established institutions has been a contributing factor. But the long term behavior of the organized bar in response to the major issues of professionalism that have arisen since World War II has helped to persuade the public, as well as many lawyers, that the profession does not live up to its pretensions of altruism.

Access to legal services. A longstanding professional duty is that of assuring that legal services are provided to those who need them. Until recently, however, the organized bar has opposed various means of providing access on the ground that they involved solicitation, champerty, or illegal practice. Segments of the bar did

support group legal services, provision of increased information to consumers, and publicly funded civil legal assistance. But general acceptance of those reforms came about primarily over bar opposition as a result of judicial and executive actions. The professional monopolization of routine services, many not requiring the services of an "expert" with seven years of higher education, continues to be a problem.

Litigation abuses. Defining and enforcing procedural rules that result in fair, accurate, and efficient determinations is a central responsibility of the legal profession. Despite evidence of an enormous increase in the use of abusive litigation tactics for strategic purposes, the bar has been unable to agree on ethics rules with any substantive bite. Professional discipline plays virtually no role in this area because the relevant ethics rules are stated in vague generalities or are not enforced by disciplinary bodies. Major initiatives in this area have come not from the organized bar but from the judiciary in the form of sanctions imposed in a particular litigation. Rule 11 of the Federal Rules of Civil Procedure and its state analogs are probably the most important development in professional responsibility in recent years, but the bar is still uncertain and divided about this effort to enforce fairly obvious professional obligations. The 1993 amendments to Rule 11, pushed by bar groups but by few federal judges, threaten to eliminate Rule 11 as a meaningful control on abusive litigation behavior.

Prohibited assistance. Ethics rules prohibit lawyers from assisting clients in criminal or fraudulent conduct. Yet the organized bar, worried that any ethical requirement other than silent withdrawal would increase lawyers' exposure to civil liability, has resisted conforming ethics law to civil and criminal law that sometimes requires a lawyer to take some steps to prevent a client from carrying out a scheme that the lawyer has learned is criminal or fraudulent. Modest proposals to permit a lawyer in these situations to take some additional action have been rejected twice by the ABA House of Delegates, even though the ABA Committee on Ethics and Professional Responsibility has criticized the existing

200. See supra notes 150-53 and accompanying text.
201. See generally Geoffrey C. Hazard, Jr., Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 EMORY L.J. 271 (1984) (exploring the debate over how lawyers should react to the possibility of client fraud); Susan P. Konak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389 (1992) (noting the controversy and tension between disclosure and confidentiality of unlawful client conduct).
situation as unworkable. The unwillingness of state supreme courts to adopt the ABA’s position on client fraud is one indicator that the organized bar is unresponsive to public concerns that the profession live up to its ideals of public-spiritedness. The savings and loan crisis provides a continuing reminder of the temptations that some lawyers have been unable to resist.

Regulatory compliance. A long-standing professional tradition, from Brandeis to Lon Fuller, has emphasized the role lawyers can play by advising clients on self-interested compliance with federal and state regulatory requirements. The bar continues to defend the broad ambit of client confidentiality by arguing that only full disclosure by clients will permit the lawyer to guide the client into a legal course of conduct. Yet, ethics rules, ethics opinions, and lack of disciplinary enforcement in this area, combined with recurring scandals such as securities frauds in the 1970s and the savings-and-loan debacle of the 1980s, convey the impression that many lawyers, with the acquiescence of the organized bar, conform to the perspective of Holmes’s “bad man” as lawyer—that is, as an advisor who predicts only how officials are likely to behave, a position that tolerates violation of clear legal prohibitions if enforcement is unlikely or proof is unlikely to be available.

The fundamental conditions that have resulted in erosion of some aspects of traditional professionalism are realities that the profession’s belief system must accommodate:

- Competition in legal services markets is a fact of life that will not go away. The vast and growing numbers of lawyers, the entrepreneurial spirit of the American bar, and the growing responsiveness to consumer desires ensure a highly competitive milieu for law practice in the 21st century.
- Lawyer specialization is the source of much of the fragmentation and internal discord of the profession, but it would be hopeless and unwise to oppose it.

202. A recent review of the law in all American jurisdictions on lawyer disclosure of client fraud found that only five states agree with the position taken in the ABA’s Model Rule 1.6 which prohibits disclosure in all instances other than those in which the client intends to take criminal action that imminently threatens life or serious bodily injury. The remaining jurisdictions either permit or, in rare instances, require disclosure, either to prevent financial harm or to rectify its consequences. Analysis of “Noisy Withdrawal” Comment Under ABA Model Rule of Professional Conduct 1.6, ALAS LOSS PREVENTION J., Jan. 1993, at 18-19. ALAS is the Attorney Liability Assurance Society, a legal malpractice insurance company providing insurance to many of the country’s largest law firms with principal offices outside New York City.
• Growth of law practice in large private and public organizations has undermined the autonomy of individual lawyers, but it is unthinkable that the profession would or could return to a small-firm, individual-practice model.
• Subservience of law firms to the scrutiny and control of corporate clients and to consumer demands for accountability reduce the autonomy of lawyers, but the profession is not in a position to resist either force.
• Growth of an extreme model of adversarial advocacy ("Rambo litigation") dilutes the lawyer's public responsibilities. But the organized bar is divided on the issue of how adversarial a lawyer should be and is unwilling to take the initiative to control abusive litigation tactics.

The unsettling changes in the conditions of legal practice are not only here to stay; they have many positive aspects. Accountability, competition, specialization, and efficient organization have brought more good than harm. A more diverse profession provides better service with a wider range of price and quality to more people than ever before. The professional ideology of an earlier day was founded on paternalism ("only we can make judgments about legal matters") and hypocrisy ("we are never influenced by our own welfare but act only in the interest of the public") that are no longer acceptable.

The profession's view of itself must be reshaped in a more responsible, realistic, and truthful manner. The idealistic tradition of the profession, and especially the aspiration to balance service to client and self with regard for the interests of others, is one of the foundations on which a reshaped ethic can be built. The challenge is one of creating a new vision, courageous and truthful, of what it means to be a lawyer in today's world.

I believe the major elements of a renewed vision will be:
• A lawyer who cares about clients, who is accountable to them, who engages in moral dialogue with them, and who wants the legal profession to see that client interests are protected.
• A lawyer who cares about equal access to justice and who strives for efficiency in the provision of legal services.
And
• A lawyer who brings his or her moral conscience to bear on everything done as a lawyer.
These three principles suggest a series of remedial steps that might work in the right direction. At the very least, they will do little harm which is the first and most fundamental admonition that every professional should obey. The concluding portion of this paper summarizes those recommended steps.

IV  RECOMMENDATIONS

A. Protecting Clients from Lawyer Misconduct

1. Client Trust Accounts

Embezzlement or loss of client funds or property is a continuing and substantial problem causing harm to clients and impairing the reputation of the legal profession. In general, court rules or statutes require a lawyer to keep client funds in trust accounts subject to detailed accounting requirements. Except for a few states, however, no preventive steps are taken to assure lawyer compliance. Rules regulating trust accounts should be amended to make it clear that accounting records relating to client trust accounts are subject to inspection at any time by bar disciplinary authorities. In addition, a program of random auditing of trust accounts should be instituted in each jurisdiction.

2. Client Security Funds

Most states have created funds to reimburse clients for some losses resulting from lawyer theft. But current client security funds lack sufficient assets and are severely restricted in the type and amount of client losses that are reimbursed. The size and availability of reimbursement of client losses from security funds should be improved. Alternatively, lawyers should be required to purchase annually a fidelity bond in the amount of the maximum amount in client trust fund accounts during the prior year.

3. Reporting of Malpractice Awards

Although many malpractice cases involve individual instances of careless or negligent lawyering not deserving professional discipline, other malpractice cases involve serious violations of professional duty. Lawyers should be required to report settlements or money judgments in malpractice cases to the relevant disciplinary agency. The agency’s professional staff should screen the re-

203. If the settlement is sealed, the lawyer involved should file the pleadings and court
ports to determine whether the conduct merits a disciplinary charge. The disciplinary agency's file of malpractice awards or judgments concerning a particular lawyer should be treated as a public file available to any person upon request.

4. Opening Disciplinary Proceedings to Public View

The profession's resistance to treating disciplinary proceedings in the same manner as all other aspects of the justice system—as public proceedings open to public attendance, observation, and comment—has outlived its time. The clubby notion that bar discipline should be carried on secretly by the brethren of the bar has little relevance to current conditions. The better position is that of Oregon, which treats any complaint against a lawyer the same as a complaint filed in a court of general jurisdiction as the beginning of a public proceeding. Failing that, the current ABA position that disciplinary proceedings should be open and public once the disciplinary body has found probable cause to proceed is a second best.

B. Assuring Competent Lawyering: Malpractice Liability

Professional discipline does not and probably cannot provide much protection against incompetent (negligent) lawyering. Disciplinary authorities generally consider competence questions only when a lawyer's incompetence is egregious or repeated or when incompetence is combined with other, more serious violations. Civil liability for malpractice protects clients by providing a remedy for past harm caused by negligent lawyering. The efficacy of this remedy and its deterrent effect on lawyer behavior could be improved in several respects:

1. Mandatory Malpractice Insurance Coverage

Many lawyers, especially those who practice in the individual-client sector of the profession, do not purchase malpractice insurance. State law should require a licensed attorney to purchase a minimum amount of malpractice insurance coverage (perhaps $100,000). Since some lawyers might not be able to obtain private insurance coverage, the state bar should arrange for fall-back coverage of these lawyers. Although some part-time lawyers will be discouraged by this modest requirement, its benefits far outweigh potential drawbacks.
2. Ethics Rules in Malpractice Actions

The profession's position that ethics rules are neither relevant nor admissible in malpractice actions should be reversed. Because ethics rules are framed to protect clients and the public, they provide minimum standards of conduct that are relevant in malpractice actions. Rule provisions should be admissible in malpractice actions and their weight determined as a question of law by the court. Some ethics standards codify agency and fiduciary standards; breach of such standards (e.g., a breach of confidentiality or a severe conflict of interest) should be treated as determining the standard of care (negligence per se). In some such cases, the presentation of expert testimony concerning the standard of care will not be required to make out a prima facie case of liability.

Other ethics rules state a general standard to be applied and interpreted by the fact finder under proper instructions. In such cases, the ethics rules, should be admissible and relevant evidence of the standard of care, but expert testimony should continue to be required to assist in its application and interpretation. Ethics rules that are aspirational in character (e.g., Model Rule 6.1) should not be treated as relevant or admissible on the standard of care. As is the case with safety and regulatory standards, compliance with an ethics rule (e.g., exercising discretion not to take an action) should not shield a lawyer's conduct from scrutiny under the general negligence standard of due care under all circumstances.

C. Assuring Fairness in Lawyer-Client Relations

1. Compulsory Arbitration of Fee Disputes at Client's Request

A frequent source of disagreement between lawyers and clients involves questions relating to a lawyer's fee. Jurisdictions should be urged to provide by law for fair and expeditious arbitration of fee disputes if the client so requests. The neutral arbitral body should be composed of an equal number of lawyer and non-lawyer members. The arbitration mechanism should be viewed as a required term of the lawyer-client contract. Under this proposal, the client would be free to seek other remedies, but the lawyer's consent to binding arbitration would be inferred from the retainer agreement.

2. Contingent Fee Agreements

Clients are pressured occasionally to enter into contingent fee agreements before considering alternative representation. To prevent
this form of overreaching, a contingent fee agreement should be voidable at the client's option within ten days of its execution. Lawyers, however, should not be discouraged from timely fact investigation and other work that will preserve or advance the client's rights. The lawyer's work during the period of voidability should be compensated on a quantum meruit basis if it is valuable and is turned over, along with client records, to successor counsel. In addition, statutes or case law in every jurisdiction should make it clear that a trial court, sua sponte, may consider the fairness of the contingent fee arrangement in the particular context.

3. Sexual Relations with Clients

An ethics rule in each jurisdiction should prohibit a lawyer from engaging in sexual relations with an individual client during the period of representation. Preexisting sexual relationships should be excepted unless the circumstances suggest a conflict of interest or breach of another professional duty.

4. Communication in Writing to a Represented Person

The breadth of the anti-contact rule, prohibiting a lawyer from direct contact with a represented party (e.g., Model Rule 4.2), limits the ability of clients to be informed about their matters. Lawyers' control over the channels of communication should be reduced by permitting a lawyer to send a copy of an offer of settlement or other communication relating to a material development in a case to the lawyer's client.

D. Enhanced Competition in Legal Services Markets

1. Limitation of the Professional Monopoly

Consumers would benefit from the provision of a variety of quasi-legal services by nonlawyers or by organizations composed only partly of lawyers. The statutes prohibiting the practice of law by unlicensed practitioners should be amended or interpreted to limit the professional monopoly to its historic core—the representation of clients before courts of general jurisdiction. In addition, courts should recognize legislative authority to regulate the legal profession and related occupations. The judicial doctrine that the inherent authority of a state's high court to regulate courtroom proceedings excludes any legislative regulation of law practice, paralegals, and related activities is unsound and undesirable. The public, through its elected representatives, needs to have a voice in
the regulation of the legal profession.

2. Solicitation of Legal Business

Efforts by lawyers to obtain legal business should not be regulated, except that in-person solicitation of individual clients should be limited by time, place, and manner restrictions and by prohibitions against the use of false or misleading information in seeking legal business. Provision of living expenses to needy clients should also be allowed when necessary to permit a client to await a judicial disposition of the client’s case, provided that no such agreement be discussed or made until 30 days after a written fee retention agreement has been signed.

3. Form-of-Practice Restrictions

The current restrictions on ownership and control of organizations engaged in the practice of law (e.g., Model Rule 5.4) curtail investment and restrict competition in legal services markets to the detriment of consumers. The amended rule should be substantially the same as that proposed by the Kutak Commission’s 1981 draft:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization, or government agency, but only if the terms of the relationship provide in writing that:
(a) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;
(b) information relating to representation of a client is protected as required by Rule 1.6;
(c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by Rules 7.2 and 7.3; and
(d) the arrangement does not result in charging a fee that violates Rule 1.5.

4. Multistate Practice of Law

The increasingly national and international character of law practice requires that more generous provisions be made for multistate and international practice. The unauthorized practice
restrictions should be interpreted so as not to apply to lawyers admitted in another U.S. jurisdiction, but lawyers handling matters that are centered in a particular state should be subject to that state's disciplinary rules and malpractice liability. Admission pro hac vice should be liberally provided to out-of-state attorneys, and rules requiring association of local counsel in the representation should be waived in any situation in which the requirement would impose a costly hardship or unduly interfere with a client's choice of lawyer.

5. Market Test for Legal Education

Entrants to the legal profession are now generally required to complete seven years of higher education before becoming eligible for admission to the bar. These requirements become part of the cost structure of legal services, restricting the access of lower income people to routine legal services. Substantial educational requirements are appropriate for a learned profession, but a market test of these entry requirements should be introduced by reducing the required educational accomplishment to three years of university-level education and two years of study at an ABA-approved law school. Law schools would be required to justify whether tuition and other expenses of the current educational program are market justified. Is their value worth the amounts required to satisfy them to students and to legal employers? A more radical proposal, suggested by Judge Posner, would eliminate all educational requirements for taking bar examinations, but its consequences might be far-reaching and unanticipated.

E. Provision of Legal Services for the Poor

1. Funding of Civil Legal Assistance for the Poor

Mandatory IOLTA programs (Interest on Lawyers' Trust Accounts) have a capacity to generate substantial funds for the support of civil legal assistance for poor people. Voluntary IOLTA programs should be converted to a mandatory form and the income earmarked for provision of civil legal assistance to individuals meeting eligibility requirements. The federal government should be urged to provide matching funds for state and private funds given to recognized legal service organizations.
2. Student Loan Payback Program

An infusion of able lawyers into legal services programs benefitting the poor (primarily legal aid and public defender organizations) would be stimulated by federal legislation mandating partial payment of a law graduate’s accumulated student loans for periods devoted to low-income service in these organizations. For example, legislation might provide that 10% of a graduate’s loan obligation or $10,000, whichever is smaller, be paid by the federal government for each year of low-income public service. An additional or alternative recommendation is that funds provided to public service lawyers by law school programs should not be treated as taxable income to the recipient.

3. Restructuring of Federal Legal Services Program

The federal legal services program should be restructured by amendment of the Legal Services Corporation Act. To assure that poor clients get the same representation as those who can afford to pay, the program should be shifted largely to a Judicare model in which the eligible client picks a lawyer from those enrolled in the program. The present legal services organizations would screen clients for eligibility, make a preliminary assessment to ensure that a meritorious claim was involved, refer clients to lawyers enrolled in the program, and provide training, support, and specialized substantive assistance to lawyers participating in the program either on a volunteer basis (pro bono) or as paid participants. Fee reimbursement to private lawyers handling poor clients’ matters would be restricted to relatively modest statutory formulas, such as a fixed amount for an uncontested divorce. Class actions and social advocacy would be left largely to private groups under current fee-shifting statutes, although existing legal services specialists would provide expert assistance on significant poverty law matters raised by individual cases referred to members of the private bar. These changes would create a more traditional lawyer-client relationship in publicly-funded legal services, ensure that poor people are treated in much the same way as middle class clients are handled by the private bar, and eliminate most of the political controversy from the legal services program. The diminution of political controversy would make possible over time an expansion of funding that would come much closer than present arrangements to our ideal of equal access.
Protecting Third Persons from Harm

1. Judicial Sanctions for Litigation Abuses

A central aspect of professional responsibility is constant vigilance in assuring fair, accurate, and efficient modes of dispute resolution by courts and other tribunals. The increasing incidence of excessive advocacy for strategic purposes such as delay, cost, and harassment deserves not only professional condemnation but support for the development of standards of behavior and their effective enforcement. Use of such tactics imposes costs on the tribunal, harms opposing parties, and brings lawyers and the court system into public disrepute. Professional discipline has not dealt with litigation abuses, except in the most pathological cases such as clear suborning of perjury, because the ethics requirements are stated in vague generalities (e.g., Model Rules 3.1 and 3.3), and disciplinary bodies are generally unwilling to punish lawyers for over-zealousness. The development of judicially-imposed sanctions in litigated proceedings, however, has had beneficial effects on litigative behavior: discouragement of frivolous assertions and deterrence of tactical litigation abuses. The organized profession should support federal and state court rules that permit or require the imposition of sanctions on lawyers and parties who abuse the litigation process: (1) mandatory sanctions for deliberate litigation abuses carried out in bad faith; and (2) permissive sanctions for asserting claims or defenses that are not grounded in fact and law (i.e., requirement of a reasonable inquiry into the factual and legal foundation of assertions).

2. Permissive Disclosure of Ongoing or Future Client Crime or Fraud

The unwillingness of the ABA to permit a lawyer to take steps other than silent withdrawal to prevent or rectify an ongoing or future client crime or fraud that has harmed or threatens harm to third persons is one of the great self-inflicted wounds of the legal profession in the 20th century. Prompt steps should be taken to encourage the ABA to change this position. Perhaps more vital, given the intransigence of the House of Delegates on this issue, is the organized efforts by other lawyer groups to urge state courts to retain or expand ethics rules that permit disclosure of ongoing or future client crime or fraud. In addition, groups in the profession should be more supportive of imposing liability on lawyers for fraud and negligence for knowingly assisting a client in the con-
summation of a fraudulent transaction. Confidentiality is an important value, but it should not be treated as an absolute with only one major exception: protection of lawyers from harm. Third persons also deserve protection from the wrongful acts of clients that involve the use of a lawyer's services and lawyer knowledge of an ongoing or future crime or fraud.

3. Prohibition of Retaliatory Discharge for Reporting Client or Lawyer Misconduct

The legal profession holds itself out to the public as a group that enforces the obligations of its members by requiring lawyers and judges to report the serious professional misconduct of another lawyer. Although this duty is honored more in the breach than in the observance, it is unconscionable not to protect a lawyer who has fulfilled the duty that ethics rules require. The retaliatory discharge of a lawyer by a law firm because the lawyer has reported serious misconduct of another lawyer should be treated as a disciplinary violation and a civilly actionable wrong. Similar judicial protection, by elaboration of common law retaliatory discharge law, should also be provided to corporate counsel who are wrongfully discharged. Although a client may discharge a lawyer, acting as such, for any reason, it does not follow that an employer may terminate an employment relation without penalty when the discharge is based on a lawyer performing a professional obligation not to assist an employer in criminal or fraudulent conduct.