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Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation

ELIZABETH MICHELMAN*†

Today's regulation of the unauthorized practice of law must be justified to both the legal profession and the public at large. This article attempts to examine some of the important issues facing UPL regulation. It begins by postulating that, although the courts probably have the most legitimate authority to control UPL, they should be careful to exercise this power in the public interest. It examines the role of the market in delivering legal services and argues that a free market system cannot adequately ensure legal competence. Some alternative regulatory structures better equipped to guarantee quality are explored. Finally, the article comments on several emerging areas of lay involvement in providing legal service, cautioning that care should be taken to balance consumer needs with consumer protection. It concludes with a reminder that the legal profession has a responsibility to assure delivery of quality and competent legal services in a disinterested fashion.

I. INTRODUCTION

The role of the legal profession in regulating the unauthorized practice of law (hereinafter referred to as UPL) has been the subject of considerable controversy in the recent past. Criticism has flowed from many sources: academics, researchers, practitioners,

* Elizabeth Michelman is Associate Research Counsel for the American Bar Association Center for Professional Responsibility, where she serves as counsel to the ABA Standing Committee on Lawyers' Responsibility for Client Protection. A.B., Dartmouth College, 1976; J.D., Georgetown University Law Center, 1980.

† I accept full responsibility for all errors or inconsistencies in this article, as well as for all opinions expressed. Nevertheless, it was only with the help of many people that this study reached its present dimensions. I particularly wish to thank the past and present members of the ABA Standing Committee on Unauthorized Practice of the Law who lent concerned advice, including Richard E. Hinks, Carmine Lavieri, John R. Lund, Lawrence Mattice, Bill McBride, William R. Robie, Donna C. Willard, and Fernando Zazueta. My colleagues at the ABA Center, Jeanne P. Gray, Robert Wells, and Lennine Occhino, perceptively criticized early drafts of this article. Thanks also go to Elise Aron, Eva Wohn, Deborah Tompkins, Edward D'Arcy, and Scott Shepherd for their assistance in research and analysis.

the public, and individuals involved in applying the UPL laws. Although criticism often sets the stage for change, the preconditions for change in this area have been brewing for some time. The consequent eruption of new ideas and new movements should, therefore, take no one by surprise. It is commonly argued that unauthorized practice regulation is merely the legal profession's response to pressure from lay competitors who have efficiently standardized and specialized their services.¹

Recent years have brought increasing competitiveness and efficiency to the practice of law. Restrictions on lawyers' advertising and solicitation have diminished. This has encouraged lawyers to standardize their methods of practice and to compete more effectively with lay as well as legal competitors. With greater efficiency and professionalism in its own practices, the profession's reliance on self-protective enforcement of unauthorized practice laws has greatly diminished. Nevertheless, the public interest requires that the courts continue to monitor unauthorized practice issues and develop appropriate programs to establish UPL policies. Comprehension of such issues requires a clear understanding of both contemporary trends in delivering legal services and of consumer interests protected by UPL regulation.

This article reviews the legitimacy of current forms of UPL regulation, discusses the major criticisms offered regarding such regulation, and proposes new strategies for dealing with changed expectations on the part of the public and the bar regarding UPL regulation.²

1. See Q. JOHNSTONE & D. HOPSON, JR., *LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND* (1967).

As in all occupations, the work of lawyers is marked by persistent efforts at task specialization and standardization. But the conditions unfavorable to lawyers specializing and standardizing are so strong that without effective monopoly protection, the profession keeps losing out to lay competitors. It appears to be axiomatic in the United States that whenever a particular task or combination of tasks performed by lawyers grows to mass volume proportions and the mass demand promises to continue, laymen will eventually take over performance of these tasks unless deterred from doing so by unauthorized practice laws.

In part this results from more efficient lay specialization and standardization and more aggressive lay advertising and solicitation. But in part, too, it results from lawyers' reluctance to counter lay competition by cutting fees or increasing quality.

Id. at 157-58.

2. This article does not purport either to describe the entire history of efforts to regulate the unauthorized practice of law or to catalogue the current statutes, court rules, or other procedures and methods by which UPL is regulated. An extensive historical analysis has recently been written by Barlow F. Christensen, a research attorney at the American Bar Foundation. See Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RESEARCH J. 159, 159-201 [hereinafter cited as Christensen]. Another useful review of the current state of unauthorized practice

II. REGULATION OF UNAUTHORIZED PRACTICE—AN OVERVIEW

Some combination of unauthorized practice case law, statutes, and court rules exists in every state protecting both the interests of the individual client and the efficient working of the judicial system.³ The clear articulation of these principles may be inhibited, however, by the lack of a unified system for determining desirable rules and necessary boundaries concerning the authorized and unauthorized practice of law.

A. Defining the Practice of Law

The manner of defining the practice of law varies substantially

regulation is provided in Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649. Although some general compilations of UPL rules, statutes, and case law exist, they tend to be outdated and may be more appropriate for historical research than for policy analysis. See, e.g., J. FISCHER & D. LACHMANN, UNAUTHORIZED PRACTICE HANDBOOK: A COMPILATION OF STATUTES, CASES, AND COMMENTARY ON THE UNAUTHORIZED PRACTICE OF LAW (1972); S. BASS, UNAUTHORIZED PRACTICE SOURCE BOOK: A COMPILATION OF CASES AND COMMENTARY ON UNAUTHORIZED PRACTICE OF THE LAW (rev. ed. 1965); L. HALE, UNAUTHORIZED PRACTICE SOURCE BOOK (1958); F. HICKS & J. KATZ, UNAUTHORIZED PRACTICE OF LAW (1934). Many studies questioning policies in UPL regulation have also appeared in the past few years. See Hunter & Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6 (1979-1980) [hereinafter cited as Hunter & Klonoff]; Morrison, *Defining the Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L. REV. 363 (1980) [hereinafter cited as Morrison]; Rhode, *Policing the Professional Monopoly: A Constitutional And Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter cited as Rhode]. See also Haskell, *Issues in Paralegalism: Education, Certification, Licensing, Unauthorized Practice*, 15 GA. L. REV. 631 (1981); Note, *Constitutional Law—Inherent Judicial Power and Regulation of Unauthorized Practice of Law*, 23 ARIZ. L. REV. 1313 (1981); Comment, *Legalizing Non-lawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest*, 9 HOFSTRA L. REV. 625 (1981); Note, *Divorce Kit Dilemma: Finding the Public Interest*, 19 J. FAM. L. 729 (1980-81); Comment, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567 (1981).

3. For example, many states have statutes that positively define the practice of law. See, e.g., ALA. CODE § 34-3-6(b) (1975); GA. CODE AM. §§ 15-19-50-58 (1982); IDAHO CODE §§ 3-104, 3-420 (1979). Alabama has no supreme court rule. Georgia has Bar Rules (issued by the unified State Bar of Georgia) which set forth provisions for bar membership. Ga. Bar Rules 1-201, 1-203, and 1-204. Idaho has a Supreme Court Rule that sets forth procedures for a committee to investigate and litigate UPL complaints and to issue advisory opinions. Idaho S. Ct. Rules 175-177. While some supreme court rules positively define the practice of law, see, e.g., Ky. S. Ct. Rule 3.020 (West 1983), this remains atypical. At the time of this writing, however, Alaska and Vermont are experimenting with the latter approach. Correspondence on file at the ABA Center for Professional Responsibility, 1984 Survey on Unauthorized Practice of Law Regulation (unpublished).

among the states. Although definitions may frequently be codified by statute,⁴ courts often claim that it lies within their constitutional or inherent power to define the practice of law.⁵ They tend to view legislative statements on the subject as advisory⁶ or as insupportable usurpations of their prerogative.⁷ As a result, definitions have commonly developed through *ad hoc* judicial determinations.⁸ In the past, bar associations often contributed to this effort by issuing advisory opinions on unauthorized practice.⁹ However, such a function is more frequently perceived to be properly delegated to the courts rather than unilaterally assumed by the bar.¹⁰

Substantial variation exists in methods of enforcing unauthorized practice norms. These methods most often include authority within the office of attorney general or public prosecutor to enforce statutes often with both civil and criminal penalties,¹¹ and enforcement by bar associations.¹² In addition, some supreme courts have set up committees empowered to investigate and

4. See, e.g., GA. CODE ANN. § 15-19-50 (1982); LA. REV. STAT. ANN. § 37:212 (West Supp. 1984); OHIO REV. CODE ANN. § 4705.01 (Baldwin 1977); TENN. CODE ANN. § 23-3-101 (1980). Definitions may sometimes be promulgated by court rules as well. See, e.g., COLO. R. CIV. P. 201.3(2).

5. See, e.g., Land Title Co. of Ala. v. State of Ala. *ex rel.* Porter, 292 Ala. 691, 299 So. 2d 289 (1974); Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822, 823 (Colo. 1982) (en banc) ("The judiciary has inherent and plenary powers, with or without legislative enactment, to regulate and control the practice of law to the extent that is reasonably necessary to the proper functioning of the judiciary."); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 407, 312 P.2d 998, 1002-03 (1957); Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo. 1961); West Virginia State Bar v. Earley, 144 W. Va. 504, 529, 109 S.E.2d 420, 436 (1959).

6. See Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 619 P.2d 1036 (Ariz. 1980).

7. See Michigan Hosp. Ass'n v. Michigan Employment Sec. Comm'n, 123 Mich. App. 667, 333 N.W.2d 319 (1983) (narrowly construing statute purporting to regulate lay practice before administrative agencies); Hagan & Van Camp v. Kassler Escrow, Inc., 96 Wash. 2d 445, 635 P.2d 730 (1981) (invalidating legislative attempt to regulate unauthorized practice).

8. "We have declined to define what constitutes the practice of law because of the infinite number of fact situations which may be presented, each of which may be judged according to its own circumstances." State *ex rel.* Norvell v. Credit Bureau of Albuquerque, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973).

9. See generally Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1978).

10. See, e.g., Idaho Sup. Ct. R. 175(c); N.J. Sup. Ct. R. 1:22; Va. R. Ct., part 6; Rules for Integration of the Virginia State Bar, § IV, ¶ 10 (1984).

11. See, e.g., Section 476-a of the New York Judiciary Law, which grants the Attorney General of the State of New York the authority to proceed against nonlawyers for the unauthorized practice of law. N.Y. JUD. LAW § 476-a (McKinney 1983). Georgia makes violations of Georgia Code sections 15-19-51 through -55 a misdemeanor. GA. CODE ANN. §§ 15-19-51-15-19-55 (1982).

12. See, e.g., TEX. REV. CIV. STAT. ANN. art. 320a-1 § 19(b) (Vernon's Supp. 1984). (State Bar Act) (authorizing a committee appointed by the supreme court to use appropriate methods to seek the elimination of unauthorized practice).

prosecute for UPL violations.¹³

Fears of potential constitutional and antitrust liability, as well as concern about adverse public opinion have motivated a number of bar associations in recent years to cease UPL activity, or to seek clearer authorization or definition of their role.¹⁴ Others simply monitor or investigate UPL without taking any formal enforcement role.¹⁵ An American Bar Association committee studies UPL issues and developments for the purpose of assessing how UPL policy might be better understood and served.¹⁶

Uncertainty about the definition of the practice of law confuses lawyers and nonlawyers alike. A single jurisdiction may have several different authorities with an interest in defining the practice of law, including unauthorized practice committees, disciplinary authorities, and bar admissions committees. In many states, the definition is constantly growing and changing through case law as a result of the interests asserted in individual UPL controversies. Confusion may also stem from conflict between jurisdictions due to application of different tests or rules. Finally, in different contexts, definitions of the practice of law may serve entirely different purposes; the definition in relation to a layperson

13. See, e.g., District of Columbia Court of Appeals, Rule 46II (a)-(d) (1980) (committee empowered to bring proceedings for contempt or injunctive relief).

14. The Rhode Island State Bar terminated its Unauthorized Practice Committee following the initiation of a civil rights action against it in the early 1980's: Werle v. Rhode Island Bar Association, Magistrate's opinion C.A. No. 82-0029B, U.S. Dist. Ct. (D.R.I. Jan. 20, 1983) (on file, Center for Professional Responsibility Brief Bank). A new Committee was formed under the auspices of the Rhode Island Supreme Court. Conversations with Michael Margolis, Chariman, Unauthorized Practice Committee of the Supreme Court of Rhode Island, May, 1983.

15. In 1982, the Maine State Bar Association created an Unauthorized Practice Committee to explore unauthorized practice issues and the possibility of defining UPL, but the committee has neither assumed enforcement powers nor sought to issue advisory opinions. See Correspondence with Judith Andrucki, Co-Chairman of Maine State Bar Ass'n Comm. on UPL, March, 1982, and Ralph Lancaster, Jr., President of Maine State Bar Ass'n, September, 1982, on file, ABA Center for Professional Responsibility.

16. Since August, 1984, this jurisdiction has been vested in the ABA Standing Committee on Lawyers' Responsibility for Client Protection. See American Bar Ass'n Standing Comm. on UPL, Report and Recommendation to the ABA House of Delegates, proposal 11-4, as amended, approved August 8, 1984. The American Bar Association Center for Professional Responsibility monitors developments in case law, statutory changes, and new court rules on unauthorized practice of law. Since 1981, the Center has, under the sponsorship of relevant ABA committees, surveyed various developments in UPL regulation and published case summaries and occasional research articles in the ABA/BNA Lawyers' Manual on Professional Conduct and in the *Disciplinary Law and Procedure Research System*, periodical publications of the ABA Center for Professional Responsibility.

wishing to perform legal services or in relation to a lawyer desiring to practice in a jurisdiction where he is not admitted.

From this welter of uncertainty two goals for UPL regulation reform emerge. First, each jurisdiction needs clearer and more uniform methods of predictably defining what constitutes the practice of law. Second, specific policy questions must be answered. Above all, it should be emphasized that the ideal mechanism for defining the practice of law is one that will not only give a predictable answer in most cases, but will also yield acceptable policy results.

Most jurisdictions have codified restrictions on the practice of law into UPL statutes.¹⁷ These statutes generally establish that only duly licensed attorneys are authorized to engage in the practice of law. Approximately two thirds of the statutes also specify that representing oneself as authorized to practice law is forbidden to unlicensed persons.¹⁸ However, few statutes explicitly define the acts constituting the practice of law, leaving this task to the judiciary.

In exercising the responsibility of fleshing out unauthorized practice definitions, the courts have tended to focus on acts and surrounding circumstances rather than the qualifications of the actors. Four types of tests have been used by different states. The first test focuses on the relation of the qualifications of the actor to the nature of the act, and whether the act required legal skill and knowledge. This method tends to be subjective, asking whether the act required no more than ordinary lay intelligence, and whether it was a difficult or complex legal task as opposed to a simple task often performed by laypersons.¹⁹ A more objective version of this test asks whether the act affected the legal rights or status of the client.²⁰ The second test focuses on the relation of the interest of the actor to the nature of the act. This inquiry considers whether the services are incidental to the actor's established business practice²¹ or whether the actor has a proprietary interest in the particular act.²² The third and most commonly used test asks whether the act is part of a lawyer's traditional practice or implies the existence of an attorney-client relation-

17. See *1984 Unauthorized Practice Survey: Definitions of the Practice*, on file, ABA Center for Professional Responsibility Brief Bank; see generally J. FISCHER & D. LACHMANN, *UNAUTHORIZED PRACTICE HANDBOOK* (1972).

18. See J. FISCHER AND D. LACHMANN, *UNAUTHORIZED PRACTICE HANDBOOK* at 79-84.

19. See, e.g., *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 543, 469 P.2d 353, 358, 86 Cal. Rptr. 673, 678 (1970).

20. See *State v. Shumacher*, 214 Kan. 1, 519 P.2d 1116 (1974).

21. See MINN. STAT. ANN. § 481.023(3) (West Supp. 1984).

22. See HAWAII REV. STAT. § 605-14 (1976).

ship. It may inquire into a number of factors, such as whether the act is customarily performed by lawyers,²³ whether a confidential or trust relationship is present,²⁴ whether there is compensation for the services,²⁵ or whether the actor held himself or herself out as an attorney.²⁶ The fourth and final test is a general inquiry into whether the activity should be presumed harmful to the public interest, thus demanding public protection from the untrained, incompetent, or unscrupulous, particularly in the rendering of services affecting legal rights.²⁷

Three exceptions to the scope of unauthorized practice of law recognized in most states include: (1) cases in which a personal attorney-client relationship is absent; (2) cases in which legal services are incidental to another business and not for profit; and (3) cases where such activity seems consistent with the legislative purpose in a specific area.²⁸

A possible substitute for the tests might be the simple preference of the client, thereby defining a legal matter as "a matter for which a potential client thinks a lawyer would be useful."²⁹ However, the public interest is unlikely to be well served by such an approach, since consumers will often overemphasize the immediate cost benefits and underestimate less obvious long-term risks to themselves, to others, or to the system of administration of justice. Of course, the legal profession has an interest in shaping both perceptions and demands of potential clients so as to require the services of a lawyer rather than of some other type of professional. Therefore, to prevent professional self-interest from dominating, the mechanism defining the practice of law should permit consumers some representation in determining whether a lawyer

23. See *Undem v. State Bd. of Law Examiners*, 266 Ark. 683, 693-94, 587 S.W.2d 563, 568 (1979).

24. See *State ex rel. Schneider v. Hill*, 223 Kan. 425, 426, 573 P.2d 1078, 1079 (1978).

25. See *id.*

26. See CONN. GEN. STAT. ANN. § 51-88 (West Supp. 1984).

27. See, e.g., *LeDoux v. Credit Research Corp.*, 52 Cal. App. 3d 451, 125 Cal. Rptr. 166 (1975); *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778, 782 (Ky. 1965); *Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n*, 91 Wash. 2d 48, 60, 586 P.2d 870, 878 (1978).

28. See Note, *Divorce Kit Dilemma: Finding the Public Interest*, 19 J. FAM. L. 729, 731-32 (1980-81); Comment, *Lay Divorce Firms and the Unauthorized Practice of Law*, 6 U. MICH. J.L. REF. 423, 428-29 (1973).

29. See Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RESEARCH J. 519, 533.

is necessary, and if so, how much those services should cost.³⁰

To serve the public interest, a UPL definition should avoid professionally self-serving tests which overly rely on empirical comparisons of the services in question with those traditionally provided by lawyers. A policy-oriented balancing test that considers a number of easily recognizable factors is more desirable. It should require that the public be substantially benefited and that the likelihood of harm to individuals or to the administration of justice be minimal. Such tests have been applied in recent cases where courts have considered whether representation before state administrative agencies by nonlawyers should be permitted.³¹

It is clear then that UPL decision-making bodies should not define forbidden or protected practices merely in terms of the status quo. Instead, value judgments balancing the important interests of the relevant actors and society as a whole are required.³²

B. The Power to Determine the Public Interest

A growing demand seems to exist on the part of the lay community to have some influence in determining what constitutes the practice of law. In theory, policy decisions expressing the public interest are legislative in nature. In fact, however, great uncertainty exists as to whether the legislature or the judiciary should be the final decision-maker in the regulation of the practice of law. One would expect that the legislatures, which are in theory more sensitive than the courts to changes in the will of the electorate, would articulate the public interest in these matters. Yet, as already mentioned, courts have historically carved out an exception in their power to regulate directly the practice of law. Moreover, in recent years they have tended to assert exclusive power in regulating unauthorized practice and have rejected legislative

30. As a recent student note has remarked:

The purpose of prohibiting the unqualified from practicing law is, of course, to protect the public. . . . Clearly more definitive standards are desirable. It is equally clear that "public interest" encompasses more than protection from those unqualified to practice law—the public is served also by the availability of inexpensive legal assistance, something the organized bar so far has been unable to offer.

Note, *supra* note 28, at 731-32.

31. *Cf. Hunt v. Maricopa County Employees Merit Sys. Comm'n*, 127 Ariz. 259, 619 P.2d 1036 (Ariz. 1980); *State ex rel. Pearson v. Gould*, 437 N.E.2d 41 (Ind. 1982).

32. Alan Morrison, an attorney with the Public Citizen Litigation Group in Washington, D.C., has suggested that a balancing test which considers the public interest be observed as a procedural requirement by a legislative commission on the unauthorized practice of law. *See Morrison, supra* note 2. Although opinions may differ on the optimal method for establishing uniform UPL policies within a state, Morrison's proposal conveniently ensures that a balancing test will be applied.

pronouncements as invalid encroachments upon their inherent power.³³ The American Bar Association has supported this trend by stating that the role of the legislature in regulating the practice of law should be advisory only.³⁴

An influential student comment has observed that this claimed inherent power by the courts to regulate the practice of law has been unnecessarily expanded beyond its primary doctrinal basis—"the protection of the dignity of the judicial process."³⁵ This argument does not deny the courts all power to regulate in this area, but it does suggest a basis for legislative action in certain contexts where the dignity of the courts is not directly challenged.

The risk that neglected voters might nullify the court's asserted prerogative through a constitutional referendum initiative should not be ignored. Such an incident occurred in Arizona in 1962.³⁶ The public image of the courts and the legal profession might be exposed to unfavorable public scrutiny in a continuing political tug-of-war between the legislature and the judiciary. This has occurred in the recent battle in the state of Washington between lawyers and title and escrow agents. In two recent cases, *Hagan, Van Camp v. Kassler Escrow, Inc.*³⁷ and *Washington Bar Association v. Great Western Federal Savings & Loan Association*,³⁸ the Supreme Court of Washington rejected legislative efforts to define certain real estate closing activities as authorized practice of law and held the statute in violation of the constitutional separation of powers. Facing continued pressure by title and escrow agents

33. See, e.g., *Hunt*, 127 Ariz. at 261-62, 619 P.2d at 1038-39; *In re Member of the Bar*, 257 A.2d 382, 383 (Del. 1969); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1970).

34. See American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement 10-18* (1970) [hereinafter cited as "The Clark Report"] (adopted unanimously as policy by the American Bar Association House of Delegates).

35. Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162, 165 (1960). Instead, the comment argues:

[T]he courts ask whether the activity, if undertaken by laymen, will harm the public. If so, it is included within their definition of the "practice of law." This manner of defining the "practice of law" leads to the determination of the scope of an exclusive judicial power on the basis of the protection of the public rather than the protection of the judicial process The protection of the judicial process is important only insofar as it results in the protection of the public.

Id. at 166.

36. See Note, *Constitutional Law—Inherent Judicial Power and Regulation of the Practice of Law*, 23 ARIZ. L. REV. 1313 (1981).

37. 96 Wash. 2d 443, 635 P.2d 730 (1981).

38. 91 Wash. 2d 48, 586 P.2d 870 (1978).

seeking to protect their livelihood, the supreme court subsequently adopted a rule proposed by the state bar defining the limits and conditions under which title and escrow agents could continue with the minimal practice of law that was necessary in the course of their business.³⁹ This course of action avoided the controversial alternative of a constitutional amendment permitting the legislature to advise the court on UPL policy.⁴⁰

Although many state supreme courts continue to assert the exclusivity of their inherent power to regulate the practice of law,⁴¹ it is increasingly argued that a theory of exclusive judicial power is neither necessary nor desirable. One commentator has proposed a functional analysis of the overlap of legislative and judicial powers which would allow the court "to refine its definition of exclusive powers without relinquishing ultimate control."⁴² Adopting this method of analysis, a court must first determine to what extent a legislative enactment is inconsistent with the supreme court's rules. Even if it fails to find an actual inconsistency, it must then inquire to what extent applying the statute would "impede the supreme court's reasoned view of the proper functioning of the system of administering justice in the state."⁴³ A legislative incursion must be found objectionable under one of these conditions for the court to hold the statute unconstitutional.

Although the principle of comity permits a court to accept some expression of the legislature's will without requiring an actual surrender of the court's powers,⁴⁴ a "functional" interpretation provides an advantage over doctrines of "comity" or "exclusivity" because it "clothes properly enacted legislative regulations with a presumption of constitutionality and thus requires a specific showing of infirmity to invalidate them."⁴⁵ Unlike the exclusivity

39. Washington Admission to Practice Rule 12, Wash. Sup. Ct. R. APR 12.

40. *See Court Adopts Rule for Real Estate Closings*, 1983 WASH. BAR BULL. 21 (January).

41. *See, e.g.,* Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973); Wajert v. State Ethics Comm'n, 491 Pa. 225, 420 A.2d 439 (1980).

42. Shapiro, *Judicial Control Over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative*, 20 DUQ. L. REV. 13, 27 (1981).

43. *Id.*

44. *See* Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002-03 (Me. 1980); Sadler v. Oregon State Bar, 275 Or. 279, 285, 550 P.2d 1218, 1222 (1976).

45. Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 802 (1976) (footnotes omitted).

The exclusive power doctrine might also be narrowly interpreted under an informal variation of the above-mentioned approaches. Courts could simply distinguish the regulation of lay practice from the regulation of lawyers' discipline and admission, where the courts' powers have historically been plenary. The legislature could be accorded general power to regulate lay practice which does not inti-

doctrine, the functional approach allows the court the final word on matters relating to the conduct of the bar, while restraining it from needless interference with legislative expression regarding important public policies in the regulation of the practice of law. The adoption of this approach could thus significantly assist the growth of unauthorized practice policies that more directly respond to contemporary consumer demands.⁴⁶

III. A CLOSER LOOK AT REGULATORY MECHANISMS— IDEAL AND ACTUAL

Consumer needs concerning access to legal services and freedom of choice should clearly be recognized in the future reshaping of unauthorized practice policies. Advocates of these interests should keep in mind, however, the need for regulation that will protect the public interest in receiving legal services of adequate quality.⁴⁷

mately affect the business of the courts. Although this solution is not as obviously principled as the others discussed previously, a California case prohibiting an administrative agency from disciplining attorneys appearing before it suggests that legislative power does exist to authorize administrative agencies to admit laypersons to practice and to discipline them. See *Hustedt v. Workers' Comp. Appeals Bd.*, 30 Cal. 3d 329, 351, 636 P.2d 1139, 1152, 178 Cal. Rptr. 801, 814 (1981) (Newman, J., concurring and dissenting).

46. As the same student commentator observes:

The proposed analysis would similarly restrict judicial invalidation of statutes authorizing out-of-court lay practice, such as lay representation before administrative agencies or the "practice of law" by real estate brokers in connection with their business. In the case of lay representation before an executive agency, the only interference with the adjudicatory process would be the unlikely possibility that inadequate records might be produced and hamper judicial review on appeal. Similarly in the case of lay performance of such "lawyer-like" tasks as drawing up documents of conveyance, any impact upon the judicial branch would result only from a possible increase in litigation generated by lay incompetence. Neither interference would seem sufficiently substantial to warrant the judiciary overturning a legislative judgment that such lay practice is desirable.

Note, *supra* note 45, at 803.

47. The quality of legal advice and draftsmanship depends not only on legal knowledge, analysis, and expression skills, possessed more generally by lawyers than others, but also on the ability to recognize relevant legal issues. The possible relevance of areas of law may not be recognized or understood by even competent non-lawyers who are knowledgeable in other fields of law. As in the practice of medicine, the original diagnosis of a legal problem may be the most critical element. Probably, more legal rights are lost through ignorance of their existence than through sloppy advocacy to achieve their enforcement. Many lawyers claim that they make more money trying to rectify the mistakes made by laypersons who initially represent themselves or others than they lose by not being con-

The organized legal profession has been criticized for an overzealous bias against alternative methods of providing services usually performed by lawyers.⁴⁸ This charge, even where true, must be tempered by recognition of the need for expertise in fulfilling the regulatory function which lawyers undoubtedly have. However, attitudes may be changed without eliminating the participation of the organized bar in UPL regulation. It is not unreasonable to propose that the bar work "not against unauthorized practitioners but against the specific evils that are said to flow from their activities."⁴⁹ It is important, then, to take a more specific look at how the legal profession as well as the courts can be encouraged to become more sensitive to competing public policies and interests in the process of regulating the unauthorized practice of law.

Opinions diverge on who should control the interaction between the legal profession and other groups providing or wishing to provide services related or similar to those commonly provided by lawyers. According to a number of critics, the legal profession should be denied any power to determine the extent of its monopoly over the delivery of legal services, since professional self-interest is likely to overwhelm any independent public interest in the matter. One view suggests market regulation as the solution.⁵⁰ Others believe regulatory power should be vested in independent governmental agencies.⁵¹ Still others propose that a legislative commission might best reflect the public interest in determining UPL policies.⁵² The commentators tend to view these alternatives as more responsive to the public's true interests than a decision-maker governed by the organized bar who is too closely allied to the legal profession's own self-interest.

The urgency of such proposals may be somewhat overstated if

sulted in the first instance. Furthermore, since an initial mistake may extinguish legal rights, failure to consult qualified legal counsel may cause irreparable harm. Accordingly, the unauthorized practice laws should continue to have force both within and beyond the courtroom.

Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649, 675.

48. See Rhode, *supra* note 2, at 10.

49. See Christensen, *supra* note 2, at 213 (suggesting such priorities as assisting accountants to acquire the necessary competence to deal with the law in the field of tax practice, helping realtors to provide competent services surrounding real estate transactions, and developing systems of safeguards to help avoid the conflicts of interest that arise in legal service programs operated by lay intermediaries).

50. See Christensen, *supra* note 2.

51. See, e.g., Rhode, *supra* note 2; Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Hunter & Klonoff, *supra* note 2.

52. See Morrison, *supra* note 2.

the problems are due in large part to UPL regulators' lack of information about changes in the economics of legal services delivery. One commentator has maintained, for instance, that contemporary UPL policies fail to adequately recognize that much of the feared encroachment of standardized lay services upon the traditional market for legal services has already occurred.⁵³ He acknowledges that, while these lay encroachments may impose potential costs to the consumer, such as "mass-producing, dehumanizing, and diminishing the quality of legal services in general,"⁵⁴ they clearly make legal services more widely available at a lower cost. A sociologist from the American Bar Foundation has argued that increased external control of the legal profession by government agencies, clients, and the press has decidedly chilled the potentially anticompetitive policies of the organized bar in the last two decades.⁵⁵ If this latter perception is accurate, many current advocates of drastic reforms are responding to a crisis that has already passed.

A new awareness of the purposes and the methods of UPL regulation is needed in order to put the problems and their solutions in the proper perspective. Criticisms of contemporary UPL regulation can be broken down into economic, antitrust, constitutional, and policy categories. The economic arguments stress that antitrust law and a system of free competition require greater freedom of choice for the consumer.⁵⁶ The constitutional and policy arguments challenge the use of state power in unauthorized practice enforcement, at least to the extent that it simply incorporates self-interested objection to competition by the organized bar.⁵⁷

A. *Competition and Competence*

In reviewing claims that the free market may be the best regu-

53. See Engel, *The Standardization of Legal Services*, 1977 AM. B. FOUND. RESEARCH J. 817, 841.

54. *Id.* at 841.

55. See Remarks of Michael Powell, Research Social Scientist, The American Bar Foundation, "The Organization of the Profession," at American Bar Association Midyear Meeting, January, 1982; M. Powell, "Developments in the Regulation of Lawyers: Intra and Extra Professional Controls," (paper presented at the Annual Meeting of the American Sociological Association, Toronto, August, 1981), on file, ABA Center for Professional Responsibility Brief Bank.

56. See Christensen, *supra* note 2.

57. See Rhode, *supra* note 2; cf. Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649.

lator of price and quality, the proper inquiry should be how the practice of law can be regulated with a minimal amount of restriction while still protecting the public interest. Attention should be given to developing more efficient ways of delivering legal services which maximize the quality of such services without being unduly restrictive.

In examining the bar's traditionally anticompetitive attitude, one scholar has argued that the market for legal services should be deregulated and freedom of choice by the consumer established as the guiding principle.⁵⁸ However, it is not clear that market regulation would be superior to government intervention through occupational licensing schemes as a means of maximizing the public welfare.⁵⁹ For example, Milton Friedman would impose a stringent test in deciding whether licensure or similar regulation is appropriate, utilizing a general presumption against the state undertaking regulatory activities.⁶⁰ Yet such a consumer-oriented presumption against government intervention may be inappropriate when, in actuality, the market fails to protect consumers. As another market theorist observes, a number of transactional deficiencies may upset any such presumption. There may be a human inability to comprehend and process information ("bounded human rationality"), insufficient access to information which is necessary for a decision ("information impactedness"), misrepresentation or strategic manipulation of information by one party to the transaction, and specific attitudes affecting the exchange.⁶¹

It is far from certain that the deregulation of lay competition to legal services proposed by Barlow Christensen would create a consumer paradise blessed by a free flow of information and the absence of exploitation. A more probable result is that the mar-

58. See Christensen, *supra* note 2.

59. See generally M. FRIEDMAN, CAPITALISM AND FREEDOM 137-61 (1962); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-52 (1968); Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); see also Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189.

60. Only if there is a general recognition that governmental activities should be severely limited with respect to a class of cases, can the burden of proof be put strongly enough on those who would depart from this general presumption to give a reasonable hope of limiting the spread of special measures to further special interests.

M. FRIEDMAN, CAPITALISM AND FREEDOM 144 (1962).

61. Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 190. Applying these criteria, Professor Rose finds market failure most likely in the case of health professionals and lawyers. Market failure may be aggravated, however, by self-imposed restrictions on advertising and solicitation. Additionally, too much emphasis may flow from the perceived risk of serious harm caused by a wrong decision and "a fear that consumers of these services may be insufficiently risk-averse." *Id.* at 191.

ket failure described by Professor Rose will hinder the consumer's free and intelligent selection of services by preventing them from adequately assessing their needs, evaluating quality, and judging price or other factors. This may render consumers susceptible to incompetent, fraudulent, or financially irresponsible providers.⁶² As a result, two issues require further discussion: first, whether deregulation would adversely affect the competence level currently prevalent among licensed attorneys; and second, whether deregulation would promote the public interest by sufficiently increasing access to competent services.

1. Competence and How it May be Regulated

Perhaps the chief legitimate interest of the state in regulating unauthorized practice by nonlawyers and by lawyers not licensed in the jurisdiction is to ensure a high level of competence in the delivery of legal services to the public. A second interest, of course, is in protecting the quality of the administration of justice, represented by institutions and processes with which lawyers interact. The quality of administration of justice is a public good that benefits all of society, even though individuals might often choose to benefit their personal interest over the public interest. For this reason, the preservation of this quality is an appropriate aim of governmental regulation. Since access to the legal system as a means of resolving disputes also has important value to the individual, access to competent services should be made available where reasonably possible. Deregulation of legal services might well result in serious harm to the public because of the client's typical trust and dependency within the traditional lawyer-client relationship, and is clearly not desirable. However, an absolute ban on lay involvement in the delivery of legal services is not the only alternative. Presumably, if a lawyer's competence can be adequately defined and regulated in a manner that protects the public interest, then so can a nonlawyer's competence, at least in some instances. Of course, competence must first be defined if the regulatory system is to regulate rationally and effectively since the definition will affect the selection of monitoring and regulatory mechanisms. Definitions of lawyers' competence might serve as models for similarly defining and regulating competent

62. *Id.*

services by non-lawyers.⁶³

Competence is increasingly recognized as an important concern of lawyer disciplinary systems, through efforts both to define its meaning and to ensure its presence among practicing lawyers. Rule 1.1 of the recently approved ABA Model Rules of Professional Conduct establishes certain guidelines on lawyers' competence.⁶⁴ The comment accompanying this rule acknowledges that lawyers need not be expert in an area to be competent, as long as they make use of the opportunity to acquire the necessary knowledge to handle the problem.⁶⁵ This should remedy, to some extent, the failure of the prior ABA Model Code of Professional Responsibility to give clear guidance as to what constitutes competence.

Competence may be defined as a set of qualities shared by lawyers of relatively similar backgrounds. These qualities include the general ability and legal training necessary to relate the problem to other legal issues within the context of a relationship with a client who expects professional behavior and services.⁶⁶ But

63. Paradoxically, the availability of particular mechanisms may also control what can be defined and administratively recognized as competence. See generally Blair, *Trial Lawyer Incompetence: What the Studies Suggest About the Problems, the Causes, and the Cures*, 11 CAP. U.L. REV. 49 (1982); American Law Institute American Bar Association Committee on Continuing Professional Education, *A Model Peer Review System* (Discussion Draft 1980); Trakman, *Competence in Law: An Unending Search*, 11 CAP. U.L. REV. 401 (1982).

64. Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (as amended, August, 1980) ("A Lawyer Should Represent a Client Competently"); EC-2-30 ("Employment should not be accepted by a lawyer when he is unable to render competent service . . ."). In the past decade, increasingly careful attempts have been made to define and categorize factors contributing to lawyer competency. Various studies have defined numerous areas of skill recognized to promote competence. See, e.g., A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1979) (study sponsored by the Federal Judicial Center on federal trial advocacy in eight areas: proficiency in the planning and management of litigation, technique in the examining of witnesses, general legal knowledge, technique in arguing to the trier of fact, professional conduct generally, and additional factors in criminal cases); Maddi, *Trial Advocacy Competency: The Judicial Perspective*, 1978 AM. B. FOUND. RESEARCH J. 105 (surveying lack of preparation, analytical ability in the framing of issues, awareness of the fundamental ethics of the legal profession, and inadequate understanding of basic courtroom etiquette). See generally Blair, *Trial Lawyer Incompetence: What the Studies Suggest About the Problems, the Causes, and the Cures*, 11 CAP. U.L. REV. 419 (1982).

65. Model Rules of Professional Conduct, MR 1.1 (comment "Knowledge and Skill") (1983).

66. The American Bar Association's Task Force on Competence recently stated:

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she prac-

the "competence" of lawyers and nonlawyers performing similar services may consist of quite different qualities. In contrast to lawyers, who are assumed to be generalists with the capacity for becoming specialists as well, nonlawyer practitioners must be assumed to be specialists only. There must be no guarantees of competence beyond assurances of their expert status in a narrow area. Accordingly, careful consideration should be given to those mechanisms which could actually affect or control competence in nonlawyer specialists, and whether the same assumptions made in regulating lawyers' competence will be valid when applied to nonlawyers.⁶⁷ For example, as a general rule, the entrustment of legal affairs to an unauthorized practitioner effectively precludes

tices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

American Bar Association Task Force on Professional Competence, Interim Report of the Task Force on Professional Competence 4 (July 1982). This definition quotes language of the Committee on Continuing Professional Education of the American Law Institute—American Bar Association in its publication *A Model Peer Review System* (Discussion Draft 1980) expressing "minimal standards which connote a broad *client-oriented* statement of competence—the notion being that a lawyer should possess at least the minimal knowledge, skill and experience to be both responsive professionally to a client's needs and motivated to prepare for and undertake the representation of the client." *Id.* (emphasis added).

67. Expectations may have diminished in recent years as to whether certain methods are capable of adequately insuring competence among lawyers. The effectiveness of curing incompetence through mandatory continuing education has been questioned on the grounds that:

mere attendance at CLE courses will not necessarily improve competence, that learning will not necessarily take place since attendance may be passive or active, that many approved CLE courses have no relevance to some attorneys, (what is heard in the classroom, without advance preparation, classroom participation, review and application is unlikely to be retained), and the number of hours of attendance being prescribed under mandatory systems is too minimal to have any long lasting effect on competence.

Blair, *supra* note 63, at 437 (citing Wolkin, *Improvements in the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 529 (1976)). Nor is it certain that traditional systems of lawyer discipline are capable of singlehandedly insuring and maintaining professional competence. See generally Interim Report of ABA Task Force on Professional Competence, *supra* note 65. Programs for voluntary specialization and for peer review combined with remedial CLE requirements, often believed more effective, may yet be too unpopular or expensive to gain widespread acceptance. Still, all of these programs, which generally offer the bar some opportunity for self regulation, have some combined effect on competence. Analogous programs might be devised for nonlawyers. Civil liability for malpractice, which imposes another

the client from pursuing the civil remedy of a malpractice action should the practitioner act negligently in the performance of his or her duties.⁶⁸ However, recent cases indicate a slow trend toward allowing damages in such instances.⁶⁹

Where the provision of legal or quasi-legal services by lay persons is in the public interest, competence arguably should be regulated by the same methods which seem to be effective in regulating lawyers' competence. However, the best method of regulation of nonlawyers may depend on whether the services they are providing are more like those typically requiring an advocate's function or those involving areas where lawyers generally have substantive legal expertise. In the latter circumstances, licensing nonlawyers to perform services in their areas of particular specialization might effectively be combined with regulation through malpractice liability, applying the same standard of care required of lawyers.⁷⁰

control on incompetence in lawyers' services, might theoretically provide a control on incompetent services by lay persons.

68. See, e.g., *In re Arthur*, 15 Bankr. 541 (E.D. Pa. 1981) (citing Dauphin County Bar Ass'n v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976) (private cause of action allowed for damages caused by the unauthorized practice of law)).

69. *Torres v. Fiol*, 110 Ill. App. 3d 9, 441 N.E.2d 1300 (1982) (suit for negligence against unauthorized practice allowed); accord *Wright v. Langdon*, 274 Ark. 258, 623 S.W.2d 823 (1981); *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958); *Latson v. Eaton*, 341 P.2d 247 (Okla. 1959); *Mattieligh v. Poe*, 57 Wash. 2d 203, 356 P.2d 328 (1960).

70. Such specialization would be different from schemes for specialization by lawyers, which are really a form of certification of specialties. Milton Friedman distinguishes three different levels of occupational control: registration, certification, and licensing. Registration simply involves an official listing of names of all practitioners, often accompanied by a taxing scheme. Certification may, but need not necessarily, restrict practice to those certified as possessing particular skills. However, one may only hold oneself out as certified if one has indeed passed the special examination or other requirements. Friedman describes the third level of control, licensing, as:

an arrangement under which one must obtain a license from a recognized authority in order to engage in the occupation. The license is more than a formality. It requires some demonstration of competence or the meeting of some tests ostensibly designed to insure competence, and anyone who does not have a license is not authorized to practice and is subject to a fine or jail sentence if he does engage in practice.

M. FRIEDMAN, *CAPITALISM AND FREEDOM* 144-45 (1962). The most restrictive form of regulation, licensing, may be the strongest form of consumer protection. However, the second part of the article considers special categories of lay practice where other models of regulation may be more desirable. In addition, lawyer specialization schemes operate as a method of further certification. Clients are not prohibited from obtaining services from nonspecialist lawyers, and such services may well be competent. However, lawyers who fail to meet the specialization requirements only risk losing the privilege of holding themselves out as a specialist, not their right to engage in the practice of that area of law or their general license to practice. In contrast, lay specialists who lack the training and experiential basis creating general competence in lawyers might reasonably be required to obtain mandatory continuing education about the law or submit to periodic license re-

Once differences in standards of competence for lawyers and lay practitioners are resolved, the power of licensing and disciplining lay practitioners might be combined with that currently exercised by disciplinary systems for lawyers. Responsible agencies would be qualified to monitor and enforce standards of conduct for both groups. Methods such as directing a single court or entity to handle all disciplinary mechanisms relating both to lawyers and nonlawyers should be considered. However, imposing substantially increased responsibility upon disciplinary agencies who currently deal with the bar alone would be impractical unless this was accompanied by an appropriate increase in funding and resources. Additionally, this combination of responsibilities might even create a conflict of interest disproportionate to the possible benefits. Nevertheless, reform along these lines would be consistent with the contemporary movement toward greater state involvement in the regulation of lawyers.

2. The Effect of Deregulation on Quality and Access to Services

Deregulation of unauthorized practice would seem to be desirable if it would create more variety in levels of competence resulting in increased access to legal services at acceptable levels of quality. The prospect of deregulation appears attractive because of the possibility that the supply or availability of legal services would increase and the average price for some types of services would decrease, thereby benefiting the consumer in general.⁷¹ It has been suggested that deregulating the legal profession by lifting restrictions on the public's freedom of choice to obtain needed services would actually have a salutary effect on lawyers' competence. Presumably, market pressures would encourage lawyers to increase their competence in fact in order to distinguish their services from those of nonlawyer competitors and justify the higher prices they charge.⁷² Lawyers would no longer be insu-

view. Prohibitions on practicing outside of their specialty would also prevent lay practitioners from misleading the public as to the extent of their expertise and competence.

71. See Christensen, *supra* note 2, at 214-15.

72. *Id.* at 215. Christensen argues:

Continuing legal education, which in most states has languished for years, might now come into its own and receive the support and emphasis it deserves. More might also be done in developing methods of assuring the competence of lawyers through periodic relicensing and other measures.

lated from this pressure by the monopoly granted by the licensing system. At the same time, consumers would theoretically benefit by greater freedom of choice, since they would gain an expanded supply of providers at lower cost and would only voluntarily bear the costs of lawyer disciplinary structures.⁷³

Consumers may respond to a number of different elements in forming their perceptions of the quality of a particular service. Competence may be distinguishable as one of the more objective components which helps determine overall quality. Arguably, consumer preference can and should play a role in determining the quality of services available. However, because competence is an important concern of society as well as of the individual, consumer preference alone should not determine the level of competence required for a particular type of professional service.

There are a number of reasons why deregulation of the market for legal services would be an inadequate solution to consumer needs. First, it is likely that average consumers in such a market would not likely be capable of adequately distinguishing differences in quality and competence of services. They would be better off if either the profession or a governmental regulator were to make this information available and assist in making those decisions.⁷⁴ Second, deregulation might result in an overall diminution of higher-quality services on the market. Even though this might be beneficial to many individuals on a short-term basis, in

And this new effort to raise the competence of lawyers would be both necessitated and made possible by the ending of the unauthorized practice campaign.

73. *See id.* "This approach to unauthorized practice [deregulation] might provide the stimulus necessary to cause the bar to become serious about lawyer discipline and to take effective steps to ensure the competency and honesty of lawyers being offered to the public." It might be more accurate to say that deregulation, or at least the threat of it, may stimulate the bar to communicate more effectively to the consumer information about comparative risks in obtaining legal services from licensed lawyers and from unregulated nonlawyers.

74. This inability of many consumers to make the best determination of their own needs would result from their lack of information regarding the quality of legal services or because they are unable to make use of such information when available. Addressing the latter concern in *Bates and O'Steen v. State Bar*, 433 U.S. 350 (1977), the Supreme Court determined that the first amendment prohibited an absolute ban on lawyer advertising which conveyed to the public the kind of information necessary to enable consumers to choose between price and quality alternatives within the profession. In a subsequent case, however, the Court acknowledged that states had legitimate interests in regulating intraprofessional advertising in order to perform their legitimate function of protecting the public from false or deceptive advertising. *In re R.M.J.*, 455 U.S. 191 (1982). The Supreme Court thus apparently would countenance some imposition of state-determined values in the regulation of legal services delivery, as long as the state articulates a valid interest in protecting other individual interests, especially where the market does not encourage them to make a responsible determination of their longer-term interests.

the longer term, this would injure the public by diminishing the quality of advocacy before the courts and the administration of justice as a whole.⁷⁵ Finally, deregulation might impose a hidden cost upon the poor who lack the economic resources in any case to enjoy and maximize the advantages of free choice.⁷⁶ Those best served by this change are those who not only have the financial means to obtain services and the adequate access to such information, but also have sufficient cultural familiarity, linguistic facility, education, and self-confidence to make maximum use of the services available. One may realistically assume that the poor lack these resources more than do other segments of the population.

Maintaining a highly organized legal profession may be society's most efficient way of attaining a high level of quality and competence in legal services, even though there may be a cost in allowing lawyers to monopolize the production of these services. The legal profession should, however, foster the variety and inno-

75. Where the market fails to provide adequate information about quality, and instead encourages the consumer to choose services for cost alone, suppliers would be pressured to provide services more cheaply and at a lower quality than would truly be in the public's interest. A resulting influx of cheaper and lower quality services delivered by personnel governed neither by the rules of the courts nor by fidelity to the values of the legal system would be likely to reduce the efficiency and increase the social cost of the administration of justice. Christensen's claim that the public interest in freedom of choice should be given broad deference assumes that an important element of the democratic ideal is "the notion that the individual can think for himself, that he is capable of making his own decisions." See Christensen, *supra* note 2, at 202. But this assumption is not necessarily realistic where individuals at middle and lower income levels not uncommonly become involved in complex transactions with private entities or confrontations with bureaucracies. Government commonly intervenes in complex transactions between private entities to protect individuals from control by more powerful actors; regulation of securities and credit transactions provides but two examples of these. It is consistent with the individual's interest in his or her own autonomy to recognize a right to proceed *pro se*, while on the other hand, society also has an interest in seeing that decisions affecting legal rights are made efficiently, and in a responsible and fully informed manner. Requiring legal representatives and counselors to meet a minimum level of expertise serves a balance of these interests.

76. Another policy argument to be considered is the hidden danger that a free market movement could be manipulated by some in a manner that sacrifices the interests of the poor. The current political administration opposes the providing of large-scale subsidized legal assistance to the poor which provides higher quality legal services than they could afford without the subsidy. Political pressure has mounted in recent years to remove federal, and perhaps all governmental support for legal assistance programs. Deregulation could be used as an excuse to force the poor, who have no choice as to quality, either to rely on the lowest quality services available in that market, or to forego any services at all.

vation in methods of delivering legal services that make alternative price levels possible. The experience of legal clinics and other types of mass-marketing suggests numerous possibilities exist for reducing the costs of at least some types of legal services. The per unit cost of legal services can be reduced while total volume is increased in at least four different ways: first, by specialization of attorneys, reducing attorney time per matter and reducing the cost of shifting areas of expertise; second, by applying systems management techniques; third, by the increased use of paralegals, allowing less expensive workers to perform specialized tasks; and fourth, by substituting various forms of capital for labor.⁷⁷ Further experimentation along these lines could provide the consumer with lower cost services, maintain quality, and offer efficient protection to clients and to the public through already existing regulatory structures policing quality and competence.

Although the free market approach would seem to offer a solution to the need for increased access to legal services, policy-makers should be critical of any solution that views access as the only good with which the public should be concerned.⁷⁸ The market solutions should certainly not be considered an adequate substitute for government subsidized legal assistance, since this would overlook too many serious costs to the poor as well as to society in general. More preferable than deregulation would seem to be expanded innovative delivery mechanisms accountable to clients and to the courts, supplemented by subsidized legal services for the poor.

B. Other Related Proposals

Many recent writings have attempted to identify specific areas where the public interest demands alternatives to traditional lawyer-delivered legal services. They have also suggested various methods to protect consumer interests. Such proposals should be judged on two grounds: whether they are supported by a clear showing of public need and whether they propose a workable

77. Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUND. RESEARCH J. 179, 185-88. Muris and McChesney note that, for the savings to occur, the increase in volume must be planned. In addition, limits may eventually descend upon the extent to which the rate of production may be increased. Consequently, economics of scale may cease after a certain point.

78. Cf. Hunter & Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6, 11-14 (1979-80) (arguing that under utilitarian principles, the benefit of individual free choice to select a lay representative rather than a lawyer may be outweighed by the government's interest in restricting access to nonlawyers whose capacity to harm other individuals would be greater than that of already regulated attorneys or individuals representing themselves).

mechanism to protect the public's interests. If these proposals are not sound in all respects, they at least suggest that policy-makers should explore the procedure by which the public interest is asserted and promote reforms which enable non-professionals and lawyers alike to participate in determining the content of the public interest.

One proposal has suggested licensing nonlawyers in particular fields of practice and ensuring their competence through a set of standards.⁷⁹ The attorneys' code of ethics would be statutorily extended to nonlawyers who do legal work while a disciplinary agency would be created and empowered to fine or prohibit them from practice upon a determination of incompetence.⁸⁰ The same agency would handle both lawyer and nonlawyer discipline.⁸¹ A public file of consumer complaints would be kept and a fund maintained to reimburse victims of minor incompetence.⁸²

Although this proposal addresses a number of important issues, it suggests no practical method for either identifying areas of practice where alternative practitioners are seriously needed or conveniently instituting a disciplinary mechanism capable of enforcing standards of competence and conduct. Although the legislatures might be more likely than the courts to support a broad licensing proposal of this type, several arguments should dissuade them. First, except in a few states, legislatures may lack the power to set qualifications for admission to practice before the courts, since the inherent power of the judiciary to regulate the practice of law is generally recognized to include this function.⁸³ Second, policing the competence of groups of alternative practitioners through a licensing and disciplinary process would be costly unless such groups were limited to cases of special con-

79. *See id.* at 35-36.

80. *Id.* at 23.

81. *Id.* at 22-26. The authors suggest that the Code of Professional Responsibility could be extended, possibly through statutory reform, to encompass both nonlawyers as well as lawyers. An agency would enforce these expanded standards.

82. *Id.* at 33. Whether a fund for reimbursement of incompetence could be easily administered is not considered. Voluntary client security funds maintained by bar associations currently reimburse theft, but not damages caused by incompetence.

83. This power may not explicitly be granted to the courts by their state constitution, but is often claimed as "an adjunct to [the court's] power to license attorneys." *State v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 88, 366 P.2d 1, 9 (Ariz. 1961); *see Taylor v. Hoboken Bd. of Education*, 185 N.J. Super. 546, 455 A.2d 552 (1983).

sumer need. One specific area where reform might be both feasible and timely is the regulation of lay practice before administrative agencies.⁸⁴

Finally, it seems questionable whether lay practitioners should ever be licensed for litigation in courts of general jurisdiction, as opposed to appearances before highly specialized tribunals and administrative agencies. Unless a court or tribunal is specially set up to accept and assist nonlawyer specialists conducting a limited practice, the costs imposed on the courts to adapt to individual situations are prohibitive. Current training of lawyers already develops courtroom skills and general familiarity with court systems and procedure, and a sense of professional responsibility as an officer of the court. The efficient administration of justice would be promoted by encouraging the refinement of litigation skills among lawyers as a class, thus maximizing their competence. It is uncertain whether efficiency would be served by opening up the litigation practice to nonlawyers.⁸⁵

A second suggestion "propose[s] a framework for the future application of unauthorized practice laws that affords the protection of licensed professionals to the public but allows individuals to make knowledgeable waivers of that protection after disclosure of the principal risks and under conditions that minimize adverse consequences of a waiver."⁸⁶ Since mandatory disclosure of risks is a weak way of protecting the public, this approach should be limited to those areas where the advantages of greater public access to services are very great and the comparative risk of harm is minimal. It assumes that people will understand disclosed information and will use it to make an appropriate calculation of their interests. However, if people lack the ability to understand and make rational use of such information, or if they have no alternatives on which to base a comparison, they are no better off. In addition, disclosure actually passes the risk to consumers by placing the burden on them to show that the disclosure did not occur, was not intelligible, or did not cover the matter out of which the harm arose. The consumer is better protected by a regulatory system which places the burden upon the practitioner to perform accord-

84. See, e.g., Morrison, *supra* note 2. Other methods of protecting the client short of licensing might be explored within the context of agency practices, including certification or registration and bonding requirements.

85. Pro se appearances by nonlawyers undoubtedly obstruct the efficiency of the courts, but are generally considered necessary and proper in order to ensure basic fairness and access to the courts. However, this efficiency argument holds strong when the added impact is considered of a subclass of practitioners who may not be as easily regulated as lawyers.

86. Weckstein, *supra* note 2, at 676.

ing to a particular standard of competence or to lose the privilege of practicing.

IV. SPECIAL CONCERNS OF UPL ENFORCEMENT

It has been cautiously noted that “[a]lthough state requirements regarding education, character, and examinations have been held constitutional because of their rational relation to the practice of law, many unauthorized practice rules remain untested under the Constitution as well as under federal antitrust laws.”⁸⁷ Going further, one commentator has claimed that there would be an inherent conflict of interest between a bar-affiliated committee charged with enforcing broad prohibitions on unauthorized practice and the public interest in maximum access to legal assistance. The conclusion is that “from the public’s perspective, the most fruitful reform strategy may involve the dismantling of current enforcement structures.”⁸⁸ Although it will be argued that these arguments and others should not drive the bar entirely from the field of UPL regulation, the raising of these considerations suggests that the states should take more active and serious steps to avoid infringing upon the protected interests of individuals.

A. The First Amendment and UPL Regulation

In a number of cases, various individuals and groups have sought first amendment protection from the application of unauthorized practice regulations.⁸⁹ Although it is not unheard of for such protection to be granted,⁹⁰ the first amendment may have greater application in UPL regulation where special interests in

87. *Id.* at 670-71.

88. See Rhode, *supra* note 2, at 60.

89. See, e.g., *Great Western Cities, Inc. v. Binstein*, 476 F. Supp. 827 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979) (organization of clients seeking to assert common legal rights through an association has first amendment protection to recommend use of attorney); *Hopper v. City of Madison*, 79 Wis. 2d 120, 133, 256 N.W.2d 139, 145 (1977) (legislative expenditure for services by tenants’ union providing legal information on tenants’ rights presumed constitutional as serving a valid public purpose, and does not constitute illegal practice of law where the first amendment protects “the right of persons to unite to assert their legal rights as effectively and economically as possible”). *But see McGiffert v. State ex rel. Stowe*, 366 So. 2d 680 (Ala. 1978) (no first amendment right to advertise for unauthorized legal services where to perform such legal services would be illegal act).

90. See, e.g., *Great Western Cities, Inc. v. Binstein*, 476 F. Supp. 827 (N.D. Ill. 1979); *Hopper v. City of Madison*, 79 Wis. 2d 120, 256 N.W.2d 139 (1977).

free political expression are involved. Without a showing of special interests, the courts may regard the communication accompanying unauthorized practice as entitled to no more than the limited protection available under the commercial speech doctrine. At worst, they will treat communication between nonlawyer-counselor and client as an illegal activity undeserving of any first amendment protection.⁹¹

In some limited respects, regulation of activities involved in unauthorized practice may be compared to regulation of attorney advertising. The validity of this analogy may be examined by considering the rules governing regulation of advertising. Regulation of lawyer advertising must conform to the restraints placed on it by the commercial speech doctrine of the first amendment.⁹²

According to the commercial speech doctrine, developed by the Supreme Court in the late 1970's, speech does not lose its constitutional protection merely because it is commercial, as opposed to political, in nature.⁹³ The Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* that the state must balance the governmental interests of restricting commercial speech with the consumer's interest in the free flow of economic information. Consumer decisions would be protected because "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."⁹⁴ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁹⁵ the Supreme Court established a four-part analysis to determine whether restrictions on commercial speech are justified. First, to come under the protection of the first amendment, commercial speech must concern lawful activity and must not be misleading. Second, a substantial governmental interest must be asserted. Third, the regulation must directly advance the governmental interest asserted. Finally, the regulation must be no more extensive than necessary to serve that interest.⁹⁶

As applied to UPL regulation, the first prong of the *Central*

91. See Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981), and L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2-12-7, 12-20 (1978) for a general discussion on first amendment analysis.

Currently, two separate standards of judicial review are applied to two different types of governmental regulation of expression. Strict scrutiny is generally applied to restrictions based on the content of the speech. A lower level of scrutiny is applied to other types of speech regulation deemed to be content-neutral. *Id.*

92. See generally *In re R.M.J.*, 455 U.S. 191 (1982); *Bates and O'Steen v. State Bar*, 433 U.S. 350 (1977).

93. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

94. *Id.* at 765.

95. 447 U.S. 557 (1980).

96. *Id.* at 566.

Hudson test permits government bans on "forms of communication more likely to deceive the public than to inform it,"⁹⁷ and on commercial speech related to illegal activity.⁹⁸ Thus, to the extent that unauthorized practice of law is an illegal activity, advertisements or communications encouraging participation in the activity could be validly regulated or even prohibited. In addition, commercial speech cases involving professional advertising often focus on whether the message is misleading to its audience.⁹⁹ Advertising of legal services performed by nonlawyers could be prohibited on the theory that it is inherently misleading to suggest that nonlawyers are permitted or otherwise competent to perform services restricted by law to lawyers.¹⁰⁰ As a further note, if a balancing test were adopted in the context of UPL speech, it would weigh the value of such speech to inform and assist the public against its potential to deceive or harm the public.¹⁰¹ It is indeed probable that the negative aspects of UPL would be found to outweigh the positive.

If UPL activity, like lawyer advertising, were determined to be a

97. *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16, *reh'g denied*, 441 U.S. 917 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978).

98. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

99. *See, e.g., In re R.M.J.*, 455 U.S. 191 (1982); *Bates and O'Steen v. State Bar*, 433 U.S. 350 (1977). This is so because claims of quality may be inherently misleading due to the consumer's lack of sophistication about legal services. *Bates*, 433 U.S. at 383-84. One commentator points out that the Court may have been influenced in this judgment by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976), which determines the deceptiveness of an ad by its effect on the ordinary consumer. Note, *Lawyer Advertising in Kansas: Expanding Marketing of Legal Services*, 21 WASHBURN L.J. 626, 634 (1982) (citing *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960)).

100. *See supra* notes 89-95 and accompanying text. However, the Supreme Court stated in *R.M.J.* that an absolute prohibition is justified only where a particular form of advertising is shown to have inherent likelihood to deceive or is shown by the record to have been in fact misleading. The state must meet a heavy burden in showing that a statement is inherently misleading. "Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." However, the Court did articulate that the state retained some authority to regulate even if the communication was not misleading if a substantial interest was asserted and interference with speech did not extend beyond the substantial interest. *In re R.M.J.*, 455 U.S. 191, 192 (1982).

101. *Cf. Note, Lawyer Advertising in Kansas: Expanding Marketing of Legal Services*, 21 WASHBURN L.J. 626, 637 (1982) (standard for deceptive or misleading lawyer advertising articulated as balancing test, weighing informational value of advertising against its potential for deception).

form of commercial speech, it would be subject to some degree of first amendment protection. Most notably, regulation of lay practice would have to meet the intermediate level of judicial scrutiny prescribed by the commercial speech doctrine: government activity would not only have to be justified by a substantial government interest, but would also have to observe certain types of limits. Under this intermediate level of scrutiny, the agency regulating the practice of law may have to bear the burden of showing there was a substantial likelihood of consumer harm before instituting potentially chilling activities of investigation or enforcement.¹⁰²

A distinction should be recognized between prohibitions on advertising or holding oneself out as qualified to provide legal services when one is not a lawyer (often specifically prohibited as part of a state's UPL regulations)¹⁰³ and prohibitions on unauthorized practice itself. The former are more directly analogous to prohibitions on lawyer advertising, as they address communications proposing a commercial transaction. The latter, in contrast, tend to confirm and develop the relationship in which legal advice or representation by a nonlawyer occurs. Although such relationships undoubtedly proceed through communication, they should be viewed as primarily private conduct not entitled to the special protections contemplated by the first amendment.

Professor Rhode criticizes the value of the distinction between speech and conduct in the context of UPL regulation because the

102. See *In re R.M.J.*, 455 U.S. 191 (1982). Cf. Rhode, *supra* note 2, at 50.

103. See, e.g., LA. REV. STAT. ANN. 37:213 (West 1974).

No natural person, who has not first been duly and regularly licensed and admitted to practice law by the Supreme Court of this state, no partnership except one formed for the practice of law and composed of such duly licensed persons, and no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 11 of Title 12 of the Revised Statutes, shall:

...
(3) Hold himself or itself out to the public as being entitled to practice law;

...
(5) Assume to be an attorney at law or counselor at law;
(6) Assume, use or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles, in such manner as to convey the impression that he is a practitioner of law; or

(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts or maintains an office of any kind for the practice of law."

... Awarded by Acts 1964 No. 357 § 1.

Massachusetts Gen. Law c. 221, 346A states: "No individual other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; . . ." Added St. 1935, c. 346, § 2." MASS. GEN. LAWS ANN. ch. 221, § 346A (West 1958).

distinction implies that speech receives greater protection than conduct.¹⁰⁴ She finds it paradoxical that actual cases have penalized lay persons for giving oral advice while permitting the conduct of assisting clients in processing forms.¹⁰⁵

As a practical matter, there seems to be a substantial difference from the regulator's point of view between the filling out of forms and the giving of spoken advice. Form-filling is essentially a ministerial act accompanied by little risk of communicating false or misleading information about the nature of an individual's rights or a court's procedure. However, spoken advice involves a more complex dialogue between the person rendering the service and the client. While spoken interaction may communicate a great deal more to the client than the ministerial form-filling, greater risk is involved as to the quality of advice and accuracy of information exchanged. For this reason, the regulator would be justified in more closely circumscribing, or even prohibiting, this type of potentially harmful activity.

Furthermore, it may be argued that the lay practitioner engages not in the expression, but in the conducting of business transactions. The first amendment does not clearly cover this activity. If this is the case, the lay practitioner should not be able to challenge UPL prohibitions except in special circumstances when his activity could be distinguished as expressive activity rather than purely self-interested, economically motivated services. For example, a practitioner who offered services to further a group's ideological or social cause, such as assisting tenants, battered

104. See Rhode, *supra* note 2, at 64-65. One line of Supreme Court cases has distinguished situations where only speech is involved from situations involving "speech plus" some other conduct. See *Cox v. Louisiana*, 379 U.S. 559, *reh'g denied*, 380 U.S. 926 (1965) (picketing of stores near a courthouse); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (upholding state ban on peaceful labor picketing). The distinction seems applicable in the context of the attorney-client relationship. See *United Mine Workers of Am., Dist. 12 v. Illinois Bar Ass'n*, 389 U.S. 217 (1967) (Harlan, J., dissenting) ("litigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression."). Generally, the "speech plus" principle teaches that the speech is subject to full first amendment protection while the conduct, being something other than speech, may be more highly regulated. The analytical validity of distinguishing between speech and conduct has been severely criticized by Professor Tribe, however, who points out that such a distinction "asks a question which is answerable only if one has already decided, on independent grounds, whether the act is protected by the first amendment." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 601 (1978).

105. See Rhode, *supra* note 2, at 64-65.

women, or immigrants, might be perceived to be involved in politically expressive conduct or associational activities falling under first amendment protections.¹⁰⁶

Some freedom of association may also be infringed upon by UPL prohibitions, but probably not to the extent supposed by Professor Rhode. She believes that state-sponsored regulatory mechanisms should be circumscribed by stringent constitutional limits, since prohibitions against the unauthorized practice of law attempt to restrict sensitive first amendment interests in freedom of expression and association, and the power of the state to seek an injunction against unauthorized practice may constitute an impermissible prior restraint on speech. Whether it is freedom of speech or freedom of association that is involved, however, must be determined.

Only rarely, if at all, would individual legal counseling or representation by nonlawyers seem to come under the definition of association implicit in the first amendment. Current doctrine on freedom of association recognizes only a narrowly construed right to join with others to pursue goals independently protected by the first amendment.¹⁰⁷ This contrasts with the more permissive concept that whatever a person may lawfully pursue as an individual he may also pursue with others.¹⁰⁸ While activities in pursuit of litigation have been recognized to involve freedom of association, an underlying fundamental right must be shown to exist to justify constitutional protection.¹⁰⁹

The associational interest might be analyzed from the point of view of two different holders—the client and the lawyer. In favoring assertions of clients' interests in obtaining counsel of their

106. Compare Young & Herbert, *Political Association Under the Burger Court: Fading Protection*, 15 U.C.D. L. REV. 53 (1981). Even if there might be a protected interest at stake, the level of judicial scrutiny required under the first amendment would have to be determined. Under strict scrutiny, state regulation could be upheld where it was in furtherance of clearly articulated, legitimate state interests. To the extent that the general purpose of UPL regulation is to protect the integrity of the individual's judgment in legal matters, it furthers such an interest. In order to avoid the risk of constitutional challenge, however, some states' rules, statutes, and interpretations of UPL policies might be redrafted in order to more explicitly assert such interests. The purpose of such state regulation of the practice of law would then clearly be not to prevent free expression, but to control a particular kind and quality of communication of advice involved in the formation of an attorney-client relationship. Regulation of this relationship would promote a client's ability to exercise intelligent choice in protecting his rights.

107. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-23, at 701 (1978).

108. *Id.* See Raggi, *An Independent Right to Freedom of Association*, 12 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 15 (1977).

109. See, e.g., *United Transp. Union v. State Bar*, 401 U.S. 576 (1971) (recognizing fundamental right of unions to engage in collective activity to obtain meaningful access to the courts); *NAACP v. Button*, 371 U.S. 415 (1963) (right to join together to advocate legal and political rights of minority group through litigation).

choice, the Supreme Court has sought to protect the interest of the group rather than the individual client.¹¹⁰ A lay counselor who renders specific legal advice directed at a particular individual's needs probably has little basis for claiming an associational right to counsel the client, especially where the lay counselor has no personal interest in political advocacy. Even less likely to succeed, however, would be a counselor's claim to a property interest in the counselor-client relationship. Analogous claims by lawyers that they have a right to render services have already fared ill with the Court. In *Leis v. Flynt*,¹¹¹ involving such a property-based due process claim, the Supreme Court held a lawyer's interest in obtaining admission *pro hac vice* to represent his client in an out-of-state case was not a property interest specially protected by the due process clause of the Constitution.

Traditional first amendment challenges against current forms of UPL regulation seem overstated. Even challenges brought under the commercial speech doctrine may be held inapplicable or limited in their application. Unless a specific first amendment interest such as political expression or group access to the courts is involved in a particular case, substantive first amendment issues are probably of minor concern to UPL regulators.

B. Due Process Concerns

In contrast to first amendment concerns, procedural due process challenges may pose greater threats to some UPL regulatory agencies. One potential challenge is that the vagueness of the prohibition deprives the defendant of his right to fair notice and adequate warning.¹¹² Statutory vagueness may be challenged both as a denial of procedural due process¹¹³ and as an abridgment of substantive first amendment rights.¹¹⁴ In contrast to a vague statute directed against conduct, one directed against speech creates the additional danger of not only depriving the in-

110. See *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

111. 439 U.S. 438 (1979).

112. See Rhode, *supra* note 2, at 49-51.

113. See *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (reversing conviction under a statute making it a penal offense to be a "gangster").

114. See *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (invalidating vague language of state loyalty oath for teachers).

dividual of adequate notice that an activity is prohibited, but of chilling all speech that could conceivably be covered by it. Therefore, the Court has demanded greater specificity when first amendment interests are implicated.¹¹⁵ Under the vagueness doctrine, a prohibition on speech will thus be held void when it is not clearly worded.¹¹⁶ The offense must be defined with sufficient definiteness such that ordinary people can understand what conduct is prohibited, and worded in a manner that does not encourage arbitrary and discriminatory enforcement.¹¹⁷

However, a vagueness challenge may have limited chances for success. A statute or court rule will not be struck down simply because it contains vague language. A federal court will generally evaluate a facial challenge to a statute in light of “any limiting construction that a state court or enforcement agency has proffered.”¹¹⁸ The courts generally search for minimal guidelines established by the legislature to govern law enforcement.¹¹⁹ These minimal guidelines are present in states where courts have interpreted statutory definitions through case law. In addition, to the extent that first amendment or other fundamental rights are absent in the purely business-like behavior of rendering law-related services, the court’s scrutiny may be even less strict.¹²⁰

Special needs in the regulation of the practice of law and in the administration of justice may also justify imposing lesser constitutional restraints on the regulation of those licensed to render legal services than on the regulation of the general public.¹²¹ Arguably, the same policy would apply to nonlawyers rendering legal services. Another more practical limitation on the use of a vagueness challenge may be that standing to raise it is restricted to those who actually lack fair warning, and is not available to one whose own “conduct falls squarely within the ‘hard core’ of the statute’s proscriptions.”¹²² The Supreme Court has also indicated that the related overbreadth doctrine is not available as a chal-

115. See *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109-10 (1972).

116. See *Smith*, 415 U.S. at 572-73; *Grayned*, 408 U.S. at 108-09.

117. *Kolender v. Lawson*, 103 S. Ct. 1855, 1858 (1983); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 503 (1982).

118. *Hoffman Estates*, 455 U.S. at 494.

119. See *Kolender*, 103 S. Ct. at 1858 (citing *Smith*, 415 U.S. at 574).

120. Cf. *Kolender*, 103 S. Ct. at 1858.

121. See *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982) (review of state disciplinary standard restricting counsel’s extrajudicial speech in criminal trial requires balancing defendant’s constitutional interest in a fair criminal trial against counsel’s first amendment interest in commenting to the press); cf. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

122. See *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

lenge to restrictions on commercial speech.¹²³ It is arguable that the vagueness doctrine would also be limited in its application in the context of commercial speech. In *Village of Hoffman Estates v. Flipside*, the Court recognized that where economic behavior not involving free speech or associational interests is affected by a regulation, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow."¹²⁴

C. Conflict of Interest

The dangers of conflict of interest may be an overestimated danger to most UPL enforcement entities. According to Professor Rhode, Supreme Court due process cases on self-regulation of professions imply that pecuniary interests of "the bar as a whole should disqualify the organized bar from any type of involvement in UPL enforcement."¹²⁵ A close comparison of the relevant cases, however, suggests that the federal courts would not closely scrutinize the structure of UPL committees unless a conflict of interest of an extraordinary nature was revealed by the committees' makeup. While the early case of *Gibson v. Berryhill*¹²⁶ applied due process theory to the procedures of professional licensing boards, the Supreme Court subsequently indicated in *Friedman*

123. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978); *Bates and O'Steen v. State Bar*, 433 U.S. 350, 379-81, *reh'g denied*, 434 U.S. 881 (1977). Under the overbreadth doctrine an individual would be permitted to attack a statute on first amendment grounds whether or not the person has engaged in constitutionally protected activity. See Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). But commercial speech is more immune to being chilled because of the strong profit motive behind it, and thus has been considered less deserving of this special first amendment protection.

Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach. Even if the commercial speaker could mount an overbreadth attack, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Ohralik, 436 U.S. at 462 n.20 (quoting *Broadrick*, 413 U.S. at 615). See Comment, *Commercial Speech: Foreclosing on the Overbreadth Doctrine*, 30 U. FLA. L. REV. 479 (1978) (restrictions on commercial speech not voidable for overbreadth).

124. *Hoffman Estates*, 455 U.S. at 498; see *Kolender*, 103 S. Ct. at 1859 n.8. It has also been suggested that the doctrine forbidding prior restraints on speech is not applicable to commercial speech. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24; Westen, *The First Amendment: Barrier or Impetus to FTC Advertising Remedies?*, 46 BROOKLYN L. REV. 487, 498-500 (1980).

125. See Rhode, *supra* note 2, at 63.

126. 411 U.S. 564 (1973).

*v. Rogers*¹²⁷ that the potential pecuniary self-interest of a profession would not automatically be imputed to its individual members absent some factual basis for doing so.¹²⁸

The lesson UPL regulators should draw from *Friedman* is to structure their internal procedures so as to recognize and forestall potential conflicts. The "broad limits" of the due process clause could be met by a variety of measures such as establishing a legislative record showing a valid need to use this means to protect the public interest, providing written procedures for the enforcement process, and including a written conflict-of-interest provision disqualifying lawyers from involvement in the process where they have a substantial conflict of interest as defined by current law.¹²⁹

One important reform that could help to reduce the potential for conflict of interest in UPL committees is the presence of lay or public members. Lay members on a committee can alter its inter-

127. 440 U.S. 1 (1979).

128. *Id. Friedman* upheld the statutory structure of a state optometry board against a number of substantive and procedural due process challenges as well as equal protection claims. The Supreme Court in *Friedman* distinguished between substantive and procedural due process claims, holding that, although the state was not required as a matter of substantive due process to place a representative of consumer interests on the board, procedural due process required it to provide a fair and impartial hearing in any disciplinary proceeding conducted by the board. *Id.* at 18. The Court remarked in a footnote that "[t]he Due Process Clause imposes only broad limits, not exceeded here, on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions." *Id.* at 18 n.19. The *Friedman* Court also drew back from a more expansive approach taken six years earlier in *Gibson v. Berryhill*, 411 U.S. 564 (1973), by refusing to assume the existence of a due process violation where the facts did not specifically point to it.

129. Many of Professor Rhode's other criticisms of the potential for reform respond to the limited experience of a single jurisdiction, Virginia, and thus may be one-sided. The State Bar of Virginia, having been forced by an antitrust suit to restructure its procedures for issuing advisory opinions, see *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978), set up an enforcement process involving the UPL Committee of the Virginia State Bar, the Supreme Court, the Bar Counsel, and the Attorney General at different levels. The system routes complaints first through the Attorney General to the Bar Counsel for investigation and informal disposition where appropriate, then back to the Attorney General for enforcement, or on to the Committee for an advisory opinion. Referring at least in part to the specific characteristics of UPL enforcement in Virginia, Professor Rhode claims, first, that a bar counsel in charge of enforcement is likely to resolve UPL complaints in favor of informal disposition, especially where all other decision-making bodies involved in the process are staffed by lawyers. See Rhode, *supra* note 2, at 58. She also argues that a lay member's voice on a UPL committee might be limited. Since their abilities would vary they would tend to be nominated by regulated groups and thus favor professional interests, being unlikely to exhibit pro-consumer attitudes. Finally, she suggests that lay persons could be "captured" by the regulatory agency or be outvoted as a minority. See *id.* at 58-59. However, the latter seems to be a risk to consider rather than a reason for rejecting such a reform.

nal process by encouraging other members to better articulate their arguments and to take into account lay views and concerns in order to avoid controversy or disagreement with the lay members.¹³⁰ The ability of nonlawyer members to monitor and challenge internal committee dynamics could be as effective in preventing group tendencies toward overenforcement as other externally imposed systems for political accountability.¹³¹

Rules requiring laypersons on UPL committees could be worded to express a specific commitment toward increasing consumer advocacy. Experience may show that laypersons seeking access to these committees tend to be highly motivated and effective in making their concerns felt. The possibility of agency capture could also be minimized by having both nonlawyers and lawyers appointed directly by the state supreme court or some other impartial agency, rather than by the bar association.

Though individual reforms in isolation might have little power to effect the inertia of a pre-existing system, a comprehensive set of rational reforms that addresses the many pressures at work within the system may well have an opportunity to succeed. Further evaluation of actual enforcement experiences is clearly in order before concluding that such reforms lack all potential for effectiveness. Nevertheless, criticisms of current shortcomings in UPL enforcement agencies should be heeded, if only to avoid

130. See Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974 U. ILL. L.F. 193, 199, 234.

131. A number of states now require lay members on their UPL committees, including Florida, FLA. BAR RULES art. XVI, part II (a)(1) (1978) as amended by S. Ct. order No. 59, 126 (Jan. 29, 1981); N.J. SUP. CT. R. 1:22-1(a) (as amended July 16, 1981); New Mexico (as reported in 1982 *Survey of Unauthorized Practice of Law Enforcement Agencies* conducted by the ABA Standing Committee on Unauthorized Practice of the Law and the ABA Center for Professional Responsibility (on file, ABA Center for Professional Responsibility Brief Bank)); Texas, *Rules for the Establishment and Operations of the Subcommittee of the Unauthorized Practice of Law Committee of the State Bar of Texas*, part II (c) (1981) (adopted pursuant to TEX. REV. CIV. STAT. ANN. art. 320a-1, § 8 (Vernon 1979) and section 3 of the Rules of the Supreme Court of Texas adopted on Nov. 17, 1980) (on file, ABA Center for Professional Responsibility).

The value of public involvement in state regulatory structures for the legal profession was recently acknowledged by the American Bar Association in its ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 3.4 (1979). The Commentary to Standard 3.4 remarks, "A combination of lawyers and non-lawyers on the [disciplinary] board results in a more balanced evaluation of complaints in the full context of the lawyer-client relationship." The Commentary observed that as of February, 1979, more than one-third of the states had structures with public members. By June, 1983, the number of states increased to 36. (Information on file, ABA Center for Professional Responsibility Discipline Department.)

costly constitutional challenges in the courts. Bar associations involved in UPL enforcement should thus reexamine their procedures to identify constitutional vulnerabilities as well as to clarify their aims concerning UPL regulation.

D. Controlling Overregulation or Underregulation of the Unauthorized Practice of Law

Officials involved in unauthorized practice enforcement must, as administrators of public policy, develop goals and procedures for reaching reasonable, fair, and efficient decisions. While prosecutorial discretion is available for obtaining these results, such discretion should be protected from abuse and structural biases. Enforcement powers should be channeled properly by locating sources of discretion and curtailing their abuse.

UPL regulation may be considered as a system with input at various levels which affects the overenforcement or underenforcement of unauthorized practice prohibitions. Assuming that some regulatory presence benefits the public, the question is how to restructure the regulatory system to insure a balanced sensitivity to public interests.¹³²

In some jurisdictions, UPL norms may tend to inhibit legitimate activity by asserting too broad and too vague an ambit. In others, officials may too actively wield the threat of prosecution, resulting in overdeterrence. Inconsistent enforcement procedures may also result in confused applications of policy. Ideally, definitions of prohibited conduct should closely relate to what people actually do, while enforcement policy should be consistent and publicly known, so that people expect a high likelihood of sanctions for engaging in prohibited acts. Furthermore, continuing oversight should be exercised to curb unnecessary prosecutorial discretion at all possible points within the system. Continuing pressures invite discretion which is likely to reappear elsewhere within the system rather than disappear altogether.

One means of reducing excessive prosecutorial discretion and variation in degrees of enforcement effort might be by establishing a standard and possibly more restrictive definition of unauthorized practice. Furthermore, redefining UPL and its exceptions by means of a court rule or statute may increase the

132. In principle, regulation of unauthorized practice serves the public interest. However, some commentators suggest that there is currently a serious problem of either overregulation or overdeterrence of unauthorized practice. *See, e.g.,* Rhode, *supra* note 2, at 3. Although bar committees may have been historically responsible for a degree of overzealous prosecution of UPL matters, *see generally* Christensen, *supra* note 2, at 159, the organized bar today may be more responsive to a consumer concerns while desiring less risk of antitrust and constitutional liability.

burden of proof upon the enforcing individual by requiring stronger evidence before a remedy is granted. A governing body could establish policies or enforcement guidelines and issue advisory opinions with the intent and effect of reducing the number of practices to be considered unauthorized. These two suggestions would reduce the instances in which actions might be brought by increasing the procedural burden on the prosecutor for making a prima facie case and reducing the classes of activities against which an enforcement action may be brought.

The process of UPL regulation has two levels of discretion. The first occurs during investigation where information is collected in a preliminary screening of complaints, and decisions are made to either pursue warranted claims or reject unsupported or misdirected claims. The second level involves an actual determination of probable cause where considerably more discretion may be applied. It is uncertain whether these decisions are best made by a committee of volunteer lawyers. It might be preferable to modify this common practice by establishing committees comprised of experienced lawyers and lay persons. Such committees, seasoned with the practical judgment and different viewpoints of both groups, might contribute expertise and efficiency to the enforcement process at an informal screening level. However, permanent and paid counsel may be more likely to develop expertise than are volunteers. In addition, there may be greater efficiency in allowing a single individual to perform these functions than in giving some or all decision-making powers to a volunteer group.

It seems reasonable to expect an early articulation of actual harm to the individual client or imminent harm to the public or the system of administration of justice as a means of conserving scarce prosecutorial resources in UPL actions. It has been pointed out that the requirement of proof of actual harm is more reasonable where particular services have a history of operation without public complaint.¹³³ In contrast, where a program is newly established and closely resembles other programs shown to have produced actual harm, prohibition would seem reasonable based on the likelihood rather than the actuality of harm.¹³⁴

In addition, the seriousness of public harm may be a valid con-

133. See Christensen, *Regulating Group Legal Services: Who is Being Protected—Against What and Why?*, 11 ARIZ. L. REV. 229, 243 (1969).

134. *Id.*

sideration in the exercise of prosecutorial discretion. In California, this factor has been utilized as a method of strict control over prosecutorial discretion during the last several years. According to the former UPL director of the State Bar of California, to whom all UPL complaints in the state were then referred, no complaint was acted on unless a clear showing of public harm could be made.¹³⁵ Enforcement in California has apparently been directed against fraudulent or reckless activities where harm either had actually occurred or could be shown to have a strong likelihood of occurring. However, a voluntary, self-imposed public harm standard would only be effective as long as it reflected the outlook of the prosecutor. In those jurisdictions where the judiciary claims the inherent power to regulate the practice of law, this standard may have to be implemented through a policy statement, advisory opinion procedure, or case law. However, in other jurisdictions, it could be instituted by the legislature. Another alternative is for the enforcement agency itself to pass an administrative resolution.¹³⁶

Critics have also asserted that, as a matter of policy, UPL enforcement should be greatly restricted because there is little evidence of public harm to justify the belief that UPL enforcement protects consumer interests.¹³⁷ Professor Rhode, for example, reports that none of the cases she reviewed which involved lay real estate services, lay divorce services, or discussed evidence of customer injury found abuses relating to confidentiality, conflict of interest, or lawyer integrity.¹³⁸ However, it would be fallacious to conclude that because the cases do not show findings of public harm that in fact it never occurs nor is imminent. Those cases involving the most obvious types of harm to the consumer are probably the least likely to go to trial or be appealed. Furthermore, to the extent that the courts may presume the existence of harm without requiring actual proof, the parties may have no incentive to litigate this issue.

Professor Rhode's empirical research on "consumer injury" is confusing and inconclusive. Her survey asked UPL enforcement officials if they had received complaints from customers, and if so,

135. Conversation with Robert Burkett, former Unauthorized Practice Director, State Bar of California (July, 1982).

136. See, e.g., Policy Statement of Robert Burkett, former Unauthorized Practice Director of the California State Bar (1978) (on file, ABA Center for Professional Responsibility Brief Bank).

137. See Rhode, *supra* note 2, at 91-92. See generally Christensen, *supra* note 2, at 201.

138. See Rhode, *supra* note 2, at 91. In addition, interviewed UPL committee chairpersons did not cite confidentiality as a concern related to consumer harm. *Id.*

to describe evidence of specific consumer injury. She emphasizes that "only 39% . . . of respondents reported any direct consumer complaints in 1979, and only 21% . . . indicated that any of these cases had involved specific injury."¹³⁹ Of course, evidence of specific customer injury may well have been present in complaints initiated by judges, opposing lawyers, or lawyers subsequently representing these consumers. However, the total proportion of consumer injury cannot be tested since no follow-up questions regarding evidence involved in nonconsumer complaints were asked. In addition, in relying on consumer complaints as an indicator of the amount of actual harm to consumers, she may have ignored the likelihood that actual injuries are underreported. Complainants must perceive that they have not only been harmed but harmed significantly enough to pursue their grievance.

One may forfeit a right or opportunity without knowing it exists. An example is the hiring of a law insurance adjuster who negotiates a settlement to the client's satisfaction, but actually obtains less for the client because he has less bargaining power than a lawyer who could threaten to litigate. Complainants also will not act unless they believe there is a remedy. Those who avoid lawyers in the first place, either out of distrust, ignorance, or lack of funds, may similarly lack confidence to go to lawyers or bar associations in order to seek a UPL remedy. In addition, public awareness mechanisms to protect against UPL may be very limited. Enforcement officials are more likely to receive complaints from those who know there is a forum for complaints and know how to reach it. Finally, some injuries may not be reported because the victims fear they will incur a penalty for doing so. A common example is that of Hispanic victims with questionable immigration status who are frequently deterred from reporting instances in which they have been defrauded by unlicensed Spanish-speaking practitioners, due to fear that publicity will harm them further.¹⁴⁰

Procedural mechanisms for constraining inappropriate prosecutorial discretion in UPL overenforcement or underenforcement should also be considered. A number of possible factors

139. Rhode, *supra* note 2, at 33.

140. The California Government Code specifically requires notaries public who are not attorneys and who use another language to use signs indicating their exact status and statutory fees and prohibits use of the misleading translation "notario publico." CAL. GOV'T CODE § 8219.5 (West 1976).

may account for the tendencies of some UPL committees toward overenforcement. For example, if participation on the committee is open to all, some committee members may join specifically out of concern about excessive competition that may affect their own income. Solo practitioners, for example, may feel particularly threatened by many forms of external competition and thus be drawn toward participating in a UPL committee in order to protect their interests. Another factor may be that members choose to serve simply to provide a social service. Further, committee participants may lack sufficient information on the changes in antitrust policy or constitutional law which now discourages excessive enforcement activity by bar UPL committees. Alternatively, though they may be aware of external social changes in relation to the legal profession's UPL role, they may be uncertain of how to incorporate these changes into the traditional structure of the committee's activities.

The following approaches might help minimize the potential for anticompetitive bias of some unauthorized practice enforcement committees. The first is to change committee structure and composition. For example, lay persons could be appointed to counteract any pro-professional bias. The power of appointment might also be transferred from the bar association president or governing board to the state supreme court, thereby creating a more official power of enforcement as well as firmly imposing a requirement of constitutional safeguards upon the procedure used. Recently, some state supreme courts have set up their own committees to handle the responsibility of UPL enforcement, more or less advising the bar associations to withdraw from any active role in this area. Secondly, the costs and benefits of dividing functions between an investigatory committee and an official prosecutor should be analyzed. There is a concern, for example, that immunities for constitutional torts may be dangerously narrow for committees involved only in investigation, though not in later stages of UPL enforcement. Paid investigators and prosecutors may also be more efficient than volunteer committee members.

Underenforcement may also be a problem in some jurisdictions. Since not all bar committees may have or wish to risk using the power to initiate UPL proceedings, the entire burden of investigating and bringing enforcement actions against UPL violators may fall upon the attorney general or district attorney in some states. Among their myriad responsibilities, UPL enforcement may take lower priority than more visible or newsworthy prosecutorial activities. In addition, public prosecutors may be

averse to negative publicity accompanying prosecutions perceived as only benefitting other lawyers.

The ideal enforcement structure may be one that combines the resources commonly found in bar association UPL committees with certain powers and privileges of state enforcement agencies, such as the use of subpoenas and prosecutorial immunity.¹⁴¹ In some jurisdictions, an adequate working relationship may exist within which power and discretion are shared between the bar and public enforcement agencies. However, where imbalances exist toward overenforcement or underenforcement, a unified agency with enforcement powers subject to appropriate controls may be the best solution.

E. Potential Antitrust Problems in Current UPL Enforcement Structures

UPL regulation raises serious concerns when examined under current antitrust doctrine. While bar associations involved in UPL enforcement may take certain precautions to reduce the risks, the potential for antitrust problems may be sufficiently great to suggest that alternative mechanisms for dealing with UPL problems should be investigated.

A very real possibility exists that state or bar involvement in present UPL regulation could be interpreted as an undue restraint on trade in violation of the Sherman Antitrust Act.¹⁴² Three common purposes of UPL committees include: providing input in the drafting and interpretation of court rules and statutes to avoid or resolve unauthorized practice issues; issuing advisory opinions to the public on whether actual or proposed activities constitute unauthorized practice of law; and assisting in or actually performing the function of investigation and enforcement of the law in regard to unauthorized practice violations. In the past,

141. UPL committees involved only in investigatory activities may be entitled to no more than a qualified immunity. *See Butz v. Economou*, 438 U.S. 478 (1978); *Simons v. Bellinger*, 643 F.2d 774, 800-04 (D.C. Cir. 1980) (Wilkey, J., dissenting).

142. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." The Sherman Act carries criminal penalties of fines and imprisonment for committing a felony, 15 U.S.C. §§ 1, 2, 7 (1982), and may be enforced in a private cause of action for treble damages by any injured person. 15 U.S.C. § 15(a) (1982). *See Surety Title Ins. Agency*, 431 F. Supp. at 298. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975).

many bar associations established UPL committees to perform all or some of these functions. A bar committee that is the policy arm of a private voluntary association may encounter antitrust problems. As evidence of this, the case of *Surety Title Insurance Agency v. Virginia State Bar*¹⁴³ suggested that at least one of these functions, the issuing of advisory opinions on unauthorized practice, might subject a bar association to antitrust liability for creating undue restraint of trade under the Sherman Antitrust Act.¹⁴⁴ The remaining functions of UPL committees might also create antitrust liability.

Under the Sherman Act, which forbids unreasonable restraints on trade, two forms of analysis have developed for determining whether liability exists.¹⁴⁵ "Unreasonableness" can be based on either (1) the nature or character of the contracts, or (2) the surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of the impact on competitive conditions. Thus, there are two complementary categories of antitrust analysis. First, agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality are illegal per se. Second, agreements whose competitive effect are not so obvious can only be evaluated by analyzing the facts peculiar to the business, the history of restraint, and the reasons why the restraint was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint. It is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry.¹⁴⁶ The stricter per se test has yet to be applied to UPL restrictions, though future application is a distinct possibility. Under the per se approach, if UPL restrictions could be shown to fall into certain economic categories, there would be little opportunity for rebuttal. On the

143. 431 F. Supp. 298 (E.D. Va. 1978). To the extent it is an arm of the state, it may face potential constitutional difficulties as well, of the kind discussed previously.

144. *See id.*

145. Not all restraints on trade will be held illegal. Only those that unreasonably restrain competition are prohibited. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-62 (1911). In order to determine whether a restraint on trade is unreasonable, the court must examine the facts in the light of the public policy the Sherman Act was intended to serve. *Id.*

146. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690-92 (1978) (citations omitted). *See Little & Rush, Resolving the Conflict Between Professional Ethics Opinions and Antitrust Laws*, 15 GA. L. REV. 341, 346-57 (1981). *See generally* J. VAN CISE & W. LIFLAND, *UNDERSTANDING THE ANTITRUST LAWS* (8th ed. 1980).

other hand, if the "rule of reason" test is applied, the court will be required to make a detailed factual analysis and carefully balance whether, in light of various social policies and concerns of the state, the restraint on trade should be deemed unreasonable and hence prohibited.

Though some state and local bar UPL activities can probably be defended under the "rule of reason" analysis, the threat of exposure to antitrust litigation is costly. A less costly solution would be to deemphasize the role of bar associations in regulating UPL and to put regulatory authority in the hands of the state in a manner that obtains protection under state action immunity.¹⁴⁷

One solution to the uncertainty created by the antitrust laws is to obtain state action immunity for those functions of UPL committees which raise the greatest risks.¹⁴⁸ A second solution is to limit the activities of UPL committees. For example, the committee might adopt a policy of refusing to offer advisory opinions to lawyers and the general public, while reserving the discretion to advise enforcement officials at their request. It might also continue to play a role in the state's overall UPL enforcement structure if it were assured of protection by the *Noerr-Pennington* first amendment doctrine.¹⁴⁹ Whether the above-mentioned courses of

147. See *California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc.*, 445 U.S. 97 (1980); *Parker v. Brown*, 317 U.S. 341 (1943). See also *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984).

148. The American Bar Association adopted Model Rules for Advisory Opinions on the Unauthorized Practice of Law following this approach in January of 1984. See Reports and Recommendations to the ABA House of Delegates, January, 1984 (Report and Recommendation of the Standing Comm. on the Unauthorized Practice of Law). The Model Rules advocate that the state supreme court take full responsibility for the appointment process and include lay persons on the committee rendering opinions, in addition to providing other constitutional safeguards for participants in the process.

149. See *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freights, Inc.*, 365 U.S. 127 (1961). The above line of cases establishes the first amendment right of business entities to combine and lobby administrative bodies, legislatures, and courts without violating the antitrust laws. However, the most recent of these cases, *California Motor Transport*, limited this immunity from the Sherman Act to exclude "sham" involvement in such processes which amounted to attempts to interfere directly with the business relationships of a competitor. 404 U.S. at 511. *California Motor Transport* also distinguished legislative lobbying as entitled to greater protection than unethical conduct in the adjudicatory and judicial context. *Id.* at 513. See Note, *The Limitations of the Noerr-Pennington Doctrine as a Defense for Political Activity in Restraint of Trade*, 12 LOY. U. CHI. L.J. 773, 784 n.64 (1981); Robinson, *Reconciling Antitrust and the First Amendment*, 48 ANTITRUST L.J. 1335, 1343-44 (1979).

action are or can be made available should be carefully examined, since certain investigative and enforcement activities may be particularly risky. For example, investigations which do not result in the filing of a complaint may have a chilling effect on legitimate competition.¹⁵⁰

The availability of state action immunity from antitrust liability for local bar association UPL committees depends on whether the test of *California Retail Liquor Dealers Association v. MidCal Aluminum*¹⁵¹ and *Community Communications Co. v. City of Boulder* is met.¹⁵² *Midcal* created a two-pronged test requiring that restraint on trade must first be “clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.”¹⁵³ Subsequently, the test was further explained by the Court in *Community Communications* when it held that the first prong of the test requires more than “mere neutrality” on the part of the state when it creates a potential restraint on trade.¹⁵⁴

Community Communications highlights the possibility of anti-trust liability when UPL enforcement committees of different bar associations within a single state develop mutually inconsistent policies of UPL investigation and enforcement. If the actual power to act has been clearly delegated by the state, however, it may be enough to obtain state action immunity from antitrust liability for the anticompetitive effects of committee actions. A centralized reviewing system, in which policy for investigating or referring cases for prosecution is made uniform throughout the state, should satisfy the requirement that the state actually contemplate the specific anticompetitive actions which might other-

150. A “rule of reason” analysis applied to UPL investigations by bar association UPL committees might take into consideration, among other factors, whether such investigations are taken in good faith. Bar associations may even be held vicariously liable for unauthorized activities by Committee members which result in anticompetitive effects. *Cf. American Soc’y of Mechanical Eng’rs v. Hydrolevel Corp.*, 102 S. Ct. 1935, *reh’g denied*, 102 S. Ct. 3502 (1982).

151. 445 U.S. 97 (1980). *MidCal* developed the earlier doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

152. 455 U.S. 40 (1982).

153. 445 U.S. at 105.

154. The *Community Communications* Court rejected the argument that the requirement of “clear articulation and affirmative expression” was fulfilled by the state constitution’s guarantee of local autonomy to a municipality through a home rule provision, since the state’s position was “one of mere neutrality respecting the municipal actions challenged as anticompetitive.” 455 U.S. at 55. The Court suggested either that the state must “[contemplate] the specific anticompetitive actions for which the municipal liability is sought,” or that there be an “affirmative addressing of the subject by the State.” *Id.* These expressions suggest that immunity requires a coherent state policy for the immunity to attach, which at the minimum might involve some “interaction of state and local regulation.” *Id.*

wise be challenged.¹⁵⁵ Finally, *Community Communications* seems to approve of some interrelation between state and local rules, with the implication that the rules or procedures governing actions at a local level should be consistent with those governing at the state level. This interpretation would seem to permit a finding of state action immunity where a UPL enforcement agency is an entity of an integrated state bar, since the actor would be presumed to be a governmental entity.¹⁵⁶

A related question is whether a UPL committee, especially one closely tied to the state bar through both budgeting and appointments, could subject the bar association to antitrust liability through its activities. The risk of vicarious antitrust liability is probably most serious in the context of UPL activities by a voluntary bar which is probably unable to claim state action immunity. The committee and the bar association may be bound by the acts of its members which result in serious anticompetitive effects. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,¹⁵⁷ the Supreme Court held a voluntary professional association vicariously liable for the acts of a committee member, even though his acts were intentionally fraudulent and unauthorized. It found that his opinion interpreting the association's standards had an adverse impact on the market. In light of this decision, UPL committees which routinely issue either formal opinions or informal advice should implement written procedures limiting their purpose and power, and identifying personnel authorized to speak for the organization.

V. ACCESS TO LEGAL COUNSEL AND REPRESENTATION

Certain evolving developments in the practice of law where concerns exist about unauthorized practice policy are of particular interest today and need to be examined more closely. They are private infusion of capital into the delivery of legal services, self-help legal assistance, standards for lay admission to practice

155. See, e.g., IDAHO S. CT. R. 175-177 (1981). Several states have attempted to restructure their systems for issuing UPL advisory opinions to insure state action immunity for all participants. The state supreme court usually reviews all opinions and promulgates them as court rules. In addition, a centralized board could be established to review the conclusions of any localized investigations which result in recommendations to seek further legal action.

156. See *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384, 385 (7th Cir. 1983).

157. 456 U.S. 556 (1982).

before administrative agencies, and regulation of the interstate practice of law. The issues raised by these practices have not been dealt with in a uniform manner. In addressing these issues, special attention must be paid to the balance between consumers' interests in access to legal services and in protection in such services. A policy of stringent enforcement of unauthorized practice prohibitions in these areas is undesirable from the points of view of both the public and the profession. It is more appropriate for UPL regulators to identify and address the public interests involved here and to acknowledge changes in the structure of current public demand for legal services. Upon close inspection, many of the developments in the evolution of unauthorized practices can be attributed to market responses to a still largely unmet demand for legal services.

A. Private Infusion of Capital and Alternative Mechanisms for the Delivery of Legal Services

In recent decades, group legal services have developed in a variety of forms to meet the latent demand for legal services among people with low to moderate incomes. One offshoot of this development, private capital investment in more efficient mechanisms to deliver legal services, may prove to be a successful means of meeting the demand for assistance with legal problems. Private infusion of capital might help to improve the low success rate of legal clinics.¹⁵⁸ The strongest justification for allowing some form of lay controlled for-profit agency delivery is that lay businesspeople provide better law office management. This will reduce the price of lawyers' services and increase access to legal services by middle-income groups. Yet, the availability of this type of solution may be delayed if not ultimately denied by the confusion of competing ethical and economic interests in mechanisms of lay ownership or management.

The presence of lay corporate intermediaries and the division of fees with lay persons have traditionally triggered unauthorized

158. A national survey of legal clinics conducted by the American Bar Association Special Committee on Delivery of Legal Services in 1980 concluded that the term "legal clinic" covered a diverse set of law offices, which typically advertised services and provided one or more specific routine legal services at a specified fee. ABA Special Comm. on the Delivery of Legal Services, *Legal Clinics: Merely Advertising Law Firms?* 8 (1982). The study cited undercapitalization and mismanagement as two chief problems of the clinics studied. *Id.* Forty-eight percent of clinics opened with less than \$5,000 and 62% with less than \$10,000 in initial financing. *Id.* at 19. Owners' funds or personal loans provided most clinics' start-up funds. *Id.* at 42. Fifty percent of the clinics studied described their financial status as only "poor to good." *Id.* at 31.

practice concerns.¹⁵⁹ Under traditional UPL analysis, nonlawyers may not hold a financial interest or exercise managerial authority in an organization involved in the delivery of legal services, regardless of their actual involvement in lawyers' activities. Such lay intermediary arrangements are effectively restricted by the ABA Model Rules of Professional Conduct¹⁶⁰ and the ABA Model Code of Professional Responsibility¹⁶¹ as well as by similar codes adopted by most states.¹⁶² Several courts have forbidden lay ownership or intermediary arrangements in recent years on the assumption that the public would be harmed by the profit motive of lay participants.¹⁶³

Nevertheless, in one case where the profit motive of lay ownership was absent, a court found a nonprofit corporation serving lower-income people to be in the public interest and thus took the creative approach of formulating rules to minimize the risk of harm to laymen.¹⁶⁴ The court held that a nonprofit corporation with lawyer and lay directors does not engage in the unauthorized practice of law where the participation of nonlawyers is limited to formulation of broad policies. The court noted that the corporation was not subject to discipline by the courts. Possible dangers were said to include corporate interference with the lawyer's professional independence and the lawyer-client relation-

159. See Christensen, *supra* note 2, at 198-99. See generally *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen*, 377 U.S. at 1; *NAACP v. Button*, 371 U.S. 415 (1963).

160. See Rule 5.4, ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983).

161. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1980) (permitting lawyers to work in certain group legal services plans); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (1980) (prohibiting the dividing of legal fees with a non-lawyer); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103 (1980) (prohibiting the formation of a partnership with a non-lawyer); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C) (1980) (prohibiting the practice of law in a corporation or organization formed to earn a profit).

162. See, e.g., OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(6).

163. See, e.g., *Carter v. Berberian*, 434 A.2d 255 (R.I. 1981) (lawyer may not form nonbusiness corporation which charges clients for legal services when he could have formed professional-services corporation subject to regulation by the courts); *Florida Bar v. Consolidated Business and Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980) (corporation may not, as its sole business, supply legal services where non-lawyer officers control attorney-employees; court used six factors to find an inherent danger of lay control); *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 52 Ohio Misc. 105 (1975) (for-profit corporation with lawyer and nonlawyer officers which, as its sole source of profit, organized legal service plan subject to injunction; no first amendment protection for solicitation of clients where organization participation incidental to other, primary purposes).

164. *In re Educ. Law Center, Inc.*, 86 N.J. 124, 429 A.2d 1051 (1981).

ship, but public policy considerations were balanced against the likelihood of these dangers occurring.¹⁶⁵

Although the cases show a general mistrust of private infusion mechanisms, many leaders of the legal profession continue to promote a search for effective ways to control financial innovations without resorting to outright prohibition. An experimental and permissive approach to private infusion was recently suggested in the draft version of Rule 5.4 of the ABA Proposed Model Rules of Professional Conduct, originally favored by the ABA Commission on Evaluation of Professional Standards.¹⁶⁶ This rule, which was rejected by the ABA House of Delegates in February of 1982, would have expressly condoned the practice of law through a system in which there is outside ownership or management services by nonlawyers through some sort of profit sharing arrangement.¹⁶⁷ Although the immediate future of private infusion remains uncertain in view of the absence of national sponsorship through the ABA Model Rules, the issues will continue to appear and therefore justify examination from a number of points of view. Since a major concern of unauthorized practice regulation is to prevent the unwarranted control of the lawyer-client relationship by lay persons, an analysis of the relation of private infusion to UPL policy should carefully balance the costs against the benefits of this innovation.¹⁶⁸

Private infusion would accordingly serve two needs—the demand of the public for greater access to legal services and the demand of lawyers for new sources of capital to fulfill the public's requirements. Recent surveys show that there are many more people who have problems which could be resolved by access to a lawyer than people who actually use lawyers for their resolu-

165. *Id.* The court allowed the delivery of legal services by a lay intermediary corporation under the conditions that:

- (1) The corporation must serve as an intermediary which does not purport to control the lawyer-client relationship;
- (2) The lawyer must remain responsible to the client and the corporation must be liable for malpractice damages;
- (3) Lawyer-employees must be subject to all Disciplinary Rules;
- (4) Nonlawyers must be limited to the formulation of broad social policies;
- (5) Determination of the acceptance of cases must be made by lawyers. *Id.* at 137-38, 429 A.2d at 1058.

166. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft May, 1981) ("The White Book").

167. *Id.*

168. Such an analysis requires an examination of the need for and availability of alternative sources of operating capital, a comparison of the ethical costs to the lawyer-client relationship against the cost to society of denying a particular means of access to legal services, and a consideration of the possibility that the ill-effects upon the lawyer-client relationship could be controlled by certain restrictions short of the outright prohibition of private infusion of capital.

tion.¹⁶⁹ Lawyers' needs for alternative sources of capital are also growing. Traditionally, lawyers have done business as partnerships, providing their own individual assets as capital.¹⁷⁰ However, as new technological aids to office efficiency are developed and as the growth in lawyers' number and salary expectations continue, the practice of law continues to become more capital intensive.¹⁷¹

Although private infusion is only one of many possible solutions to the problems of rising cost and intraprofessional competitiveness, its promise of substantial gains in efficiency requires serious consideration. However, the ethical costs, which may ultimately harm the client, must also be considered where a privately owned corporate structure not only employs but also controls lawyers who render legal services. Most importantly, the trust relationship between lawyer and client, imposing duties of loyalty and confidentiality, ought not to become a casualty in the drive for increased profits through new methods of reaching potential clients.

The public harm to be feared from private infusion stems primarily from interference by laypersons motivated by profit with the lawyer's independence of professional judgment and action.¹⁷² Barlow Christensen distinguishes two types of conflict of interest in group legal services: that between the group and its members or between individual members, and that caused by the power and opportunity of the group to control the lawyers.¹⁷³ Lay control of the latter type may depend on such factors as whether the

169. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); American Bar Association Special Committee to Survey Legal Needs, *Final Report of the Special Committee to Survey Legal Needs* (1978). See generally, B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970).

170. See Rabenhorst, *Getting Capital for the Firm*, Nat'l L.J., Dec. 13, 1982, at 14.

171. See Murriss & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUND. J. 179, 187.

Combined with the public need argument, efficiency based arguments might be marshalled in favor of private infusion by asserting that it does not seriously affect the nature of the lawyer-client relationship, that its ill effects, if any, can be controlled, and that it is the logical end result of attempts to mass-market legal services currently being attempted in less efficient forms by large-scale providers. These assumptions apparently underlie the rejected White Book version of Rule 5.4 of the Model Rules of Professional Conduct discussed previously. See *supra* note 159.

172. See Christensen, *supra* note 129, at 239; Note, *Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest*, 9 HOFSTRA L. REV. 625, 638-45 (1981).

173. See Christensen, *supra* note 129, at 243.

organization selects the lawyers and pays their fees or merely recommends them to the members; whether it employs them on salary or retainer; whether they spend full or only part time rendering services to members under the program; whether they handle other matters for the organization or only the cases of individual members; and whether the agreement between the lawyers and the organization requires it to respect their independence of professional judgment.¹⁷⁴

The question still arises as to whether private infusion raises any more serious questions of conflict of interest than other typical sources of financing. The following are a few examples of such alternatives:

1. Lawyers can borrow from a bank. However, when short term interest rates are high this may be very expensive compared to issuing stock and deciding when the firm can afford to pay a dividend. Banks may impose restrictions on management as conditions of their loans, and may also require close audits of firm activities and accounts to protect their interests. In any case, this form of debt financing is not likely to be available to recent law school graduates who are most likely to lack credit.

2. Lawyers may join pre-existing law partnerships which will subsidize their training period in which they develop their own clientele or they may invest their own personal funds, if any, in the firm.

3. A lawyer may borrow from or share ownership with clients. However, this may raise ethical problems of conflicts arising from business dealings with clients.

4. A related method of raising capital is through prepaid legal insurance plans where a group of clients raise capital through pooled premiums.

5. Unusual sources of capital or services such as those used by Hyatt Legal Services may be available. Hyatt is a large scale legal services entity that leases office space and administrative services from H & R Block, an operation with substantial seasonal discrepancies in the use of its plant and personnel.¹⁷⁵ However, the ownership and consequent control remain with the original legal partners.¹⁷⁶

Support from a number of groups within the legal profession

174. *Id.* at 244. Cf. *Florida Bar*, 386 So. 2d at 797.

175. See Harper, *The Joel Hyatt-H & R Block Alliance: A 1,000 Lawyer Firm?*, Nat'l L.J., Nov. 1, 1982, at 1.

176. Private infusion would further permit outside owners to control the physical plant, the management and administrative employees, and the legal employees, and would allow the free trading or selling of ownership interests. However, not all of these elements need be present to create the danger of lay control.

may be forthcoming for a change in the rules to permit private infusion. Young lawyers ill prepared to begin private practice on their own may welcome the increased prospects of employment available with private infusion entities. Senior partners or lawyer-shareholders of currently existing law firms could well benefit from increased liquidity in their ownership interests provided by an open market in law firm shares.¹⁷⁷ And corporations might become more willing to develop programs selling legal services if they were free to modify or sell the program in accordance with the choices presented by market pressures.

Nevertheless, conflicts of interest would seem inherent in private infusion models. The key problem is the lack of a conveniently enforceable mechanism for holding lay owners or managers ethically accountable in situations where their interest in maximum profits may conflict with the lawyers' ethical duties toward their clients.¹⁷⁸ These conflicts may be manifested in a number of different ways. The interests of the lawyer-employee, who supposedly serves the client in a special position of trust, may be opposed to the interests of the client. In a private infusion model, lawyer-employees may lack sufficient control of their working conditions to protect the integrity of their relationship with the client. If they leave their employment in the middle of a case they may be contractually forbidden from taking the clients' files with them, although lawyers are theoretically entitled to the files in order to preserve the integrity of the clients' right to confidentiality. The interests of lay investors wishing to control their investments through management techniques that will insure a reasonable profit are also potentially opposed to the clients' interests. Lay influence on lawyers' professional judgment under private infusion poses a different danger than the influence of an unusually large client upon a firm or by a corporation upon lawyer-employees. Under private infusion, lawyers are likely to have significantly less freedom to make independent decisions. They are forced to balance the need to make a profit for services rendered against the duty of loyalty to the client under the Code of Professional Responsibility.¹⁷⁹

177. See generally Minkus, *The Sale of a Law Practice: Toward a Professionally Responsible Approach*, 12 *GOLDEN GATE* 353 (1982).

178. See, e.g., *Florida Bar*, 386 So. 2d at 797.

179. It would be misleading to assume that all lawyers except those whose operations are partly capitalized by outside investors are able to exercise independ-

Although private infusion has mainly been proposed as a method for securing greater access to legal services among those of middle and lower incomes, it might have widespread undesirable consequences for the practice of law. Private infusion could affect the ownership of large law firms as well as small ones. A lawyer's professional independence could probably be more easily compromised where an outside corporation or individual actually owns the firm than where such a corporation or individual provides a substantial portion of the firm's business. The individual lawyer-employee is more likely to be confined to the sole recourse of quitting and seeking another employer. Faced with the risks of seeking alternative employment, lawyers are more likely to be discouraged from offering ethical objections to undesirable policy directives. Large-scale private infusion may lead to a general diminution of the legal profession's ability to guarantee independent judgment and ethical integrity.¹⁸⁰

The final question is whether it is possible to control some of

ent judgment in all instances. The loyalties of different types of lawyers are rather dictated by their particular roles. For example, lawyers in larger firms who serve corporate clients may be ruled not only by those corporations' economic interests, but also by the lawyers' own perceived self-interest in maintaining that corporation's future business. See Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 672-73 (1981). Conversely, lawyers serving individual nonbusiness clients in such areas as personal injury, family, and criminal law may be more independent of individual clients but may depend in other ways on established relationships with adversaries, opposing counsel, and institutions, all of which enable them to function more efficiently. See *id.* Lawyers working directly for corporations, government entities, or legal services agencies may also experience similar types of pressures which can undermine their degree of professional independence.

Nevertheless, some of these concerns are offset by the fact that the lawyer may be serving only one entity, which minimizes much of the likelihood of conflicts arising among clients. Other lawyers whose behavior is largely affected by the institutions with which they habitually interact must still protect and rely on their individual reputations in order to gain clients. This may not be true of lawyers who are only known to their clients as employees of a private infusion entity.

180. If corporations are permitted to own law firms, at the very least such firms should not be permitted to render legal services to the corporation. A lawyer's professional independence could probably be more easily compromised where an outside corporation actually owns the firm than when such a corporation provides a substantial portion of the firm's business. In the latter case, the lawyer may point out that even if the client switches to another firm, that firm will still have to follow the ethical rules binding all lawyers. But where the corporation attempting to dictate policy actually owns the law firm, an individual lawyer has less bargaining power and moral force within the lines of authority of the corporate structure to disagree on ethical grounds with attempts to control his judgment.

There might also be a danger if larger law firms were controlled by outside capital that corporate clients would lose their ability to obtain disinterested legal advice. While corporate counsel may tend to recommend seeking outside advice when they perceive themselves too closely controlled by their employers, as private ownership of large firms increased, outside counsel themselves might become unable to render the necessary independent judgment on a legal matter. Large-

the ill effects of private infusion upon the lawyer-client relationship by building in safeguards. Clearly, the viability of such safeguards would depend on whether they could actually be enforced.¹⁸¹ Unless a rather inclusive set of guidelines were established for the operation of law firms following the private infusion model, the risks to the client would seem to strongly outweigh the benefits. At the very least, sufficient information should be made available to consumers to advise them of the existence of a risk and to encourage their responsible choice as to the value of the particular service.¹⁸² Disclosure of possible conflicts of interest and other inroads threatening the traditional protections of the lawyer-client relationship should be required.¹⁸³ Nonlawyer employers should disclose the fact that they must observe the ethical requirements binding lawyers. Clients could be required to give their informed consent to an oral and written description of these conditions in a manner which might include a

scale private infusion might thus lead to a general diminution of the legal profession's ability to guarantee independent judgment and ethical integrity.

One wonders, too, if private infusion of capital were broadly permitted, whether the smaller, more risk-prone legal entrepreneurs are the group most likely to be benefited. Available capital might more easily be drawn to the larger firms with larger clients, where expected profits are greater and risks presumably lower than in smaller firms oriented to the middle class and lower-middle class individual.

181. A far-sighted analysis should ask whether economic pressures are so compelling, or, on the other hand, whether the financing of lawyer employment by private infusion does more to harm independence of judgment than traditional forms of capitalization, such that the strict prohibition of such arrangements is justified. Barlow F. Christensen proposes that lay intermediary arrangements should only be prohibited where impairment of the lawyer's independence of professional judgment and the resultant risk of injury to the public are sufficiently serious to override both potential constitutional rights of clients and other social values to such arrangements. See Christensen, *supra* note 129, at 242. He notes that it is appropriate to consider the risk rather than actual harm where a program is experimental and lacks a history of either injury or demonstrated value. *Id.* at 243.

182. These risks include the lack of certainty as to who owns or controls the files, especially when attorneys leave their employment; the possibility of lay investors' influence over the firm's operation; the effect of lay managers' and investors' ability to hire and fire attorneys upon the client's independent assessment of competence; the existence of accounting procedures that might violate the attorney-client privilege; the uncertain direction of the lawyer-employee's true loyalty; the possibility of latent conflicts of interest created by investors' outside ownership interests; and the likelihood of abuses such as solicitation or fee-splitting. See Comments of Robert Burkett, MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 comment (Discussion Draft 1980) (on file, ABA Center for Professional Responsibility).

183. See Note, *Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest*, 9 HOFSTRA L. REV. 625, 658-59 (1981). Cf. Weckstein, *supra* note 2.

cooling-off period during which the client could consider whether to take the risk.¹⁸⁴ To preserve confidentiality and loyalty between lawyer and client, a contract might also be required establishing a confidential relationship between the legal services entity and the client, to which the client would be required to consent before receiving services. This type of confidentiality might also be established even more effectively by statute. In addition, different types of structural approaches could be utilized to minimize the danger of control by lay shareholders. For example, professional corporation statutes could limit lay ownership by requiring 51% or more to be in the hands of lawyers employed by the firm.¹⁸⁵ Additional licensing or audit requirements might also be imposed.¹⁸⁶

Adequate mechanisms are clearly needed to protect the client if private infusion models are to be encouraged. Although outright prohibition may not be the best alternative, it may be the wisest one in the case of private infusion of capital until a sophisticated mechanism can be devised which not only addresses all of the issues mentioned above, but is capable of being enforced as well.

B. Self-Help and Consumer Interests

Another important concern of courts and state bars regulating competence in legal services is the quality of self-help services obtainable by the public. The quality of our justice system may suffer if inadequate or incompetent self-help programs or procedures are widely used, imposing costs and inefficiencies on others trying to use the judicial machinery. In addition, the public needs protection from a proliferation of incompetent, inadequate, false, deceptive, or misleading self-help services and materials.

The consumer movement has probably helped to liberalize lawyers' attitudes towards self-help legal activity over the past two decades. Early legal actions to enjoin the distribution of self-help

184. More than a written warning may be needed to maximize the effectiveness of an informed consent procedure that would permit representation involving conflict of interest. First, there should be a written contract which avoids technical language and briefly explains to both parties all the assumptions, warnings, waivers, and informed consents required by the relationship. Secondly, there should be an oral discussion and explanation by the lawyer to the client explaining what he is giving up, and ascertaining that the client understands. It should be made especially clear that the new service being provided is not what a lawyer normally retained by a client generally provides. A one-to-three day waiting period or "decent interval" should be allowed outside the setting where the contract was entered into so the client has an opportunity to reconsider and, if necessary, rescind it.

185. It is not certain, of course, that even a proportion of 51% would be sufficient to prevent lay control in significant aspects of the firm's business.

186. See Note, *supra* note 175, at 659.

materials, such as estate planning books and do-it-yourself divorce kits, were no doubt fueled by the fear of competition as well as of the potential for mass-marketed, over-simplified explanations of legal problems and methods of solution to mislead the public.¹⁸⁷ Nevertheless, debate continues on whether lay assistance beyond purely secretarial services relating to forms should be permitted.¹⁸⁸ Although the legal boundaries of legitimate behavior are generally more permissive today than in the past, there is a recurring concern among many UPL regulators that individuals providing such services tend to confuse and mislead the public. This occurs either by advertising in such a way as to develop expectations of greater assistance than is possible, or by mistakenly asserting a right to provide legal services.¹⁸⁹ Others have tended in recent years to focus on whether actual public harm has occurred.¹⁹⁰ This seems to reflect a growing sense that first amendment interests in freedom of speech and association as

187. Recent cases, however, recognize a protected first amendment interest in the publishing, advertising, and distribution of such materials. *See, e.g.*, *New York County Lawyers Ass'n v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967); *Oregon State Bar v. Gilchrist*, 22 Or. 552, 538 P.2d 913 (1975). However, this protection has been held not to extend to actual legal counseling by nonlawyers. *See, e.g.*, *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

188. *See Florida Bar v. Brower*, 402 So. 2d 1171 (Fla. 1981).

189. *See, e.g.*, *McGiffert v. State ex rel. Stowe*, 366 So. 2d 680 (Ala. 1978) (advertising services to obtain divorce "without attorney's fee" by one not licensed to practice held an unauthorized holding of self out as qualified). UPL enforcement efforts may thus be directed against deceptive advertising even though the services themselves may be legitimately rendered. The enforcement policy of the State Bar of California in the late 1970's recognized that a policy of prohibiting proper services was not likely to succeed in preventing the continual spontaneous appearance of such services. *See R. Burkett*, "Unauthorized Practice of Law—An Overview From California" (1979) (on file, National Center for Professional Responsibility Brief Bank). It attempted instead to regulate proper services in the public interest by requiring such businesses voluntarily to comply with a set of prohibitions and regulations taken from the permanent injunction issued in *State Bar v. Benson*, No. EA-C-16879 (Super. Ct. Los Angeles County May 18, 1978). Under this procedure, persons operating the service were required to sign a consent decree agreeing to limit their services to practices of a scrivener or public stenographer, and to furnish a legal warning to all potential customers before payment.

190. *See People v. Divorce Associated & Publishing, Ltd.*, 95 Misc. 2d 340, 407 N.Y.S.2d 142 (Sup. Ct. Spec. Term, Queens County 1978) (in-person sale of divorce kits allowed, but injunction issued against giving advice regarding marital problems, selecting proper forms on basis of individual circumstances, and assisting in filling out forms, where attorney general's investigation showed sufficient evidence of public harm where laypersons gave unauthorized and misleading advice).

well as access to the courts may well require a narrow focusing of enforcement efforts in this area.

As the regulatory emphasis has changed over the last two decades from the cold war of outright prohibition to a more peaceful, albeit watchful coexistence, more consideration has been given to helping the public obtain greater access to the courts through specialized legal materials and written instructions, as well as through advice by certain groups of lay persons and publications. The steady increase in the cost of legal representation has provided an incentive for consumers to obtain alternatives to in-person services by lawyers. Cost increase has been paralleled by a trend toward simplification of legal procedures in order to reduce time and cost.¹⁹¹ The spread of no-fault divorce law has made nonlawyers more competent to steer themselves through the necessary procedures which "no longer require professional skill or judgment."¹⁹² Many states have developed streamlined procedures in such areas as probate and will drafting. California, for example, has statutorily created a "do-it-yourself" will form for state residents.¹⁹³

The combined impact of changes such as these could substantially help to increase citizens' access to the courts. The legislatures could continue to acknowledge this change by passing statutes to simplify the complexity of litigation and facilitate pro se representation in a number of areas. Some of these areas might include consumer and individual rights, including dissolution of marriage, guardianship, adoption, name change, probate, annulments, enforcement and modification of agreements for custody, visitation, support, and expungement of criminal records.¹⁹⁴ Well-planned procedural reforms could not only increase the overall efficiency of many institutions for resolving disputes and processing individual rights claims, but could also provide roles for lay personnel to assist the public while conforming with the needs of orderly judicial administration. Nonlawyers with appropriate training may be effective in assisting citizens in such

191. This has been most evident in the areas of divorce and bankruptcy.

192. Note, *Divorce Kit Dilemma: Finding the Public Interest*, 19 J. FAM. L. 729, 742 (1980-81); see also Note, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

193. See Granelle, *Do-It-Yourself Wills Ready in California*, Nat'l L.J., Nov. 1, 1982, at 7.

194. See J. Mills, *The Legal Needs of the Poor and Underrepresented Citizens of Florida: An Overview* 20 (1980). This study was commissioned by the Florida Supreme Court as a consequence of *Florida State Bar v. Furman*, 376 So. 2d 378 (Fla. 1979), an unauthorized practice case in which the respondent claimed a first amendment right to assist individuals in gaining access to the courts where sufficient alternative means were not available.

processes. Consumer needs for low-cost dispute resolution might also be better met by increased reliance on small-claims courts, mediation systems diverting inappropriate litigation from the conventional fora, and other alternative systems.

Nevertheless, new delivery mechanisms for legal services and lay assistance services which use self-help should be examined for the possibility of hidden dangers to the consumer, since superficial cost reductions may often result in greater risks to the consumer down the road. Publishers should certainly be made aware that either authorship control, or review of the self-help instructions by a lawyer who is both ethically accountable and subject to malpractice liability for his errors will protect purchasers by preventing a proliferation of incomplete or incompetent self-help materials. Bar regulators might apprise consumers of forms of recourse such as tort liability against publishers, or disciplinary sanctions, or malpractice liability against attorneys for harm suffered from misleading or incompetent self-help materials.¹⁹⁵ At the very least, publisher disclaimers might be advisable, since lay assistance, or self-help programs that imply external legal advice is no longer needed, may cause the consumer to forego advantageous alternative courses of action in many areas involving individual and property rights. Advisory guidelines or standards of competence might be developed to protect consumers in such areas as the role of paralegals and other assistants in the process of delivering legal services, the proper development of computerized systems for assistance handling one's own legal problems, and materials and procedures to assist non-lawyers in helping themselves with legal problems.¹⁹⁶ Consumers would also benefit from guides to the kinds of self-help publications available and explanations of the differences in quality or reliability that ex-

195. See, e.g., *People v. Roehl*, 134 Ariz. 279, 655 P.2d 1331 (Ariz. 1983) (attorney suspended for using misleading and deceptive advertising, gross carelessness, and conduct adversely reflecting on his fitness to practice law, violating DR's 2-101(A), 2-101(B)(14), and 1-102(A)(6), in his sale of self-help divorce forms to clients).

196. Complex types of computerized legal assistance marketed directly to the lay person may raise a host of unauthorized practice problems and concerns about competence. See Thomas, *Unauthorized Practice and Computer Aided Legal Analysis Systems*, 20 JURIMETRICS J. 41 (1979). See also Engel, *The Standardization of Lawyers' Services*, 1977 AM. B. FOUND. RESEARCH J. 817, 835-38; Sprowl, *Automating the Legal Reasoning Process: A Computer That Uses Regulations and Statutes to Draft Legal Documents*, 1979 AM. B. FOUND. RESEARCH J. 3; Sprowl & Staudt, *Computerizing Client Services in the Law School Teaching Clinic: An Experiment in Law Office Automation*, 1981 AM. B. FOUND. RESEARCH J. 699.

ist.¹⁹⁷ Regulators may protect consumers by informing them of the potential harm they may suffer if self-help materials are not up-to-date or complete. They might also advise of the possible inadequacy of materials that are not prepared by those accountable to high standards of professional responsibility. These suggestions could be utilized to protect consumers from ill-conceived self-help materials.

The organized bar should promote the valuable aspects of self-help by educating the public to recognize and demand quality in self-help materials and services. The bar, indeed, may benefit by the growing interest in self-help, since self-help materials may often inform the public of their legal rights and of their interest in obtaining the further assistance of a lawyer. Bar associations might wish to develop self-help materials for the public as a public relations venture to help shape expectations and knowledge of what a lawyer's abilities and services involve and when they are useful. They might also offer courses in self-help procedures, from which students might gain insight into their own legal problems and rights and more clearly understand the value of a lawyer's assistance. Through programs such as these, the bar could not only increase the quality of legal self-help but also benefit from the innovations created by the self-help movement.

C. Regulation of Law Practice Before Administrative Agencies

Nonlawyer practice has been permitted before many federal administrative agencies and before agencies in many states to assist claimants before those agencies in obtaining the fullest access to the system and the greatest opportunity of receiving the benefits that may be due them.¹⁹⁸ Among the states, one of the chief obstacles to determining whether such nonlawyer practice has legitimately been authorized is the widespread and often recurring controversy of whether the supreme court, the legislature, or the

197. Three committees of the American Bar Association are currently engaged in a project to report and make recommendations on contemporary self-help activities and services. See Report to the House of Delegates of the Standing Committee on Unauthorized Practice of the Law, Informational Reports, ABA Annual Meeting (August, 1984), and Report to the House of Delegates of the Special Committee on Delivery of Legal Services, Informational Reports, ABA Midyear Meeting (February 5, 1983). The latter committee has surveyed types of self-help materials currently marketed and has produced a list of authors and publishers.

198. Lay representation is permitted before certain administrative tribunals in a number of cases. A recent comparative survey of lay practice before workers' compensation boards and public utilities commissions revealed that in 1981, 20 of 50 workers' compensation boards permitted such representation. Eleven public utility commissions allowed lay representation generally, while 22 restricted non-lawyer appearances to corporate officers and agents and 17 excluded nonlawyers. See Rhode, *supra* note 2, at 103-04.

agency itself has the power to authorize it.¹⁹⁹ While separation of powers is of less concern to the federal government,²⁰⁰ there is uncertainty among federal agencies, as among state ones, regarding the proper, most effective, and least harmful role of lay advocates.

Concern about who should have the power to authorize nonlawyer practice and narrow applications of unauthorized practice prohibitions obscure the deeper question of how to address and protect the public interest in effective access to administrative tribunals.²⁰¹

There seems to be an increasing trend by administrative agencies, both at the federal and state levels, to permit certain lay experts and advocates to appear before them. When lay representation should be permitted is not entirely clear because of the diverse nature of agency processes and needs. However, it may be concluded from a brief review of the changes in regulation of lay practice before these agencies that a principled approach is needed to the questions of when to permit such practice and how

199. See *supra* notes 3-32 and accompanying text. See also Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567, 583-99 (1981).

200. See 5 U.S.C. § 3555(b) (1977); Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567, 572 (1981).

201. See, e.g., *Hunt v. Maricopa County Employees Merit Sys.* Comm'n, 127 Ariz. 259, 619 P.2d 1036 (Ariz. 1980); *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *State ex rel. Pearson v. Gould*, 437 N.E.2d 41 (Ind. 1982). *But cf.* *Idaho State Bar Ass'n v. Idaho Pub. Util. Comm'n*, 102 Idaho 672, 637 P.2d 1168 (1981) (invalidating as violation of separation of powers administrative rules of state public utilities commission attempting to authorize representation before the commission to lay persons not directly connected with corporate parties); see also *Merco Constr. Eng'rs, Inc. v. Municipal Ct.*, 21 Cal. 3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978) (statute permitting corporate officers to appear in trial court held unconstitutional).

One commentator has described the divergent ways that state courts have approached this subject:

At one extreme are decisions by state courts striking down legislation or administrative rules that permit non-lawyers to serve as advocates in quasi-judicial proceedings before public utility commissions, workers compensation boards, or other state agencies on the theory that only the court may authorize one to practice law. Thus, while a layperson may negotiate another worker's compensation claim or fill out an application for such benefits, only a lawyer is permitted to appear in a representative capacity before the boards in certain jurisdictions. Other states and the federal government take a more permissive approach and defer to legislative or administrative rules regulating who may appear before administrative adjudicative bodies.

Weckstein, *supra* note 2, at 657-58.

to regulate it.²⁰² Several state cases evidence this growing trend, at least where consumer benefits can be clearly pointed to and potential harms can be minimized.²⁰³

In *State ex rel. Pearson v. Gould*,²⁰⁴ the Indiana Supreme Court considered the interests of both the individual involved and the general public in applying a balancing test to determine whether lay representation of an employee before the Indiana State Employees' Appeals Commission should be prohibited as the practice of law. Focusing upon the particular stage of administrative practice involved, the court examined the "character of the tribunal, the interests at stake, and the potential for ineptness in the representation to create a hazard for the public."²⁰⁵ It was noted that the Commissioners themselves were not required to be lawyers as long as they were experts in the personnel field and capable of fair evaluation.²⁰⁶ It was further noted that the potential for detriment to the public through inept representation is low where there is great uniformity and continuity in the administrative process, all of which takes place "under one roof."²⁰⁷ Finally, the court rejected the claim that since the commission generally followed a judicial model in its opinions, skilled lawyers would better protect clients' interests, finding common-sense an adequate tool and labeling the potential for dire consequences as "speculative."²⁰⁸

In *Hunt v. Maricopa County Employees Merit System Commis-*

202. See Rose, *Representation by Non-Lawyers in Federal Administrative Agency Proceedings: An Expanded Role*, Report to the Administrative Conference of the United States (April 9, 1984) 8-13. Four rationales have been advanced for permitting representation by non-lawyers before administrative agencies: where particular non-lawyers have specialized competence, such as patent agents and accountants who may practice before the U.S. Patent Office and federal tax agencies; where the nature of the issues presented causes legal questions to be less complex or less dominant, such as agency determination of workmen's compensation and personnel claims; where lawyers are unavailable, because claims are either economically unattractive or otherwise inappropriate for resolution by lawyers, such as neighborhood, family, and low-level political disputes over individual rights; and finally, where the interest in freedom of choice justifies allowing such representation.

203. The Michigan Supreme Court has not yet resolved these issues in the context of appearances before employment security commissions. Compare *State Bar v. Galloway*, 335 N.W.2d 475 (Mich. Ct. App. 1983) (interpreting amendment to statute permitting representation by "duly authorized agents" to include nonlawyers; issue of legislature's duty to establish minimum standards of practice waived at trial) with *Michigan Hospital Ass'n v. Michigan Employee Security Comm'n*, 333 N.W.2d 319 Mich. Ct. App. 1983).

204. 437 N.E.2d 41 (Ind. 1982).

205. *Id.* at 43.

206. *Id.*

207. *Id.*

208. *Id.*

sion,²⁰⁹ under facts very similar to *Pearson*, a state employee sought representation by a nonlawyer in a hearing on appeal before the county employee merit system commission. Unlike *Pearson*, a statute defining the practice of law created an explicit exception, stating:

An employee may represent himself or designate a representative, not necessarily an attorney, before any board hearing or quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.²¹⁰

The court chose to balance the social objectives of protecting the public and assuring the availability of competent representation so that individuals might defend their needs, and adopted the statute in part in an exercise of comity.²¹¹ It recognized that the economic value of a claim often does not justify the cost of retaining a lawyer. It was decided that lay representation was allowed where no fee was charged and the matter was of no greater value than \$1,000.00. *Hunt* thus, more explicitly than *Pearson*, made an economic determination that in a specific set of administratively determined issues, namely personnel matters, individuals deserved greater access to representation that would not be available from lawyers due to the high cost of legal services and the low value of the claims involved. However, by recognizing the activity to be the practice of law, the *Hunt* court asserted its power to impose further conditions on the market for such services.²¹²

A third approach was taken by the Supreme Court of Florida in *The Florida Bar v. Moses*.²¹³ Under facts similar to *Hunt*, the Florida court first determined that lay representation in a hearing

209. 127 Ariz. 259, 619 P.2d 1036 (Ariz. 1980).

210. *Id.* at 263-64, 618 P.2d at 1038 (citing ARIZ. REV. STAT. § 32-261 D (Supp. 1984)).

211. 127 Ariz. at 263-64, 618 P.2d at 1040-41. In contrast to *Pearson*, the parties in *Hunt* conceded that practice before administrative bodies was the practice of law and sought instead to establish policy reasons why a legislative infringement of the judiciary's inherent power should not be struck down.

212. For example, the court chose not to require licensing but it prohibited the charging of fees. A dissenting opinion in *Hunt* would have prohibited all lay practice in order to deny labor unions the incentive to provide lay representation where higher quality representation by an attorney was desirable. However, assuming that lay practice where small amounts are in issue helps more than harms the individual, the majority opinion still establishes a clear demarcation between the value of competent legal and lay representation. It seems fair to assume that union members could and would control the organization's decision of when they would be entitled to representation by an attorney.

213. 380 So. 2d 412 (Fla. 1980).

before a state unfair labor practice agency constituted the practice of law within the Florida definition. The court acknowledged that the respondent was fulfilling the classic functions of an attorney, but recognized that the state administrative procedure act authorized "qualified" lay representatives and specified types of knowledge and skill as necessary. However, the court held that the absence of specific standards of competence and professional responsibility in either the state's Administrative Procedure Act, or a specific agency rule authorizing such representation, meant that the representation constituted unauthorized practice.²¹⁴ Although *Moses* held that explicit standards must be created before lay practice before administrative agencies would be permitted, such standards were in fact subsequently developed by the Florida executive branch.²¹⁵

Different issues prevail in regard to nonlawyer practice before federal agencies. Authority to regulate has not posed the same problem in the federal agency context as in the states, since legislative preeminence is clear. The Administrative Procedure Act gives each agency the power to allow representation by a qualified representative instead of counsel.²¹⁶ Federal regulation of nonlawyer practice has also preempted state attempts to prohibit nonlawyer practice within the state relating to federal agency concerns.²¹⁷

A number of federal agencies have permitted various forms of lay representation in the past, and consideration of expanding the role of non-lawyers in administrative advocacy is possible.²¹⁸ The

214. *Id.* at 418. The court refused to permit a showing by the respondent that his services were competent and necessary because of his experience, relevant legal knowledge, reliance on the school board's counsel for all legal decision making, and the economic impediments to requiring a lawyer at such proceedings.

215. See FLA. ADMIN. CODE, Model Rule 28-5.1055 (1982). The administrative rule specifically sets forth standards of competence and professional responsibility to which an administrative law judge may refer in determining whether a nonlawyer representative is qualified. *Id.*

See generally Boggs, *What is UPL Really?*, 57 FLA. B.J. 369, 372 (1983). In light of these standards, a subsequent case proceeded to hold the appearance of an out-of-state lawyer before an administrative agency permissible despite his failure to obtain admission *pro hac vice*. See also *Magnolias Nursing Home v. Department of Health*, 428 So. 2d 256 (Fla. 1982).

216. See 5 U.S.C. § 3555(b) (1977). See also Note, *supra* note 191, at 572.

217. See *Sperry v. Florida Bar*, 373 U.S. 379 (1963).

218. An unpublished survey conducted in conjunction with the November, 1984 Colloquium on Nonlawyer Practice before Federal Administrative Agencies by the American Bar Association Standing Committee on Lawyers' Responsibility for Client Protection indicated that the frequency of nonlawyer practice before many federal administrative agencies has stayed the same or decreased during the past six years (1978-1984). Of thirty-two agencies permitting such practice that were surveyed, decreases were reported by the Agricultural Marketing Service, the Federal Deposit Insurance Corporation, the Interstate Commerce Commission, the

Federal Trade Commission recently amended its rules of practice to permit non-attorney experts, in the discretion of the Administrative Law Judge, to participate personally in the cross-examination of other experts in the same discipline.²¹⁹ Permitting expert cross-examination has been asserted as being more efficient than requiring the lawyer to retain an expert to interpret the other side's expert testimony, and to assist the lawyer in developing a strategy for cross-examination.²²⁰ It has been suggested, however, that changing the role of the nonlawyer expert may harm other aspects of the decision-making process, such as making the agency records less intelligible to lawyers and judges dealing with the matters on appeal.²²¹ Even the gains in efficiency from increased participation in the administrative process by lay experts might be limited by such factors as the costs of training and certifying experts in legal skills, or, in the absence of such training, the inefficiencies within the system caused by unethical or incompetent representation. In addition, as nonlawyer experts take over the role of testing experts' credibility, the objectivity of participants in the agency fact-finding process may become increasingly obscured. However, if objectivity is to be protected by imposing the same ethical requirements upon lay experts as those imposed upon lawyers, such as prohibitions on testifying in proceedings where they also cross-examine, such protections are likely to end up abolishing the efficiencies originally presumed to justify the expanded role of non-lawyer experts.²²²

National Credit Union Administration, the National Mediation Board, and the Occupational Safety and Health Review Commission (20% decrease). The Internal Revenue Service, however, reported an increase in nonlawyer representation. Two agencies cited the increased complexity of cases as reason for greater resort to lawyers. ABA Standing Committee on Lawyers' Responsibility to Client Protection, Report on 1984 Survey of Nonlawyer Practice Before Federal Administrative Agencies, October 19, 1984 (unpublished, on file, ABA Center for Professional Responsibility).

219. Federal Trade Comm'n R. 16 C.F.R. pts. 3, 4, 48 Fed. Reg. 44,765 (Sept. 30, 1983). See generally Miller, *Regulators and Experts: A Modest Proposal*, REGULATION, Nov./Dec. 1977, at 36.

220. See Rose, *supra* note 193, at 34-36.

221. See Middleton, *Cross-Examination Rule at FTC Draws Criticism*, Nat'l L.J., Nov. 14, 1983, at 4, col. 1 (quoting Chief Judge Nahum Litt, Dept. of Labor Office of Admin. Law Judges).

222. Under Professor Rose's model for greater participation by lay experts in federal administrative agency proceedings, agencies would develop rules assuring competence and professional responsibility. Rose, *supra* note 193, at 49. In his view, detailed requirements and examinations for competence over subject matter should be avoided unless the proceeding is highly technical or the practitioner

The public interest might be served by permitting expanded practice before administrative agencies where the agency's procedures were sufficiently simple, competence could be adequately judged and unethical conduct effectively furnished and admitting lay practitioners is considered to be convenient for the agency's particular functions. This decision might also be affected by the amount of nonlawyers' practice already occurring before the agency, the degree to which individual clients might be harmed

holds himself out as available to the general public. *Id.* at 55. Rose also recommends either reciprocal or centralized agency admission. *Id.* Legal competence could be regulated through admission standards, by prohibiting expert representation when technical legal issues such as standing, statutory interpretation, or constitutionality are present, or by limiting experts' involvement to such aspects of the case as cross-examination rather than allowing total freedom to conduct the case. *Id.* at 56.

Lay representation in federal agency proceedings may require less regulation to protect consumers where respondents are large corporations possessing technical information and expertise, who are accustomed to selecting outside experts and representatives and are too powerful to be easily misled or manipulated. *See* Rose, *supra* note 193, at 13-15. Professor Rose suggests that in agency proceedings where sophisticated expertise is often provided by economists, scientists, and engineers to serve the interests of corporate respondents,

the market functions to create disincentives for agreeing to provide services outside the competence of the provider. Individuals do not readily agree to provide services where they are incompetent, especially where the consumers are fairly sophisticated and intelligent.

Id. at 17-18. However, each administrative context, whether federal or state, requires an independent evaluation of the sophistication of the consumers appearing before it.

The desirability of a greater role for nonlawyers should be examined from the point of view of the individual agency's convenience and the clients' needs. However, it may be difficult to determine just what the agency's convenience requires. While giving great weight both to the experts' specialized knowledge and to their presumed ability to learn skills useful for effective presentation within the administrative setting, Professor Rose underemphasizes those aspects of legal training and skills that may make lawyers particularly competent to be entrusted with responsibility for representation to administrative proceedings, mentioning only in cursory fashion skills in advocacy, litigation tactics, interviewing, counseling, and negotiating, and "various types of analytical and organizational skills." *Id.* at 23-25. Whether further resort to lay advocates with expertise in the agency's specific field would lead to greater efficiency would seem a question that the agency itself must balance in light of the actual proportion of legal to non-legal matters it encounters and the potential for harm to the client.

Practice by lawyers under disabilities or admitted in other states may also be problematic. New regulations of nonlawyer practice may raise policy questions and even constitutional issues where lawyers interstate practice is impeded as well as equal protection concerns involved in the disparate treatment of lay practitioners and out-of-state lawyers by certain qualification schemes. *Cf.* Department of Labor Proposed Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.34(a)-(h) (1983). The Department of Labor rules permit appearances "at a hearing in person, by counsel, or by other representative," *id.* at § 1834(a), and grant the administrative law judge the discretion to determine whether adequate proof of qualifications has been submitted. *Id.* at § 18.34(g)(2)(i). However, suspended and disbarred attorneys as well as persons convicted of felonies or of misdemeanors involving moral turpitude are prohibited from appearing.

by abuses or incompetence and the possibility that practice by a new class of representatives would reflect an agency bias against certain types of clients. The presence of a professional organization of nonlawyer representatives that could assist in imposing sanctions could also be a factor.

There are a number of methods that could contribute to a fair and effective representation of individuals by nonlawyers before administrative agencies. For example, one commentator would apply a public policy test to determine whether lay representation in administrative agency proceedings should be allowed.²²³ He argues that the normal presumption underlying the UPL laws, that representation by lawyers is necessary to assure the orderly and speedy administration of justice, should be shifted in the area of administrative representation. He points out that since the purpose of most administrative agencies is to provide a speedy and inexpensive remedy, the party arguing that representation by a lawyer is necessary should have the burden of showing that delay would otherwise occur.²²⁴ The client's interest in an informed choice would be protected through an oral in-court procedure for obtaining informed consent, accompanied by a brief "cooling off" period in a neutral setting.²²⁵ Other commentators have proposed a more extensive system for regulating lay representation by qualified representatives before state agencies. They similarly argue that the benefits to consumers are likely to outweigh the harms and that case-by-case determinations of qualifications by the courts are likely to be too economically burdensome.²²⁶

223. See Morrison, *supra* note 2, at 367.

224. *Id.* at 368.

225. *Id.* at 369. The question that should be addressed to Morrison's proposal is whether the mechanism for protecting the consumer goes far enough. Informed consent places the burden on the individual to show that the choice was not made voluntarily or rationally. It may not be effective if the information given to the individual is too complex to be comprehended or if other pressures in the situation make it unlikely that a true choice exists. However, if the particular administrative system contains other assurances that nonlawyer representation will be competent and ethical, the informed consent procedure might be relatively effective. See generally Brandt & Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REF. 297 (1974); Davis, *Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

226. Hunter & Klonoff, *supra* note 2, at 35-36. Hunter and Klonoff propose the following method of licensing nonlawyers to perform legal services:

- 1) nonlawyers would be permitted to practice in particular fields of law of [sic] obtaining a special license for each field;

While the creative elements of these proposals might well be incorporated into specific schemes for regulating lay practice before appropriate agencies, it seems unwise to acquiesce in a reversal of the general presumption that nonlawyers are likely to be less qualified and accountable than lawyers. This will only become a probability when standards of training, ethical responsibility, and competence for nonlawyers rival the level currently required of lawyers. With less than the total reform required to bring this about, however, differences in the quality of services are likely to remain.²²⁷

Permitting the appearance of lay practitioners before administrative agencies thus seems likely to result in improved efficiency as long as there are adequate assurances that the representatives so permitted will in fact be competent. Some groups may be predictably competent because their normal business activity requires an understanding of the relevant legal concepts.²²⁸

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- 2) the Code of Professional Responsibility would be legislatively extended to apply to licensed nonlawyers doing legal work;
 - 3) licensed nonlawyers could have their licenses revoked for incompetence or ethical violations;
 - 4) nonlawyers would be subject to the same high standards as lawyers in malpractice actions;
 - 5) annual licensing fees would provide funds for compensating victims of inadequate services where the loss involved is not large enough to justify pursuit of malpractice remedies;
 - 6) a governmental agency composed of both lawyers and nonlawyers would be set up to perform the foregoing functions;
 - 7) this agency would also maintain comprehensive data relating to the quality of service by lawyers and licensed nonlawyers.

Id. at 35-36. The nonpartisan state licensing agency regulating the functions of nonlawyers would parallel the structure of court agencies or unified bars currently overseeing the conduct and competence of lawyers.

227. The latter commentators wrongly proceed on the assumption that the legal profession currently fails to police itself adequately, and propose competition to force it to greater exertion in its own disciplinary enforcement, while also encouraging serious efforts towards discipline within the authorized competing specialties. See Hunter & Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6, 15, 47 (1979) (citing the Clark Report). This ignores a host of effective reforms of disciplinary procedure instituted nationwide since the Clark Report. See McPike & Harrison, *The True Story on Lawyer Discipline*, 70 A.B.A. J. 92 (1984). Statistical reports on public discipline of lawyers by state disciplinary agencies show that sanctions imposed throughout the country have markedly increased from 1974 to the present, according to information provided to the ABA Center for Professional Responsibility by state courts throughout the country. For example, in 1974, the total number of public sanctions imposed was 419, in 1977, 1053, and in 1981, 1844. See Statistical Reports Re: Public Discipline of Lawyers by State Disciplinary Agencies, 1974-1977 (1978); Statistical Reports Re: Public Discipline of Lawyers by State Disciplinary Agencies, 1978-1982 (1983), on file, ABA Center for Professional Responsibility.

228. The Washington Supreme Court has approved a plan to regulate real estate closing officers under a scheme similar to Hunter's and Klonoff's. See 1983 WASH. ST. B. BULL., (January) at 21. The "Wash. Limited Practice Rule for Closing Officers" licenses individuals customarily involved in real estate closings to perform their functions under a licensing scheme allowing them to become "certified

Competence may also be likely where lawyers must exercise some degree of oversight of the representatives' training and activity.²²⁹ The experience of federal agencies, which have experimented with various forms of lay representation, may well provide the best source for judging the relative efficiencies of various approaches. A number of different factors should enter into the determination of whether lay practice would be helpful to the client and contribute to the agency's overall efficiency. These factors include the unavailability of lawyers to represent the parties, the relative size of the claim or seriousness of the rights involved, and the complexity of the issues involved.

Crucial to a determination regarding lay representation before administrative agencies is the formulation of pre-existing standards of conduct which not only give notice to practitioners of what will be required of them, but also inform the public what to expect in the way of quality and competence of service. They will assist consumers in making an informed choice of whether to employ a lay practitioner. A few states have already contemplated or adopted such standards.²³⁰ Although this may be the beginning of an important trend, further study would be helpful in or-

closing officers." *Id.* A voluntary board of nine members would be established by the supreme court, four of whom must be lawyers, while another four members would represent the relevant businesses involved. The same board accepts applications, conducts examinations, accredits relevant education programs, and has investigatory and disciplinary power over complaints of violations of the certification rule.

The rule authorizes a limited scope of practice dealing with approved real estate documents, requiring agreements in writing by the parties to the basic terms of the transaction and oral disclosures including warnings that the parties might wish to select and consult their own lawyers.

It imposes a mandatory continuing education requirement and requires proof of financial responsibility in case of liability, but does not impose fiduciary duties, special rules regarding conflicts of interest, or high standards of care in malpractice actions.

229. See generally *Statsky, Paralegal Advocacy Before Administrative Agencies: A Training Format*, 4 U. TOL. L. REV. 439 (1973).

230. Cf. FLA. ADMIN. CODE., Model Rule 28-5.1055 (1982). A proposed amendment to the Supreme Court Rules in Wisconsin would set similar standards under which agencies could determine whether to permit lay practice. See *Petition to the Supreme Court of Wisconsin in the Matter of the Amendment of SCR 10 Re. Non-Member Appearances in Administrative Proceedings by the State Bar of Wisconsin* (April 15, 1982) (on file, ABA Center for Professional Responsibility). The Wisconsin amendment would permit lay practice under agency rules that require conduct consistent with appropriate provisions of the Code of Professional Responsibility, establish standards of competence, provide a fair and impartial procedure for revoking authorization to practice, and require disclosure of non-attorney status to the agency and to the client prior to representation.

der to clarify appropriate principles for determining when lay practice before administrative agencies is desirable and how it should be regulated.

D. Regulation of Lawyers' Interstate Practice

In contrast to regulatory issues involved in the practice of law by nonlawyers, the type of regulatory problem created where lawyers practice across state lines is quite different. Because each state retains sovereignty to regulate the practice of law within its jurisdiction, and many claim that practice within its borders requires special knowledge or amenability to local regulation, specific regulations may exist which prevent the free flow of lawyers and legal services among the states.²³¹ Unauthorized practice remedies generally play a role in protecting state regulatory interests by controlling lawyers' abilities to render services or collect fees. Mobility in interstate practice is also affected by varying criteria for admission on motion once a lawyer has accrued a certain degree of practical experience, restrictions on the availability of *pro hac vice* motions for temporary admission to represent a client in court, and a variety of policies regarding reciprocal admission or special terms of admission for certain classes of lawyers.²³²

A number of developments may affect the climate for change in the regulation of interstate practice in the coming years. There seems to be growing agreement that clients' interests in obtaining counsel of their choice, the increasing incidence of interstate litigation,²³³ and the greater mobility of clients and commerce in re-

231. See generally Brakel & Loh, *Regulating the Multi-State Practice of Law*, 50 WASH. L. REV. 699 (1975); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967).

232. Brakel and Loh observe:

The "right" or "privilege"—some limitations turn on this distinction—to practice law out-of-state is regulated by various restrictions tantamount to a general prohibition with the limited exceptions of admission *pro hac vice* (for one occasion) and admission on motion (or by comity) as a foreign attorney. All activity beyond the exceptions is, or at least risks being, prohibited.

Brakel & Loh, *supra* note 220, at 700-01 (footnotes omitted).

233. Changing patterns of litigation by out-of-state counsel may also affect the costs of maintaining restrictions on interstate practice. One commentator has pointed to the rising risk of malpractice liability for local counsel who must be associated in a case according to the requirements of many *pro hac vice* rules. See Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change*, 67 CORNELL L. REV. 345 (1982). Lawyers may have to choose among the alternatives of increasing their fees, refusing to assume the role of local counsel, or seeking modification of *pro hac vice* rules which require the association of local counsel. See generally Michelman, *Pro Hac Vice—In the National Interest?*, Monograph No. 7—Problems in Professional Responsibility (ABA Center for Professional Responsibility 1984).

cent years necessitate more permissive rules on interstate practice.²³⁴ The risk of constitutional or antitrust challenges may also provide an important impetus for state authorities and state bars to review their interstate practice policies. Constitutional challenges have successfully been brought against admissions rules requiring various periods or conditions of residence within the state before lawyers are permitted to take the bar examination or apply for membership in the bar.²³⁵ To date, restrictions creating less than absolute prohibitions on practice of out-of-state lawyers have proved less vulnerable. Interstate practice restrictions which do little more than protect the turf of the local bar will probably be viewed by the courts with increasing disfavor in the next decade.

Rules significantly increasing the costs to the client and out-of-state lawyers while benefitting interests of the local bar may raise antitrust or constitutional questions. Rules outlining exorbitant *pro hac vice* fees and protectionist requirements for associating local counsel, or unnecessarily confining advertising and solicitation rules for multistate law firms, are subject to attack. Although national bar admission may currently lack sufficient backing to attack the problem of overrestriction, reforms of specific admission and regulatory policies may indeed increase as the changing demographics of legal practice convince more lawyers that such changes are in their own interests.²³⁶

234. See Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978); Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUTGERS L. REV. 1182, 1186-91 (1976); Brakel & Loh, *supra* note 220.

235. See *Noll v. Alaska Bar Ass'n*, 649 P.2d 241 (Alaska 1982) (applying strict scrutiny test under privileges and immunities clause, U.S. CONST. art. IV, § 2, cl.1). *Accord* *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N.D. Ala. 1982); *Stalland v. South Dakota Bd. of Bar Examiners*, 530 F. Supp. 155 (D. S.D. 1982); *Jensen v. Murphy*, slip op. No. HM80-608 (D. Md. Nov. 13, 1980). See *Piper v. New Hampshire*, 723 F.2d 110 (1st Cir. 1983) (en banc), *aff'd* by an equally divided court, 539 F. Supp. 1064 (D.N.H. 1982), *cert. granted*, 104 S. Ct. 2149 (1984).

236. Lawyers' disagreement on the desirability of less restrictive policies permitting interstate movement may be diminishing. Their attitudes currently seem to vary according to such factors as the geographical region of their practice, the size of city where their practice is located, the size of their firm, and the type of practice, age, and income of practitioners. According to a 1982 survey by the American Bar Association of its members, 51% of the sample asked about reciprocity of admission to the bar among the states favored limited reciprocity policies while 45% favored complete reciprocity. This represented a shift toward approval of complete reciprocity from a previous survey conducted in 1977, when comparable figures stood at 60% and 36 % respectively. Groups where a majority favored full reciprocity in the more recent survey included lawyers from the

Regulation of interstate practice should seek to accommodate the long-term trend toward greater mobility of lawyers and lessened dependence on immediate local inaction in the provision of legal services. Outright prohibitions on legal activities by out-of-state lawyers are not only unreasonable, but costly and impossible to enforce. Incomplete enforcement and selective punishment may also breed confusion and hostility to disciplinary authority among lawyers. Some regulators are currently experimenting with more cost-effective forms of regulatory oversight such as requiring registration with implied consent to discipline and service of process, accompanied by fees to defray regulatory costs. At least one state bar currently allows an adjunct membership for in-house corporate counsel.²³⁷ Others have contemplated imposing conditions on office practice such as registration, submission to disciplinary jurisdiction, and association of local counsel.²³⁸

It may also be argued that technological changes and improvements in state admissions and disciplinary structures now permit the relaxation of traditional restrictions on interstate practice. Many former obstacles to interstate practice such as lack of uniform laws and procedures, difficulty of rapid interstate communication, and dependence on face-to-face personal contact have given way to better communications technology, permitting multi-person conference calls, video conference, on-line communications and conferences through computer networks, and electronic mail. Increased use of the multistate bar examination has made local determinations of competence more standardized and compatible with one another. In addition, centralized information sources such as the American Bar Association's National Discipline Data Bank facilitate the efficient exchange of timely disciplinary information. It would thus seem significantly easier today than in the past to respect the client's choice of counsel and still protect the legal system's interest in ensuring competent and ethical representation.²³⁹

Northeast and Midwest, in cities of over 1 million, firms over ten, specializing in business law, aged 35-44, and earning \$25,000-\$35,000 per year. Those who least favored such policies included southern and western lawyers, practicing in cities under 50,000, tending toward general practice in smaller firms, over 45, and earning under \$25,000. See *Law Poll, Specialization, Relicensing, and Reciprocity*, 68 A.B.A. J. 800, 801 (1982).

237. See Alaska State Bar, Art. II, § 3, Bylaws (as amended Jan. 31, 1979).

238. See, e.g., Arizona State Bar, Proposed Rule 28(c), Rules Governing Admission of Applicants to the State Bar of Arizona (1982) (on file, ABA Center for Professional Responsibility).

239. There may be some groups of lawyers deserving special policies of limited admission or registration, as a means of regulating conduct to a limited degree while facilitating their interstate movement as needed. Corporate in-house counsel who do not litigate before courts or other tribunals generally lack the immedi-

An increase in interstate practice restrictions may hinder a growing trend of lawyers seeking to handle matters outside of a traditional single-city or single-state law practice.²⁴⁰ Because each state retains the power to regulate the practice of law within its boundaries, as a general rule, lawyers may only practice validly in more than one state if they meet the qualifications of every state in which they render advice or provide representation. For failure to observe the ethical rules of another jurisdiction, lawyers may be disciplined in their own state. They also risk prosecution

ate incentive to take the bar examination in the state where they may be employed. However, the local enforcing state has less need to determine the general competence and quality of corporate counsel who have passed the bar of another state than they do of recent law school graduates. It also has comparatively less interest in maintaining the quality of the judicial system against the incompetent application of local law and procedure by such counsel where they do not litigate the local courts. Furthermore, the likelihood of misconduct or other harm to the general public is much less where corporate in-house counsel are responsible to only a single client, the employer, who is generally more knowledgeable about a lawyer's qualifications and competence than would the average client of a law firm. Where there is a single client-employer, too, there is less need to protect the public from conflicts of interest among clients. Because there is little potential harm to the public, most activity by corporate in-house counsel could probably be permitted as long as they do not hold themselves out to others in the state in a misleading manner as to their qualifications to practice law. Similarly, lawyers employed by the federal government not only tend to practice primarily federal law, but also have a single employer which justifies lesser restrictions on their activities, if they are already licensed in at least one state.

State may protect their regulatory interests by certain measures such as requiring lawyers to register with the court or bar in order to ensure local disciplinary jurisdiction. One pitfall of such schemes, however, may be the jurisdiction's failure to acknowledge the lawyer's experience within the jurisdiction as a factor qualifying them for full admission. Such experience could be recognized as the "practice of law" through special admission policies that either acknowledge a certain percentage of legal content in lawyers' local experience over a certain period in the jurisdiction or qualify them to take a modified form of the bar examination.

240. DR 3-101(B), which would be incorporated into Rule 5.5 of the new proposed Model Rules of Professional Conduct, proclaims that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(B) (as amended 1980). The impact of this disciplinary rule is tempered within the Model Code itself by EC 3-9, which acknowledges an increasing trend toward interstate practice due to "the demands of business and the mobility of our society," and proposes that:

In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the rights of lawyers to handle the legal affairs of their clients or upon the opportunity of clients to obtain the services of a lawyer of their choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

Id. at EC 3-9.

or injunction in the other state under its unauthorized practice statutes.²⁴¹ However, new concepts of delivery of legal services, such as legal expense insurance programs permitting toll-free phone calls and extended consultations with lawyers to large and scattered populations challenge the traditional model of lawyer-client relationships evolving within the same state. While these innovative programs can probably be structured to preserve the power of disciplinary authority of lawyers licensed in the jurisdiction, attempts should be made to maximize consumers' access to these programs by enhancing regulators' ability to handle interstate disciplinary problems efficiently.

In order to avoid unduly harsh applications of DR 3-101(B), courts, ethics committees, UPL and disciplinary authorities should examine whether valid purposes are served by rules placing restrictions on the practice of lawyers not admitted in a particular jurisdiction. The following questions might be asked in determining whether lawyers practicing law outside their jurisdiction should be regulated. First, as a matter of jurisdiction it should be determined whether the lawyer's activity is the practice of law? Second, it should be asked whether personal jurisdiction has been established: has the lawyer sufficiently come into contact with the state's territorial or regulatory interests to justify its exercise of regulatory power? Third is the question of substantive policy: whether the lawyer's activity is one that should be restricted in the jurisdiction? Arguably the enforcement agency should also consider at this stage whether there might be any other adequate regulatory authority to whom the lawyer is accountable for his acts.²⁴² It may be unfair to penalize lawyers by absolutely prohibiting their activities which cross state borders

241. Since interstate practice restrictions prevent individual lawyers from moving effortlessly from state to state in order to handle business and seek new clients, a growing trend has been for firms themselves to establish offices in different states where economically feasible rather than farming out valuable legal work to unrelated local firms. This development may sometimes create regulatory difficulties, since some out-of-state lawyers may enter the state to practice for the firm yet not be governed by local codes of ethics until they have been admitted to the local bar. See generally *Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978) (consent decree establishing rules for when local practice by out-of-state lawyers in interstate law firm is not unauthorized practice). See also *Singer, Hutner, Levine & Seeman v. Louisiana State Bar Ass'n*, 378 So. 2d 423 (La. 1979) (multi-state law firm complying with supreme court ethical rules regarding specifications on letterhead of which lawyers were admitted to jurisdiction did not violate UPL statute).

242. *But cf.* American Bar Association, *Standards for Lawyer Discipline and Disability Proceedings* § 4.2 (1980) (providing that "all lawyers specially admitted to practice in a state for a limited purpose should be subject to the jurisdiction of the agency in the state with respect to any misconduct related to that purpose"). The commentary to the rule observes that where admission *pro hac vice* has been granted, the lawyer has given implied consent to be subject to the rules of conduct in that jurisdiction. The Standards also recommend the prompt imposition of re-

when less restrictive means of regulating their conduct are available. Presumably, if there is some other adequate regulatory authority over out-of-state lawyers, the state has no need to prohibit their activity within the state, but should simply refer disciplinary responsibilities to the other authority or rely on the client's malpractice remedy. In short terms, home state disciplinary authorities may often not be effective in regulating out-of-state misconduct, leaving the state in whose jurisdiction the misconduct occurs as the only authority available to exercise power over the offenders. However, methods should be investigated for referring or sharing disciplinary authority more effectively, so that where a client needs protection, he or she will have clear and adequate recourse.

As the preceding overview shows, interstate practice by lawyers raises separate issues from the regulation of unauthorized practice by nonlawyers. States regulating interstate practice by lawyers often enforce such regulation by the same means used to deter unauthorized lay practice. However, in regulating interstate practice, states should focus on whether lawyers' activities can be adequately regulated to justify permitting them to practice. In contrast to policies often applied to non-lawyers seeking to provide legal services, lawyers who have been admitted in one state should be presumed to be at least generally competent to perform legal services even though they may not have met the other state's specific requirements for admission.

VI. CONCLUSION

The preceding exploration by no means exhausts unauthorized practice problems confronting policy makers today. Rather, the topics have been selected as representing significant ongoing controversies requiring clarification of issues and concerted plans for action. In all of the areas discussed above, UPL enforcement efforts must more closely fit the needs of the consumer of legal services and must be supported by credible efforts to inform the public that lawyers offer a special service with unique guarantees of competence. The legal profession has a responsibility to the public to participate in disinterested methods of distinguishing situations when such competence is desirable, determining when

ciprocal discipline unless the lawyer can demonstrate that the imposition of the same discipline is inappropriate. *Id.* at § 10.1.

competent legal services have not been delivered, and developing mechanisms that provide greater access to competent legal services. Undoubtedly, further empirical study would help to answer much of the speculation and disagreement surrounding today's UPL issues. However, as the environment for legal services changes, the philosophy of unauthorized practice regulation should respond—and it is the responsibility of lawyers to serve the public in bringing these changes about.