TOO FEW ALTERNATIVES TO LAWYERS

Similar observations can be made about expanding consumer choices among providers of legal services. Indeed, such observations have been le by almost all the scholars and bar commissions that have systematically studied access to nonlawyer assistance. Virtually no experts believe that current prohibitions on such assistance make sense. What consumers need, rather, is a framework that expands choices, reduces obstacles to self-help, permits qualified nonlawyer services, and provides effective regulation.[48]

Current bans on unauthorized practice of law by lay competitors are sweeping in scope and unsupportable in practice. Nonlawyers who engage in law-related activities are subject to criminal prohibitions that are inconsistently interpreted and unevenly enforced. The definition of illegal activities varies by jurisdiction, and attorneys in some states have a monopoly over routine services like completion of real estate closing forms that nonattorneys perform effectively in other states or even in other parts of the same state. The dominant approach is to prohibit individuals who are not members of the state bar from providing personalized legal assistance. For example, independent paralegals may type documents but not answer even the simplest legal questions. Courthouse facilitators are instructed to provide legal "information" but not advice and to refrain from answering "should" questions, such as "Which form should I file?" The American Bar Association recently voted to increase enforcement of unauthorized practice laws, a decision inconsistent with the prior recommendations of its own expert Commission. According to its Model Rules of Professional Conduct, "whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." "How well" and "at what cost" are questions too often overlooked.[49]

As experts have long noted, many nonlawyer specialists are equally or more qualified than lawyers to provide assistance on routine matters. These specialists are a diverse group. Some, like accountants or real estate brokers, already are subject to licensing requirements. Their work often involves assistance on legal issues, and Competent performance necessarily involves technical violations of unauthorized practice prohibitions. Other nonlawyer providers are independent paralegals or former legal secretaries with considerable expertise in areas like uncontested divorces and administrative agency representation. Comparative research finds that these lay specialists can per- form as effectively as attorneys. In the one repotted survey of consumer satisfaction, nonlawyers rated higher than lawyers. As one judge noted, paralegals with training in specialized areas are a "refreshing change" from attorneys who lack such background. One recent law graduate made a similar point about the difference between his work and that of paralegals: He "billed the client nearly twice as much per hour and [only] they knew what they were doing."[5O]

Such assessments should come as no surprise. Three years in law school and passage of a bar exam are neither necessary nor sufficient to ensure competence in areas where the need for routine services is greatest. Schools generally do not teach, and bar exams do not test, ability to complete routine forms for divorces, landlord-tenant disputes, bankruptcy, immigration, and welfare claims. For many of these needs, retaining a lawyer is like "hiring a surgeon to pierce an ear." Other countries typically permit nonlawyers to give legal advice and to provide assistance on routine matters, and no evidence suggests that these lay specialists are inadequate. Training and experience apart from law schools can offer adequate preparation for practitioners my areas where unmet needs are greatest. A case in point involves Britain's Citizen's Advice Bureaus, which provide effective low cost assistance with nonlawyer staff. [51]

This is not to discount the problems that result from unqualified or unethical lay assistance. Some unlicensed practitioners, including disbarred leys, misrepresent their status and exploit vulnerable consumers. Immigrants are particularly common targets, both because they

are often familiar with American legal practices and because they are unlikely to report abuses. However, the appropriate response to these problems is regulation, not prohibition. Consumers need frameworks that offer a reasonable degree of protection without foreclosing choice. [52]

Current unauthorized practice restrictions are ill-suited to that task se they focus only on whether nonlawyers are providing legal assistance, not whether they are doing so effectively. Strong consumer demand for low cost services make such restrictions difficult to enforce. As a result, lay practice-goes unregulated, and when abuses occur, the public has inadequate remedies. Similar problems can arise with ADR practitioners, who are not subject to licensing or ethical rules. Most states impose greater requirements to become a hairstylist than a mediator. [53]

A sensible regulatory framework would provide both less and more protection - less for attorneys and more for consumers. Nonlawyers like accountants or real estate brokers who are already licensed by the state should be allowed to provide legal assistance related to their specialties. And lawyers who licensed by other states should be permitted to provide services that comply with local ethics rules. Many of these individuals already are providing such services. Problems in their performance should be addressed by strength- the requirements governing their activities, not by curtailing cost-effective assistance through overbroad unauthorized practice prohibitions.

For currently unlicensed service providers, states should develop regulatory frameworks responsive to public needs, which may vary across different practice areas. Where the risk of injury is substantial, in contexts such as immigration, consumers may benefit from licensing systems that impose minimum qualifications and offer proactive enforcement. In other fields, it could be sufficient to register practitioners and permit voluntary certification of those who meet specified standards. States also could require all lay practitioners to carry malpractice insurance, contribute to compensation funds for defrauded clients, and observe basic ethical obligations governing confidentiality, competence, and conflicts of interest.[54]

Such a regulatory framework would offer a number of advantages over current structures. Experience here and abroad suggests that increased competition between lawyers and nonlawyers is likely to result in lower prices, greater efficiency, and increased consumer satisfaction. Regulating the activities of lay practitioners should help curb abuses that currently go unremedied, while encouraging innovative partnerships between lawyer and non- lawyer specialists. Such partnerships could increase access to cost-effective assistance by enabling organizations to provide multidisciplinary legal services. Such opportunities for "one-stop shopping" would be of particular benefit to businesses seeking consolidated financial assistance and to other groups such as elderly, juvenile, or immigrant clients who need assistance cutting across occupational boundaries. [55]

Previous collaborative efforts have bumped up against the bar's prohibitions on fee splitting and partnerships between lawyers and nonlawyers. In effect, the Model Rules of Professional Conduct allow attorneys to work for organizations controlled by nonattorneys only as long as these in-house counsel represent the organization, not its outside clients. Efforts to liberalize these rules have met with no success. The American Bar Association's House of Delegates has rejected proposals that would enable companies like Sears to employ lawyers to provide simple low-cost services. And it has tabled reforms that would permit lawyers to form partnerships with non- lawyers such as accountants in order to offer consolidated financial assistance. Opponents' stated concern is that such arrangements might compromise the independent judgment of lawyers and undermine compliance with bar ethical rules governing confidentiality and conflicts of interest. These are legitimate concerns, but they can be addressed by regulation that does not curtail competition or prevent consumer choice.[56]

The issue of multidisciplinary collaboration has attracted increasing attention largely due to increasing competition from accounting firms. Other Western industrialized nations generally permit nonlawyers to provide some law-related services and to employ or form partnerships with lawyers. As a consequence, the Big Five accounting firms dominate the global legal market with over sixty thousand employees in over 130 countries. These accounting firms are also making

increased inroads in the American market. Federal law provides that tax advice and representation in tax court does not constitute the practice of law. This exception to traditional unauthorized practice prohibitions enables lawyers to provide services for clients of accounting firms as long as the work can be defined as tax, not as legal assistance. Over the past decade, the Big Five have taken increasing liberties with this definition and have expanded their in-house legal staff to provide many the same services as law firms on matters involving finance, estate planning, intellectual property, ADR, and litigation support. The American legal profession faces growing difficulties competing with these accounting organizations, which often offer a wider range of financial services, greater economies of scale, and more effective marketing and managerial capacities. The result is that the world's largest providers of legal services are no longer firms. Or as law professor Geoffrey Hazard indelicately puts it, accountants are "eating our lunch."[57]

That realization has triggered what is variously perceived as a turf battle or a holy war. Opponents of multidisciplinary practice paint the struggle in apocalyptic terms. At stake are the independence and core values of profession, now threatened by an invasion of profit-maximizing infidels. Critics worry that lawyers will become accountable to supervisors from a different tradition with less rigorous standards governing confidentiality, conflicts of interest, and pro bono service. Law will truly become just another business, and clients will pay the price when professional judgments are 'en by the bottom line. Supporters of multidisciplinary practice see the struggle in less lofty terms. From their perspective, the stakes are status and money. Professionalism is window dressing for protectionism; lawyers are unable or unwilling to compete are attempting to miscast personal interests as public values.

A more productive debate must start from different premises. Opponents' concerns are real, but they are not limited to the multidisciplinary context, and they can be addressed by regulation rather than prohibition. American lawyers already face many pressures and constraints that compromise professional independence. In-house counsel need to please nonlawyer management. Outside counsel need to please important clients, third parties who refer clients or pay their fees, and supervisors preoccupied with billable hours. Court-appointed counsel for the poor need to balance competing cases and resource demands. No evidence suggests that threats to independent judgment in multidisciplinary practice are qualitatively different from those in other settings.[58]

As a recent ABA commission also acknowledged, strategies short of prohibition are available for addressing the pressures likely to arise in multidisciplinary practice. The commission recommended holding MDP lawyers to the same ethical standards governing conflicts and confidentiality as those applicable to the bar generally, and imposing special audit provisions to prevent nonlawyers from interfering with lawyers' professional judgments. The attorney-client privilege could be extended to cover these settings, or clients could be warned about its unavailability. An alternative approach, more workable for accounting firms, would be to follow their less stringent conflict-of-interest procedures. These procedures create screens between professionals representing competing concerns and seek informed client consent to the dual representation. Such structures have not proven inadequate here or abroad, and sophisticated clients have not pressed for reforms or alternatives. Unless and until problems with multidisciplinary partnerships arise, the bar has no convincing justification for restricting their availability. In effect, the profession should learn from competitors, not shield itself from competition.[59]

Related reforms should focus on creating a more coordinated and comprehensive system of access to justice. Efforts should center on increasing information about legal rights, services, and processes, making those processes more accessible, and expanding opportunities for low-cost assistance. One set of strategies should -enable Americans to meet more of their own needs through their own efforts. Again, we do not lack for promising models. For centuries, critics have denounced the unnecessary formalities, archaic jargon, and cumbersome rituals that discourage individuals from resolving legal problems themselves. Some of these excessive

complexities seem linked to the early British bar's practice of charging by the word, and to the American bar's desire to preserve its own business. Simplified forms and streamlined procedures could expand individuals' opportunities to handle routine matters such as governmental benefits, probate, uncontested divorces, landlord-tenant disputes, and consumer claims. Expanded hours, childcare assistance, and multilingual services would also make courthouses more accessible.[60]

More assistance for self-representation would serve similar objectives. A few courts and legal aid providers are now pioneering interactive computer kiosks and on-line self-help systems. Users obtain basic information and assistance in completion of routine forms. Such initiatives are steps in the right direction, but further efforts are necessary to make them effective for those whose unmet needs are greatest. These efforts should include free or low-cost workshops, hotlines, courthouse advisers, and walk-in centers that provide personalized multilingual assistance at accessible times and locations. Support could come from a mix of public and private sources: judicial administration funds, foundation grants, bar pro bono contributions, law school clinics and legal services outreach projects.[61]

Although the organized bar has endorsed procedural simplification and self-help services in principle, it generally has failed to do so in practice. Countless commissions, committees, and task forces have recommended such initiatives with striking regularity and few results. The resistance comes largely from lawyers who doubt that these reforms would be good for business, and from judges who depend on lawyers' cooperation or campaign support. Such reforms would, however, be good for the public-and for the profession's public image. Since surveyed lawyers identify poor image as paramount concern, the profession as a whole may have much to gain from access-to-justice initiatives. Business lawyers face little economic risk from self-help activities. Other attorneys might benefit from providing discrete “unbundled" services to groups that now are priced out of the market. Lawyers can provide limited low-cost assistance that does not involve full representation: advice about legal options; evaluation of proposed settlements; development of negotiating strategies; and referrals to other service providers such as accountants, mediators, and health professionals.[62]

If the bar is unwilling or unable to provide such services efficiently, then critics may well be right: we do have too many lawyers. We clearly have too de justice, at least for middle- and low-income Americans, and the bar's traditional solutions have fallen far short. Its preferred responses, like government-subsidized legal aid and voluntary pro bono contributions, deserve greater support, but realistically they cannot come close to meeting current needs. Fundamental restructuring is necessary for legal services and legal processes.

Policy debates both within and outside the profession too seldom confront this reality and the choices that it demands. Simplistic sound bites have displaced systematic analysis. Equal justice is the kind of principle that we find easier to proclaim than to define, let alone finance. If we are seriously concerned about America's balance of law and justice, then we need to translate more of our rhetorical commitments into policy priorities.

Endnotes

48. For scholars' views, see the sources cited in Deborah L. Rhode, "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice," *New York University Review of Law and Social Change* 22 (1996): 701; Deborah L Rhode, "The Delivery of Legal Services by Nonlawyers,” Georgetown Journal of Legal Ethics 4 (1990): 209. For other experts, see Commission on Nonlawyer Practice. ABA. *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations* (Chicago: ABA. 1995); *Report of the State Bar of California Commission on Legal technicians* (San Francisco: State Bar of California. July 1990). .

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53. Reuben. "The Lawyer Turns Peacemaker,' 60. See Nader and Smith. *No Contest,* 299-301; Carrie Menkel-Meadow. "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities," *South Texas LawReview* 38 (1997): 407; Resnik, "Many Doors,' 228.

54. For examples of such proposals, see sources cited in Rhode, "Professionalism,' 715; *California Commission on Legal Technicians' Report;* Menkel-Meadow, "Ethics in Alternative Dispute Resolution," 448.

55. See Steven Brint, *In an Age of Experts: The Changing Role of Professionalism in Politics and Public Lift* (Princeton: Princeton University Press, 1994),76 (discussing the unwarranted price increases due to restricting competition); Simon Domberger and Avrom Sherr, "The Impact of Competition on Pricing and Quality of Legal Services," *International Review of Law and Economy* 9 (1989): 41, 55 (discussing Great Britain); George C. Leef, "Lawyer Fees Too High: The Case for Repealing Unauthorized Practice of Law Statutes," *Regulation (winter 1997): 33, 34-35 (discussing Great Britain and Canada); Rhode, "Professionalism," 712-13; ABA Commission on Multidisciplinary Practice, Report to the ABA House of Delegates, reprinted in Professional Lawyer* 10 (1999): 1; and ABA Commission on Multidisciplinary Practice, Background Paper on Multidisciplinary Practice: Issues and Developments, reprinted in *Professional Lawyer* 10 (1998): 1; Mark E. Doremus,