NonLawyer Activity in Law-Related Situations

A Report with Recommendations

American Bar Association
Commission on NonLawyer Practice

August 1995
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PC: 561-0127
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Dedication

THE HONORABLE WILLIAM R. ROBIE

William R. Robie, Chief Immigration Judge of the United States, was the driving force behind the creation of the ABA Commission on Nonlawyer Practice.

Judge Robie exemplified the selflessness found in our profession. A member of the ABA since his graduation from Northwestern University School of Law in 1969, he spent his entire professional life advocating access to justice, programs for client protection, and the promotion of pro bono publico services. In twenty-three years of outstanding service to the Association, Judge Robie chaired the Standing Committee on Legal Assistance for Military Personnel, the Special Committee on Delivery of Legal Services, the Standing Committee on Legal Assistants, and the Standing Committee on Lawyers' Responsibility for Client Protection. He also served as a member of the Consortium on Legal Services and the Public and participated in its National Conference on Access to Justice in the 1990s.

Before retiring as Chair of the ABA Standing Committee on Lawyers' Responsibility for Client Protection, Judge Robie advanced the concept of creating an entity to explore the extent of the delivery of legal and law-related services by nonlawyers and to formulate a response to that phenomenon. A working group resulted, which was jointly sponsored by the Committee on Lawyers' Responsibility for Client Protection and the Consortium on Legal Services and the Public. In a real sense, it was primarily his initiative that ultimately led to the appointment of the Commission on Nonlawyer Practice.

Judge Robie also worked extensively with paralegals and paralegal organizations, and was himself a paralegal instructor. He was a member of the National Advisory Board of the National Federation of Paralegal Associations, Inc., the USDA Graduate School Advisory Committee on Law and Paralegal Studies, and the National Association of Legal Assistants, Inc. He was instrumental in establishing the paralegal training program at the University of Maryland.

Bill Robie died on October 18, 1992, and we will miss him as a friend and a visionary who long ago recognized the importance of promoting access to justice and the securing of all options for delivery of quality legal services. It is in the spirit of that commitment and in acknowledgment of his intelligence, humor and humility that the Commission dedicates this Report to him.
In 1992 the American Bar Association established the Commission on Nonlawyer Practice consisting of 16 lawyers and nonlawyers having diverse geographical and professional backgrounds. The Association's Board of Governors directed the Commission to "conduct research, hearings and deliberations to determine the implications of nonlawyer practice for society, the client and the legal profession." From this directive, the Commission embarked upon a course of nationwide hearings, fact gathering, analysis and formulation of conclusions and recommendations.

Origins of the Commission

The Commission traces its origins to the 1986 report of the ABA Commission on Professionalism which recommended that lawyers "encourage innovative methods that simplify and make less expensive the rendering of legal services" for middle class persons, including consideration of "the limited licensing of paralegals." That report also stated that "care must be exercised in having paraprofessionals enter these areas and in making sure that the training, supervision, and testing required is comprehensive." 1

For at least a decade, the ABA Standing Committee on Lawyers' Responsibility for Client Protection ("LRCP") 2 and the ABA Consortium on Legal Services and the Public ("Consortium") 3 have examined issues surrounding the delivery of law-related services to the public by persons other than licensed lawyers. LRCP is primarily concerned with client protection and the Consortium with access to affordable services. Both have emphasized the importance of high quality services, regardless of who renders those services.

In addressing the complex problem of combining access to justice with the competent provision of legal services, LRCP has emphasized the need to be responsive to the

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2 The mandate of the Standing Committee on Lawyers' Responsibility for Client Protection is: (To) ensure the reimbursement of financial loss caused by lawyers' misappropriation of client funds; promote governmental and consumer interest in the delivery of legal services wherever the participation of individuals unlicensed in the jurisdiction is involved; and identify and comment on emerging concerns in the regulation of the practice of law and, where advisable, refer those matters to other Association entities. The Committee is assisted on matters related to client protection funds by an advisory commission.

3 The Consortium on Legal Services and the Public is an umbrella organization of twelve ABA entities concerned with various aspects of legal services delivery. The Consortium works to promote measures that will make quality legal services available to the poor and otherwise affordable for low and middle-income persons. Among Consortium members, the Standing Committee on Legal Assistance considers the role of paralegals in legal services delivery and the Standing Committee on Delivery of Legal Services explores ways that lawyers alone or with the assistance of paralegals can provide more affordable services.
concerns and best interests of the client population through programs that serve to prevent or redress harm done in the rendering of legal services.

In 1989 the Consortium and Tulane Law School sponsored the Conference on Access to Justice in the 1990's, issuing its report titled Civil Justice: An Agenda for the 1990s. The Conference found that access to legal services by low- and moderate-income persons had not been significantly enhanced despite recent technological advances and the previous decade's experimentation with legal advertising, alternative dispute resolution mechanisms, national and local legal clinics, lawyer referral and information services, and a variety of prepaid legal plans. The Conference "strongly supported the relaxation of current barriers to the involvement of non-attorneys in the provision of legal assistance and called for careful experimentation with lay advocacy programs to determine whether and how much such representation will increase access to the legal system."

In 1992 an informal working group, cosponsored by LRCP and the Consortium, explored the implications of expanded nonlawyer practice. After a year of intensive investigation, the working group concluded that

"[T]here is a greater incidence of nonlawyer practice at all levels of client service than at first suspected and that formal efforts to...regulate nonlawyer practice, particularly by state legislatures are increasing. The rendering of what are traditionally considered to be legal services by persons not licensed as lawyers in any jurisdiction is a concern with implications that go to the very essence of a client's interaction with the system of justice, defined here to include the full range of legal and law-related client needs, particularly for the delivery of legal services to those not now having access to them, the quality of those services and the recourse available if those services are not competently provided."

The report of the working group supported its request that the ABA Board of Governors create a Commission to conduct an in-depth analysis of the delivery of legal and law-related services by nonlawyers. This Commission was appointed in September 1992. The ABA Justice Systems Initiative, the Association's multi-year national agenda to improve the administration of justice, identified this Commission as one of the ABA entities charged with the duty to address access issues related to improving the justice system and to identify problems and develop solutions.

Commission Hearings and Deliberations


5 Id. at 37.
6 In addition to the sponsoring entities, the working group included an at-large member and representatives from the Sections of Family Law, General Practice, Litigation and Real Property, Probate and Trust Law and ABA Standing Committees on Legal Assistants, Delivery of Legal Services and Sole and Small Firm Practitioners.
record, comprised of the testimony of witnesses,\footnote{Throughout the report the statements offered to the Commission, although unsworn, are referred to as “testimony” and the persons offering the statements as “witnesses.” This terminology is used in the legislative sense and is meant to have no formal or legal significance.} written submissions and independent documents, as the principal basis for its findings and recommendations. During the hearings, nearly 400 persons presented their views, now preserved in thousands of pages of transcripts in the Commission’s archives. Many of these persons supplemented their statements with additional written comments. More than 100 others who were unable to attend the public hearings also submitted written comments.

The Commission sought out the views of every identifiable group and sector having an interest in the provision of legal services in the United States. These groups included judges, ABA members, representatives of ABA entities, state and local bar associations, specialty bar associations, legal services programs, legal education institutions, legislators and representatives of federal and state government agencies, arbitrators, mediators and representatives of their associations, paralegals, paralegal educators and representatives of paralegal organizations, self-represented persons and document preparers, legal technicians and others in law-related businesses, representatives of consumer organizations, nonprofit entities, self-help mutual support groups, Native American Tribal Court advocates and others.

Information received at the Commission’s hearings was supplemented with extensive research into the provision of legal and law-related services in America and Canada today. The Commission’s archives now contain more than 2,000 documents including case law, statutes and court rules, reports of legislative bodies, administrative agency reports and rules, law review articles, treatises, books, reports, studies and surveys by state and local bar associations, state legal needs studies, and commentary from the general news media and other national organizations. The Commission closely examined all reports on nonlawyer activity and the responses to those reports by state legislative, judicial and bar authorities. In addition, statutes, rules and case law on unauthorized practice of law (“UPL”) and related nonlawyer activity for every state and the District of Columbia were collected to aid in understanding the pattern of UPL enforcement in the United States. The Commission also reviewed the comprehensive materials on law-related delivery systems maintained by the Association’s Legal Services Division.

The Commission’s public hearing transcripts, coupled with its extensive library of commentary and documents relating to the provision of law-related services by nonlawyers, has thus become what is probably the nation’s broadest, most comprehensive database available on the subject.

Based on the record developed at the time, the Commission issued its first report in April 1994, titled Nonlawyer Practice in the United States: Summary of the Factual Record Before the American Bar Association Commission on Nonlawyer Practice. This initial report on the Commission’s factual record was presented to elicit comment and supplemental information. At its final hearing in New Orleans in August of 1994, the Commission received comment from many persons who were active members of ABA sections and committees, and from representatives of other bar associations and legal organizations.
Two prominent national organizations of paralegals, the National Association of Legal Assistants, Inc. (NALA) and the National Federation of Paralegal Associations, Inc. (NFPA), submitted extensive information on their policies and on the history and activities of paralegals. Both organizations urged an expanded role for traditional paralegals and some form of code of ethics, entry requirements, continuing paralegal education and periodic recertification.

Representatives of HALT, a citizen’s legal reform advocacy group, spoke at several of the Commission’s hearings and provided extensive written analysis and recommendations concerning the full spectrum of issues related to permitting nonlawyer delivery of legal services directly to clients without the required participation of a lawyer.

Several other sources provided useful information for the Commission. The American Bar Association Standing Committee on Delivery of Legal Services has examined the problem of assuring greater access to the legal system for moderate-income individuals. Several of its studies have provided valuable information. Two recent studies on the future of the courts, in California (1994) and Massachusetts (1992), also offered valuable guidance.9

Special Acknowledgements

The Commission was extremely fortunate to receive gratuit transcription services of court reporters from the national reporting firm of INTERIM Court Reporting, formerly Noon & Pratt, obtained with the generous assistance of the National Federation of Paralegal Associations, Inc. These reporters transcribed the statements of several hundred persons who spoke to the Commission and the Commission gratefully acknowledges their substantial contribution to its work.

Finally, while the Commission could not have succeeded without the information and perspectives of the hundreds of persons who addressed it and the thousands of documents it amassed, its most essential support came from the many individuals on the staff of the American Bar Association who labored to support the Commission’s work. The Commission wants to thank the Center for Professional Responsibility, the Division for Legal Services and the Office of Planning for their valuable assistance.

The Report was written by the Commission, with primary roles assumed by a drafting committee co-chaired by Zona F. Hostetler and Gerry Singsen and including Commissioners Merle L. Isgett, C. Terrence Kapp, Herbert M. Rosenthal, John E. Sandbower III, and L. David Shear.

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The lexicon of nonlawyer activity in legal and law-related matters may be confusing because many of the terms are used with significant variation from jurisdiction to jurisdiction and from one organization to another. It is important to note the Commission's definitions of the four terms that follow. The Commission has attempted to define these four key terms and to use them consistently and narrowly. The Commission's definitions may differ from those used by other organizations, those used by other Association entities, or from the definitions adopted in various state laws.

The four key terms used in this Report are: Self-Represented Person, Document Preparer, Paralegal, and Legal Technician.

SELF-REPRESENTED PERSON – a person who represents himself or herself for the purpose of resolving or completing a process in which the law is involved. Such a person may seek assistance with preparing for or completing some tasks within the overall process, but ultimately brings the process to completion without representation by another person. A pro se litigant (sometimes described as a person proceeding "in propria persona" or "pro per") is a Self-Represented Person in an adjudicative proceeding.

Self-Represented Persons sometimes choose to utilize the services of a Document Preparer, a Legal Technician or a lawyer to assist in all or part of a legal process.

DOCUMENT PREPARER – a person who assists in the preparation of forms and documents using information provided by a Self-Represented Person.

A Document Preparer is a copyist, who usually types but may also use word processing computers to produce computer-generated forms. Document Preparer is synonymous with scrivener. It is important to note that the Document Preparer provides no advice or substantive information to persons using his or her services. All substantive information is provided by the Self-Represented Person. A Document Preparer functions much like a court reporter or a transcriptionist, recording as exactly as possible only the information provided by the Self-Represented Person without addition, deletion or editorial comment.

A Document Preparer may use commercially produced and court-approved forms, if available, or prepare a document drafted or dictated by the Self-Represented Person. If language translation services are provided by the Document Preparer, the translation is as literal as possible and devoid of substantive advice, implied or expressed.

A Document Preparer does not give advice, for example, on the selection of forms for a particular purpose, on the appropriateness of answers to questions on forms, or on the choice of administrative agency, court or forum. A Document Preparer sometimes provides incidental assistance, such as advice on court decorum, directions to or within a building, proper dress for an appearance in court, or other similar nonsubstantive matters.

A Document Preparer who gives advice on the selection of a form or an answer to a question is in this Report a Legal Technician.
PARALEGAL — a person who performs substantive legal work or provides advice to a client with the supervision of a lawyer or for which a lawyer is accountable. Paralegals are employed or retained by lawyers, law firms, governmental agencies, corporate law departments, and other entities.

Synonymous with the term Paralegal in this Report, and used interchangeably, are the terms Traditional Paralegal and Legal Assistant. Although these terms may be used interchangeably in this Report, it is understood that the work performed by any of these persons is supervised by a lawyer or is work for which a lawyer is accountable. The term Paralegal has been found during the Commission's deliberations to avoid some of the ambiguities included in other terms and to most clearly distinguish itself from the term Legal Technician. The term Paralegal includes the concepts of freelance and contract paralegal; such persons work with the supervision of a lawyer or produce work for which a lawyer is accountable.

In this Report, the Paralegal who provides legal services without either the supervision of a lawyer or lawyer accountability for the work product will be considered a Document Preparer or a Legal Technician, depending upon whether substantive advice is given.

LEGAL TECHNICIAN — a person who provides advice or other substantive legal work to the public with regard to a process in which the law is involved, without the supervision of a lawyer and for which no lawyer is accountable. The fact that a Legal Technician may seek guidance from a lawyer (without being either supervised by or accountable to the lawyer) does not give the Legal Technician the status of a Paralegal.

A number of terms for specific types of nonlawyer providers of legal and law related services may be familiar to the reader, for example, special advocate, agency representative, accredited representative, enrolled agent and others. Except where specifically noted, these providers will also be considered either Paralegals or Legal Technicians depending upon the presence or absence of lawyer supervision or accountability in the delivery of their services.
Executive Summary

The Commission's report, Nonlawyer Activity in Law-Related Situations, is based on the statements of nearly 400 witnesses and the information contained in more than 2,000 documents gathered during the course of the Commission's deliberations and ten hearings held in 1992, 1993 and 1994. Part One of the Report details the findings of the Commission. Part Two sets forth the Commission's analysis, conclusions and recommendations.

PART ONE: FINDINGS

A. The History of Nonlawyer Delivery of Legal and Law-Related Services

From the founding of the colonies until today, nonlawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law. The role of nonlawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years.

B. Nonlawyer Activities in Specific Legal and Law-Related Matters

Today, individuals often choose to act on their own behalf without the assistance of a lawyer in situations that involve the law, even when those situations involve appearances before courts or administrative tribunals. Self-representation is particularly common in day-to-day business and personal interactions, in family courts, in tribunals hearing traffic, housing, estate and small claims matters, and in many state and federal administrative proceedings. Among reasons for self-representation given by those appearing before the Commission were the expected cost of hiring a lawyer, the perceived simplicity of a matter, the desire to act independently, and frequently, problems of communication with lawyers.

People who choose to represent themselves obtain needed information from many sources other than lawyers, ranging from neighbors, friends and the media, to religious advisors, teachers, co-workers, counselors and computer networks. A significant development is the proliferation of self-help books and computer software programs related to a vast range of law-related situations, many of which provide ready-to-use legal forms accompanied by instructions
on their preparation and use. This new frontier of self-help materials draws on increasingly available and accepted technology: software programs guide individuals in the preparation of legal forms; e-mail networks make quick exchanges of information easier; and a few courts even make computer-generated forms available within the courthouse.

Some self-representing individuals are not skilled in the use of computers, or even typewriters; others do not speak or read English. For such persons, document preparers copy handwritten documents, type dictated information into forms, or translate responses from a person’s native language into English. As long as document preparers give no legal advice (even advice as to which form to use) their services are almost always held not to violate statutes prohibiting the unauthorized practice of law.

The Commission found that an extensive array of federal and state administrative agencies allow nonlawyers to provide advice to self-representing persons and even to represent parties in agency proceedings. Examples of federal agencies that allow nonlawyer practice include the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration and the Patent Office. In those agencies, nonlawyers not only assist with agency paperwork and applications for agency action, but also may handle full evidentiary hearings as well. The Supreme Court of the United States has held that a federal agency’s decision to allow nonlawyer practice preempts application of state UPL provisions.

Myriad instances of legal advice and representation by owners and employees of well-established businesses, as well as by employees of unions and government, are often overlooked in a review of nonlawyer activity in law-related situations. Among the businesses are title companies, real estate brokerages, accounting firms, bank trust departments, debt collection agencies and architects. Union representatives represent workers in the automobile industry, teaching profession and a host of other labor settings in grievance hearings, arbitrations and negotiations. Government employees provide advice about the law to members of the public.

Members of community-based organizations and nonprofit charitable groups also provide advice and, sometimes, representation to group members and to low- and moderate-income individuals concerning their law-related problems. In certain instances, such as asylum assistance or advocacy on behalf of children with special educational needs, these nonlawyers advocate undertake lengthy training, use sophisticated materials and offer extremely specialized services.

Finally, the Commission found that an increasing number of other nonlawyers are offering advice and assistance to self-representing individuals or are actually representing consumers in law-related situations. The Report categorizes these nonlawyers as “legal technicians.” The number of legal technicians is not known. One relatively well known example is the storefront tax preparer. Other examples include persons offering services to individuals seeking divorces, facing evictions, applying for visas, claiming bankruptcy, and desiring wills and trusts, and persons calling themselves document preparers but offering advice about legal forms. The Commission’s record contains reports of both high and low quality work by legal technicians (including some work by people described as document preparers but who were also providing advice) and some reports of actual harm to consumers.
C. The Growth of the Paralegal Profession

Paralegals, as defined in the Report, are different from legal technicians by virtue of their working with the supervision of lawyers, or at least with lawyers who are accountable for their work. The paralegal profession has grown greatly since it came into existence during the 1960s. Paralegals work in law firms, government agencies, corporate law departments, nonprofit organizations and, increasingly, on their own as freelance or contract paralegals. They often perform complex substantive tasks which would otherwise be done by lawyers. Although a lawyer is always accountable to a client for a paralegal's work, witnesses reported that many paralegals operate without meaningful supervision. An increasing number of paralegals have higher educations, and two national paralegal organizations are urging broad adoption of voluntary certification systems for paralegals. The details of their recommendations, and those of other paralegal organizations, can be found in an Appendix to the Report.

D. Nonlawyer Accountability to Consumers

Authority on the specific liability to consumers of different types of nonlawyer providers of law-related services varies. For example, union representatives are not held to a lawyer's standard of care when representing union members at hearings while some legal technicians have been held to lawyers' standards. Paralegals sometimes have been held directly liable to consumers but more commonly only the lawyers with whom they work are held liable. The one area in which there is some degree of uniformity involves self-help materials. Authors and publishers of self-help materials are generally not subject to challenge under either product liability or unauthorized practice statutes.

E. Recent Efforts to Examine and Regulate Nonlawyer Activities

Several states have recently examined nonlawyer activity. State legislatures have considered a wide variety of measures to regulate legal technicians. Reports from court and bar task forces in California, Arizona, Minnesota and Florida, among others, proposed more explicit or expanded roles for nonlawyers. Bar inquiries in other states, including Nevada and Nebraska, led to reports which did not recommend more explicit or expanded nonlawyer roles. The thoughtfulness of the varied state task force reports bolsters the Commission's general belief that most of the issues discussed in those reports can best be addressed at the state level.

PART TWO: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The Commission reached three major conclusions when it analyzed the record:

11 A listing of measures considered in recent years by state legislatures is set forth in Appendix C.
12 Several state task force reports are described in Part One, § E of the Report.
• Increasing access to affordable assistance in law-related situations is an urgent goal;
• Protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal; and
• When adequate protections for the public are in place, nonlawyers have important roles to perform in providing affordable access to justice.

The most fundamental conclusion of the Commission, however, was that each state has a unique culture, a specific legal history, a distinct record of experience with nonlawyer activity and a current economic, political and social environment which will affect its approach to varied forms of nonlawyer activity. As a result, the most important conclusion of the Commission is that each state should conduct its own careful analytical examination, under the leadership of its supreme court, to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction.

The information that led the Commission to these conclusions also led it to formulate six major recommendations and to identify a wide variety of actions that practicing lawyers, bar associations, courts, law schools and the federal and state governments might take. Part Two of the Commission’s Report sets forth the bases for these conclusions, the recommendations they led to, and the actions that are needed to implement the recommendations.

A. Increasing the Public’s Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States.

Lawyers have a long tradition of aspiring to assure that justice is available for everyone. Standards of conduct have consistently encouraged pro bono and public service activities. Despite this tradition, much remains to be done before all moderate- and low-income persons will have effective access to affordable assistance with their legal and law-related needs.

Many studies identify a massive volume of unmet legal needs among low-income persons. Similar studies focusing on moderate and middle-income individuals establish that more than sixty percent of the legal and law-related problems of that group are not brought to lawyers or courts. This widespread refusal to use the justice system can be attributed to numerous factors, not the least of which is a matter of individuals’ perceptions about their problems: either they view their problems as not serious enough to justify obtaining legal assistance; they believe that their situation does not warrant paying what they expect to be charged; or they suspect that their problem will cost more to resolve than they can afford.

The Commission heard many reasons for consumers not utilizing the services of lawyers to solve law-related needs, that lawyers are not always available at affordable rates; that for some kinds of specialized issues (for example, special education cases) few lawyers have the knowledge and experience needed; that for damage claims involving relatively low potential recoveries, the available fees may be too low for a lawyer to be able to undertake the work; that there are too few lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers’ significant debt burdens and rising operating costs put lawyers under economic pressure to
charge higher fees.

On the other hand, many initiatives to improve access to justice have originated within the legal profession, and the Commission believes that continued innovation is essential and will benefit both the public and the profession. In other words, making the justice system more accessible can be a "win-win" situation.

B. Steps to Continue Improving Access to Justice

There are many opportunities for lawyers in private practice and for the other institutions of the justice system to improve access to justice. The first recommendation of the Commission's Report calls on everyone involved to do what they can: The American Bar Association, state, local and specialty bar associations, the practicing bar, courts, law schools and the federal and state governments should develop and finance new and improved ways to help the public meet its legal and law-related needs.

1. THE PRACTICING BAR

The practicing bar can do many things that will both enhance their practices and increase the public's access to justice through affordable legal services. The profession has developed many innovations that make services more affordable and available, and therefore more attractive to consumers. The Commission recommends that the profession continue and intensify this work. Examples of innovations that lawyers can use to improve their economic well-being while reducing unmet legal needs include: making their law offices more "consumer-friendly" and their hours more convenient; offering fixed fees for routine services rather than hourly rates; improving communication with clients; participating in or even forming prepaid and other group legal service plans; employing new technology to reduce costs and increase productivity; and, in appropriate circumstances, considering new techniques for giving advice over the telephone and through other means of electronic transmissions and providing limited assistance rather than full representation to self-representing persons.

A major opportunity for enhancing law practice and improving access to legal services involves more extensive utilization of paralegals. The Commission recommends that the range of activities of traditional paralegals be expanded, with lawyers remaining accountable for their activities.

There are many ways that paralegals can enhance productivity, efficiency and quality in all law practice settings. Among the possibilities are their undertaking of an increased number of appropriate tasks, including such work as preparation of paper work in administrative claims, working as freelance paralegals when services of full-time paralegals are not needed, and possibly assuming expanded substantive responsibilities. The Association's Section of Law Practice Management has recently published materials describing many of these opportunities.

Tasks currently performed by paralegals cover a wide range of activities that include interviewing clients, drafting simple wills, conducting title searches, handling residential real estate closings, probating estates and preparing bankruptcy petitions and tax forms. Paralegals also render litigation support services such as drafting pleadings, preparing summaries of depositions, collating doc-

Recommendation 1

The American Bar Association, State, Local and Specialty Bar Associations, the Practicing Bar, Courts, Law Schools, and the Federal and State Governments Should Continue to Develop and Finance New and Improved Ways to Provide Access to Justice to Help the Public Meet Its Legal and Law-Related Needs.

Recommendation 2

The Range of Activities of Traditional Paralegals Should Be Expanded, With Lawyers Remaining Accountable for their Activities.
umentary evidence and preparing responses to discovery requests.

The Commission found that lawyers use the services of paralegals in innovative ways to save time and reduce costs to clients. Several lawyers recommended to the Commission, for example, that court rules be changed to permit paralegals to appear in court for their law firm employers on routine matters such as calendar calls or previously agreed-to matters such as child support calculations and small estate probate hearings.

2. BAR ASSOCIATIONS

Bar associations can also play a role in increasing affordable assistance to the public. For example, associations can: (1) support the expanded activities recommended for members of the practicing bar; (2) publish materials that assist self-representers to understand the law and obtain justice; (3) join with non-profit programs to bring legal information to the programs' members and constituents; (4) enhance regular and reduced fee lawyer referral and information services; (5) create legal information telephone lines; and (6) sponsor legal assistance clinics and community law programs. The Commission specifically notes in this context the special responsibility of the American Bar Association to encourage the work of its own entities in these areas. Association entities already having key roles in this process include the Division for Legal Services, the Sections on General Practice and on Law Practice Management; the Standing Committee on Legal Assistants and the Judicial Administration Division.

3. COURTS, LAW SCHOOLS, FEDERAL AND STATE GOVERNMENTS

The Commission also encourages courts, law schools, and the federal and state governments to undertake wider efforts to increase accessible and affordable law-related services for the public. As the site of the most visible and important interactions between the public and the justice system, the courts of our nation have central opportunities to help with improvements in access to justice. The Commission suggests that courts examine and consider such judicial innovations as the use of pamphlets, slide shows and video presentations for self-representers, telephone information services, employment of courtroom facilitators and use of interactive computer systems.

Law schools have profound influences on people who become lawyers and are a major resource for change in the justice system. Among suggestions for law schools are special curricula that train students to provide legal services to under-represented segments of the population on a fee generating basis, encouragement of more extensive pro bono service to those who cannot afford to pay any fees, and making space available in appropriate law school courses and facilities for law students seeking substantive and skills training.

The federal and state governments make the laws, establish and fund the courts and administrative agencies and, through their employees, interpret and enforce the rules that govern many economic, social, political and personal dimensions of our lives. Among suggestions for implementation by governments are a proposal by the Attorney General of the United States that states encourage or fund four-year college programs in community advocacy, proposals for simplification of laws, regulations and procedures to make self-rep-
representation more effective and efficient, and suggestions for government sponsored community advice and referral systems.

Individuals often attempt to resolve legal and law-related matters through federal, state and local administrative agencies. In federal agencies there is a broad acceptance that nonlawyers, working under rules established by the particular forum involved, can provide assistance and representation to clients dealing with or appearing before the agencies. The Administrative Conference of the United States urged the Commission to encourage more nonlawyer representation in these agencies under the same rules of conduct that apply to lawyers. The ABA Coordinating Committee on Immigration Law urged the Commission to recommend, among other things, that the Immigration and Naturalization Service amend its rules regarding representation by accredited nonlawyers to allow the sponsoring organizations to charge reasonable fees and to allow paralegals in law firms to be accredited.

State administrative agencies have a less uniform practice regarding nonlawyer assistance to, or representation of, individuals having administrative agency claims or problems, even though the federal experience, as well as that of many states, suggest that nonlawyers can be an important source of help in the agency arena. Consequently, the Commission recommends that states should consider allowing nonlawyer representation of individuals in state administrative agency proceedings and that nonlawyer representatives be subject to the agencies' standards of practice and discipline.

All of the individuals and institutions that are involved in the justice system have a role in making and modifying the laws, rules and policies that affect access to justice. The Commission urges that consideration be given, as part of the overall effort to consider ways to improve access consistent with public protection, to possible modifications in statutes, standards and policies. Within the ABA itself, this encouragement extends to many of its Sections, Committees, Commissions and Divisions, each of which is involved in developing and implementing Association policy.

A prominent example of what might be examined is the ABA's own set of ethical rules governing lawyer practice in conjunction with nonlawyers, rules and policies relating to limited forms of assistance by lawyers to clients, rules regarding fees and partnerships, rules related to rendering of law-related services through lawyer owned or controlled businesses, and rules addressing unauthorized practice and supervision of the work of legal assistants. The Commission, therefore, recommends that the American Bar Association should examine its ethical rules, policies and standards to ensure that they promote the delivery of affordable competent services and access to justice.

C. The Protection of the Public From Harm Arising From Incompetent and Unethical Conduct by Persons Providing Legal or Law-Related Services is an Urgent Goal of Both the Legal Profession and the States. When Adequate Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public with Access to Justice.

These two conclusions establish the basis for the final two recommendations of the Commission. Public protection is an essential component of any examination of increasing access to justice and to affordable assistance in legal and

| Recommendation 3 | States Should Consider Allowing Nonlawyer Representation of Individuals in State Administrative Agency Proceedings. Nonlawyer Representatives Should Be Subject to the Agencies' Standards of Practice and Discipline. |
law-related situations. It has long been a major concern of the legal profession, as evidenced in the report's discussion of the history of enforcement of UPL, the recent efforts by some states to establish limited licensing of legal technicians, and the range of laws and ethical rules favor public protection. It is a central element the analytical framework which is at the core of the Commission's recommendation for state-by-state assessment of the possible future roles for, and increasing regulation of, nonlawyer activity.

The record before the Commission makes it clear that expanding access to justice through the services of document preparers, legal technicians, or other nonlawyer service providers carries with it both the risk of incompetent or even fraudulent services and the promise of excellent and high quality services. The states will have to take both risk and promise into account in their assessments.

Some states have already found the promise of sufficient value to permit an extensive range of legally protected nonlawyer activity that includes assisting self-representing individuals and representing other individuals pursuant to specific statutes, court rules or agency regulations. As to nonlawyers whose work is already authorized as a matter of current law under specific statutes or within the federal legal system, the Commission recommends that their work should be continued subject to review by the entity under whose authority their services are provided.

Representation by a lawyer is essential before tribunals that use formal evidentiary rules to determine complex matters. For simpler matters, many persons choose not to retain a lawyer's help. There is no bright line along which to determine when a lawyer's skills are needed. The record does reveal, however, that where lawyers may not be essential, nonlawyers may provide a variety of important law-related services. For example, the U.S. Supreme Court has determined that the complex task of preparing a patent application can be performed by nonlawyers admitted to practice by the United States Patent Office despite a history that includes unscrupulous nonlawyer patent agents.

Similarly, in the area of tax preparation and related advice, even though significant economic interests are at stake, the consumer is allowed to represent himself, use self-help books or software, obtain tax advice from nonlawyers who work for the IRS, hire a nonlawyer tax preparer, employ a highly trained and regulated Certified Public Accountant, or obtain the service of an IRS-approved "Enrolled Agent," or retain a lawyer.

D. As to Nonlawyers Whose Services Are Not Already Authorized Under Current Statutes or Other Law, the Commission Recommends That States Should Assess Whether and How To Regulate Their Activities.

Even with all the efforts of lawyers, bar associations, courts, and others, a significant gap in access to justice and to affordable services will probably remain. Nonlawyers might help to fill the gap. However, much of the unmet need involves legal issues that seem simple but turn out to have complex and far-reaching ramifications. In these situations, consumers can be seriously hurt by misinformation and bad advice. Any attempt to determine an appropriate level of protection or regulation will require a careful balancing of interests. Among these interests will be public safety, consumer protection, access to equal justice, affordability, individual choice, judicial economy, efficient operation of the marketplace, implementation of public policy and respect for state sovereignty.
Consequently, beyond the expansion of traditional paralegal roles, more widespread approval for nonlawyer roles in state administrative agencies, and continuation of nonlawyer activity which is already lawful, the Commission recommends that the states adopt an analytical approach in assessing whether and how to regulate other varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. The Commission further recommends that the criteria for this analysis include the risk of harm the nonlawyer activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. Finally, the Commission recommends that the highest courts take the lead in examining specific activities within their jurisdictions, with the active support and participation of the bar and the public.

The Commission recommends a specific analytical approach for use by the states in determining what level of regulation, if any, is appropriate. The approach will help in assessing whether a particular activity should be unregulated, regulated or prohibited. Three broad criteria are suggested:

1. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?
2. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?
3. Do the actual benefits of regulation likely accrue to the public outweigh any likely negative consequences of regulation?

Regulation of a nonlawyer activity may be needed if the activity presents a serious risk, if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness of different options for reducing the predicted harm while avoiding countervailing negative consequences. The activity should be prohibited if no regulatory approach will effectively and economically achieve acceptably low levels of harm to consumers.

The first criterion involves judgments about degrees of injury. Of course there is some risk of harm in every activity. A state will need to consider how frequently a nonlawyer might make mistakes, whether those mistakes will actually cause injury, how substantial the injury will be, whether there is an effective remedy if injury occurs, and if there is any experience in other states on which to make such judgments. If there is relatively little serious risk to life, health, safety or economic well-being, regulation may not be needed.

The second criterion asks whether consumers can protect themselves by assessing provider qualifications, and will turn on whether the consumers will know what qualifications may be relevant and will be able to evaluate them. This criterion does not rely on the consumer's ability to directly assess the quality of services provided because this is very difficult to do when professional services are involved. If consumers can protect themselves, then regulation may not be needed.

The third criterion involves balancing the actual benefits likely to arise from regulation against any negative consequences of that regulation. Although reg-
ulation or prohibition of an activity can reduce the risk of harm to consumers who cannot protect themselves adequately, some levels or forms of regulation may reduce access to justice. For example, will the regulatory system cause nonlawyers to raise their prices so much that increases in access will be lost? Moreover, certain forms of regulation may not provide adequate protection. In that regard, it will be essential to identify whether the regulatory system under consideration can and will actually be enforced.

At the root of this balancing lies a difficult question which each state will have to assess. How much does the consumer's interest in having at least some assistance from a nonlawyer justify the increased risk of harm to that consumer from possibly lower quality services?

As states conduct their assessments, they should consider a wide range of regulatory possibilities, depending upon the activity to be regulated. Among the simplest are consumer protection laws, unfair and deceptive trade practice statutes, criminal laws against fraud and the traditional remedies of actions sounding in negligence. A second group of regulatory possibilities includes design of affirmative consumer remedies, such as insurance, bonding, arbitration and mediation, or client protection fund requirements. A third approach is regulation through control of the bar, such as that found in administrative agencies, and might include prescribing forms, limiting access to the tribunal and requiring disclosure of the provider's nonlawyer status.

Finally, for certain types of activities, states will want to explore regulation by registration, certification or licensure. In this exploration, regulatory systems might include requirements related to disclosure, education, age, work experience, specialized training, recordkeeping, continuing education, compliance with ethical standards, disciplinary procedures and admission examination.

The report concludes by giving examples of how these criteria might be applied by a state in its assessment of several common situations in which nonlawyer activity has been considered. The situations vary in complexity, potential for harm and in other ways, permitting the reader to see sample application of the Commission's proposed analytical framework. These examples include the document preparer who types or otherwise completes court-approved forms or other forms, the legal technician who assists a self-representer by providing both typing services and limited advice about a "simple" divorce, a legal technician who assists in a residential real estate sale, and a battered women's shelter advocate who, functioning as a legal technician, advises and assists a client in filing a complaint, seeking police action and preparing papers for a protective order.

Conclusion

The Commission's Report amply demonstrates that nonlawyers provide services which in many instances relate to the practice of law. We believe that this report fulfills the mandate of the Commission to investigate the extent of, and the areas in which, such practice takes place. The factual findings of the Commission demonstrate that nonlawyers, both as paralegals accountable to lawyers and in other roles permitted by law, have become an important part of the delivery of legal services, and that their expertise and dedication to the system have led to improvements in public access to affordable legal services. The
work of the Commission has also uncovered many inadequacies among lawyers in providing professional services which have given rise to increasing dissatisfaction with our profession by the public. The debate over delivery of law-related services and their cost is a public concern that will be debated by the public, not just by the legal profession. This Report should be viewed by the bar as an opportunity to take those steps which will protect the public and at the same time provide increased access. If this Report is to have any value, it will be in the thoughtful consideration of it by the bar, the judiciary and the public. In the first instance, the bar must take the lead to assure that legal services are rendered in a manner which will enhance public respect for the institutions of justice.

SUMMARY OF RECOMMENDATIONS

Whereas, Increasing the Public’s Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs Is an Urgent Goal of the Legal Profession and the States; and

Whereas, The Protection of the Public from Harm Arising From Incompetent and Unethical Conduct By Persons Providing Legal or Law-Related Services Is an Urgent Goal of Both the Legal Profession and the States; and

Whereas, When Adequate Protection for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public With Access to Justice;

THEREFORE, The American Bar Association Commission on Nonlawyer Practice Recommendations:


2. The Range of Activities of Traditional Paralegals Should Be Expanded, With Lawyers Remaining Accountable for their Activities.


5. The Activities of Nonlawyers Who Provide Assistance, Advice and Representation Authorized by Statute, Court Rule or Agency Regulation Should Be Continued, Subject to Review By the Entity Under Whose Authority the Services Are Performed.
6. With regard to the activities of all other nonlawyers, states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. State supreme courts should take the lead in examining specific nonlawyer activities within their jurisdictions with the active support and participation of the bar and public.
Part One: Findings

The Commission begins its Findings in Section A by examining the history of nonlawyer roles in the American legal system and of restrictions on those roles. Section B of the Findings outlines the extensive current roles of nonlawyers in legal and law-related situations. The initial focus is on self-representation, which is increasingly assisted by dramatically evolving technology. Section C is devoted to the recent growth in the numbers of paralegals, who are now an integral part of today’s delivery of legal services. The final section of the Findings, Section D, details the efforts by some states to examine nonlawyer activity.

A. The History of Nonlawyer Delivery of Legal and Law-Related Services to the Public

From the earliest days of this country both nonlawyers and lawyers have provided advice and assistance to others on matters involving the law. The extent to which the body politic has permitted nonlawyers to deliver legal and law-related services to the American public, however, has been subject to considerable shifts over the years.12

1. THE COLONIAL ERA

There were few lawyers in the early colonies of the 17th century and self-representation was the norm.13 The “attorneys” of early Virginia were laymen helping out their friends in court.14 The law by which the early colonists lived was not “lawyer’s law” but rather a simple system “made up of ecclesiastical principles, business usage, and common sense.”15 In addition, most of the early

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12 As exhaustive account of the history of American law and lawyers is set forth in LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2nd ed. 1985). See also BURLINGTON CHRISTENSEN, THE UNAUTHORIZED PRACTICE OF LAW: Do Good Fences Really Make Good Neighbors—or Even Good Sense? AM. BAR FOUND. RESEARCH J. 159 (1980) for a widely quoted article on the history of unauthorized practice. Also see generally the following earlier writings on the development of the legal profession and its relationship to nonlawyers: ANTON-HENRICK CHIBB, THE RISE OF THE LEGAL PROFESSION IN AMERICA, (1960); ROSCOE FOUNT, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (a study published under the auspices of the American Bar Association in 1953); JAMES WILLARD HURST, THE GROWTH OF THE AMERICAN LAW (1950); and CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (1911).

13 FRIEDMAN, supra note 12, at 94.

14 Id.

15 CHRISTENSEN, supra note 12, at 165.
colonies discouraged trained lawyers who tried to establish practices.16 Historian Daniel Boorstin writes: "[T]he ancient English prejudice against lawyers secured new strength in America."17 Yet, "[W]hile the colonies could live and even prosper without barristers, solicitors or scriveners, they could not live without the law."18 Further, as Stanford Law School Professor Lawrence Friedman writes, "[A]s soon as a settled society posed problems for which lawyers had an answer or at least a skill, lawyers began to thrive, despite the hostility."19

As the colonies grew in the early to mid-18th century, commerce and its inevitable disputes also expanded, making it increasingly difficult to regulate society through common sense, commercial usage or reliance on religious principles. Most colonies turned increasingly to the tested principles of English common law, which gave rise to a need for knowledgeable judges and lawyers.20 The number of trained lawyers grew, as did their importance. Before the end of the colonial era, "each colony possessed something like a legal profession."21

There were no law schools in the early colonies. The road to the bar was clerkship or apprenticeship with an established lawyer.22 By the middle of the 18th century every major community had a bar of professional lawyers.23 The number of trained lawyers remained exceedingly small, however, and did not exist at all in sparsely populated areas.24

In 1729 a small group of New York lawyers formed an "association" to supervise legal education, and to regulate practice and admission to the bar.25 A bar association was also formed in Boston. These associations took the lead, and other colonies soon followed, in establishing the concept of a professional bar, whose members would be given the exclusive right to represent others in court. Statutes were also enacted prohibiting nonlawyers from holding themselves out as members of the bar.26 By the late colonial period most courts had adopted rules to control who could appear before them.27

Lay persons with little or no apprenticeship training or formal legal education continued to provide legal services outside of the courtroom. Some public officials, such as justices of the peace, bailiffs and court clerks, sold their services in sideline businesses, although several colonies eventually barred that

16 Id. See also WAGEN, supra note 12, at 211 et seq.
18 Id. See also CHRISTENSEN, supra note 12, at 161–162.
19 FRIEDMAN, supra note 12, at 97.
20 CHRISTENSEN, supra note 12, at 165.
21 BOORSTIN, supra note 17, at 197.
22 FRIEDMAN, supra note 12, at 97.
23 BOORSTIN, supra note 17, at 198.
24 FRIEDMAN, supra note 12, at 100.
25 Id.
26 CHRISTENSEN, supra note 12, at 168–169.
27 Id. at 169.
practice. Except for restrictions on nonlawyer litigation in court and on private practice by public officials, law practice at the time of the Revolutionary War was largely unfettered by regulation.

2. THE FIRST ONE HUNDRED YEARS OF THE AMERICAN REPUBLIC: THE FLOURISHING OF NONLAWYER PRACTICE

Despite the number of distinguished lawyers who appeared on the scene in the years after the revolution, the first 100 years of the new American nation were marked by an unregulated legal profession. During this period, virtually all colonial era restrictions on admission to practice were removed. Some communities demanded the complete abolition of the legal profession. The Massachusetts legislature passed a law authorizing parties "to empower under seal any person whom they chose, whether regular attorney or not, to manage their causes." It also adopted a statute authorizing parties in litigation to argue their own causes in court. Most states abolished educational requirements for admission to the bar, and virtually all states either eliminated or eased other restrictions on admission to the bar. In the 19 new states admitted to the union between independence and 1860, the earlier colonial era model of an untrained and unregulated bar—even for appearances in court—was replicated.

In the mid-nineteenth century, the era of expansion to the uncharted west began and marked the rise of "Jacksonian democracy" that scorned class privilege and encouraged ordinary people to assume all the responsibilities, including representation in legal matters, that they thought appropriate. This further encouraged the practice of law by all persons without regard to educational or other qualifications.

28 Id. at 165–168.
29 Id. at 180–181.
31 Warren, supra note 12, at 212–19.
32 Id. at 218–219. Warren hypothesizes that some of the reasons for the decline in the professional bar included (1) the fact that many of the older members of the bar were Royalists or were lawyers trained by Royalists against whom the colonists had rebelled; (2) popular irritation with a court system that was governed by fees established by the colonial era bar associations; and (3) the fact that the war had generated both public and private debt and many of the legal actions being brought by lawyers were foreclosures of mortgages and debt collection actions which resulted in massive imprisonment of debtors.
33 Christensen, supra note 12, at 173–174; Pound, supra note 12, at 224–228.
34 Pound, supra note 12, at 235–236.
In general, formal bar meetings ended with the Revolutionary War, although lawyers continued to meet informally, mostly for social discourse or to discuss matters of local concern. Nearly 100 years later, in 1870, leading members of the legal profession organized a new Association of the Bar of the City of New York. One of its objectives was to condition bar membership upon various educational requirements. This became an objective of the many other bar associations established in the years following 1870. Although bar associations formed rapidly, states were slower to impose training, admission, and practice standards for lawyers. In 1902, eighteen states and four territories lacked educational requirements for admission to the bar. Of the states that did impose requirements, several also permitted private study. It was not until 1940 that all of the states required "some professional study preparatory to admission."

The period from approximately 1870 to 1920 also saw the enactment of new UPL legislation restricting the activities of nonlawyers. Although a few UPL statutes date to the early 1800s, modern unauthorized practice of law (UPL) legislation in at least 17 states dates from statutes enacted during the period 1870 to 1920. Those statutes resembled the narrowly tailored pre-1870 laws that regulated court appearances or prohibited the practice of law by court clerks, sheriffs and other public officials.

Nonlawyers continued to provide legal and law-related services to the public outside of courtrooms. Then, with the rise of the industrial age and increased governmental regulation, there was a tremendous increase in law-related needs outside the courtroom, which needs both lawyers and nonlawyers sought to meet.

In the early twentieth century, the bar began to examine some of the then existing nonlawyer practices. Bar associations, formerly concerned with the two issues of educational or experience requirements for admission to the bar and prohibiting the appearance of non-bar members in court, now began to analyze a broader range of nonlawyer activities. Lawyer groups paid particular attention to emerging forms of business corporations such as title companies, banks and trust companies engaged in drafting wills and trusts, debt collection companies, insurance companies that defended negligence claims.

36 Frieden, supra note 12 at 648 et seq.
37 Id. at 648–653; Christensen, supra note 12, at 175; Hurst, supra note 12, at 277–278.
38 Christensen, supra note 12, at 176.
39 Id.
40 Id.
41 Id. at 180.
42 Id.
43 Id. at 181, 186–187.
corporation trust companies engaged in the business of incorporating other corporations, and accounting firms that provided services in the tax and estate planning fields.\textsuperscript{44}

Bar associations also began to establish committees concerned with non-lawyers practicing law and the enforcement of unauthorized practice statutes. In 1914 the New York County Lawyers' Association formed the first formal bar committee on unlawful practice. Other bar associations soon followed.\textsuperscript{45} Bar organizations began a series of lawsuits seeking injunctions against corporations that offered law-related services.\textsuperscript{46} The case law during this period reveals increasing use of nonlicensure of opposing counsel as a defense in court litigation as well as the voiding of contracts that had been drafted by non-lawyers.\textsuperscript{47} The period 1870 to 1920 was a seminal period for the development of case law concerning unauthorized practice outside of courtrooms.\textsuperscript{48}

4. FROM THE GREAT DEPRESSION TO THE 1960S: THE FLOURISHING OF UNAUTHORIZED PRACTICE OF LAW REGULATION AND ENFORCEMENT

The Great Depression was a catalyst for increased enforcement of unauthorized practice of law prohibitions.\textsuperscript{49} In 1931 the American Bar Association established a Standing Committee on the Unauthorized Practice of Law. Most states that had not done so since the Colonial period either amended existing UPL statutes and court rules or adopted new statutes and rules. The new laws were more expansive than those of the colonial era, going beyond the earlier prohibitions against non-bar members practicing in court or falsely holding themselves out to be members of the bar who could practice in court. Instead, they broadly barred all "unauthorized practice of law." The term "unauthorized practice" was typically not defined.\textsuperscript{50}

\textsuperscript{44} The concern with corporations is reflected in the fact that prior to 1930 the Illinois State Bar Committee on Unauthorized Practice of Law was called the "Committee on Corporations Practicing Law." Christensen, supra note 12, at 178, quoting FREDERICK C. HICKS AND ELLIOTT R. KITZ, UNAUTHORIZED PRACTICE OF LAW: A HANDBOOK FOR LAWYERS AND LAIYEN 62, 66–67 (1934). Some of the newer UPL statutes also explicitly prohibited the practice of law by corporations. Id. at 181. Bar associations were also concerned about membership organizations such as unions and automobile clubs that employed lawyers to advise their members. Id. at 195.

\textsuperscript{45} Christensen, supra note 12, at 179.

\textsuperscript{46} Id. at 181–185; Hurst, supra note 12, at 323. An early exception to the unauthorized practice laws were nonprofit corporations such as the New York Legal Aid Society (which was established in 1876) so long as fees were not charged and lawyers were free to exercise their independent judgment on behalf of clients. Courts have generally continued to except nonprofit agencies from UPL rules. See, e.g., In Re Education Law Center, Inc., 429 A.2d 1051 (N.J. 1981).

\textsuperscript{47} Christensen, supra note 12, at 187.

\textsuperscript{48} Id. at 187–189.

\textsuperscript{49} See Christensen, supra note 12, at 189–190.

\textsuperscript{50} Id. at 191–192.
Proceeding on a case-by-case basis, courts experienced difficulty in defining the practice of law and frequently offered circular definitions. In a widely quoted Arizona Supreme Court case involving realtors who gave advice about real estate transactions, the court held that "[i]t is] sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries, must constitute 'the practice of law.'"51

In the thirty year period that began with the Depression, the bar associations' newly-established UPL committees, with help from courts and legislatures, vigorously enforced UPL statutes and court rules.52 They used new procedures that had appeared with the rise of corporations at the end of the 19th century such as penal actions against unlicensed practitioners and corporations, challenges to corporate charters, disciplinary actions against lawyers assisting unauthorized practice, contempt citations, and the disallowance of fees earned through unlawful practice.53 UPL case law greatly increased during and after the Depression.54

The rationale used by many courts for UPL enforcement was eventually reflected in the aspirational sections of the ABA Model Code of Professional Responsibility, Ethical Consideration 3-2 provided:

The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.55

Ethical Consideration 3-4 stated:

A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrenchment of

51 State Bar of Arizona v. Arizona Land Title and Trust Co., 366 P.2d 1, 9 (Ariz. 1961). The reluctance of the courts to attempt to define the practice of law continues to the present. For example, in 1991, the unauthorized practice of law ad hoc committee of the state bar in South Carolina petitioned the state supreme court to adopt rules that would more specifically define the practice. The court declined to adopt the proposed rules, stating the following:

We commend the [bar] for its Herculean efforts to define the practice of law. We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.

In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123, 124 (S.C. 1992)

52 Citing HUST, supra note 12, at 323, Christensen reports that "[b]y 1946, some 400 state and local bar associations had [UPL] committees." Christensen, supra note 12, at 189.

53 Id. at 192-93.

55 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-2 (1964).
a legal matter may well involve the confidences, the reputation, the propriety, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.\textsuperscript{56}

Ethical Consideration 3–3 further provided:

A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.\textsuperscript{57}

Some commentators have also stressed the need to ensure that clients have the benefit of a lawyers' independent professional judgment, suggesting that non-lawyers may elevate profit-making over ethical conduct.\textsuperscript{58}

Because the ethical considerations of the ABA Code were aspirational only, they did not serve as a model for enforceable discipline and were not continued when

\textsuperscript{56} Model Code of Professional Responsibility EC 3-4 (1986).

\textsuperscript{57} Model Code of Professional Responsibility EC 3-3 (1986) (footnote omitted).

\textsuperscript{58} The benefit to society of a law profession that is independent of the concerns that are thought to motivate nonlawyer businesses is also used as the rationale to support the rule that lawyers should not form partnerships or other business associations with non lawyers where any part of the business will involve the "practice of law." See, e.g., Harold Levinson, Independent Law Firms That Practice Law Only: Society's Need, the Legal Profession's Responsibility, 51 Ohio St. L.J. 229 (1990) (arguing that if nonlawyers are allowed to form partnerships with lawyers, there will be an ensuing diminution of the lawyers' independence and decisional autonomy). This article, along with other scholarly articles on the subject of unauthorized practice was cited by the 7th Circuit in its 1992 decision in Lawline v. American Bar Association, 956 F.2d 1378, 1385 (7th Cir. 1992).

In Lawline, the 7th Circuit upheld the trial court's refusal to hear a prospective challenge to ABA Model Rule 5.5 making law practice partnerships between lawyers and nonlawyers ethically impermissible. The case was initiated by a lawyer who operates a telephone legal assistance service employing both lawyers and nonlawyers and which is supported primarily by referral fees received from lawyers who accept cases from clients sent to them by the service. The Court held that the underlying purpose of the ethics rule sufficiently satisfied the Constitution's "rational basis" test to protect it from facial challenge but expressly declined to speculate in advance whether the rule would be constitutional if applied to particular activities such as those engaged in by Lawline. Noting that some commentators disagree with government prohibitions against unauthorized practice, the 7th Circuit stated that "[a]lthough scholars may disagree about the effect of the legal ethics rules, the state may choose any regulations that are rational. When employing the appropriate rational basis test, this Court does not require that the state choose the wisest policy, only that it choose a constitutional one." Id. at 1386.
the ABA adopted the Model Rules of Professional Conduct in 1983. Instead, unauthorized practice provisions were set forth in Model Rule 5.5 and provided: A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.59

The term "unauthorized practice of law" was not defined in the Model Rule. The comment to the Rule stated:

"[t]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law so members of the bar protect the public against rendition of legal services by unqualified persons.60"

The most recent discussion of the issue in the ABA/BNA Lawyers’ Manual on Professional Conduct states that because of significant jurisdictional differences, "few general principles exist to assist nonlawyers in determining the appropriate bounds of their activity."61

Courts faced with litigation testing the reach of UPL laws have attempted on a case-by-case basis to craft a definition of the practice of law that extends beyond court appearances. This effort has been exceedingly difficult and yielded inconsistent results. For example, in a widely publicized case, a California court held in 1954 that an accountant had engaged in the unauthorized practice of law when he discussed with taxing authorities on behalf of a taxpayer the tax consequences of the taxpayer's business loss because the questions at issue were "legal" ones.62 Six years later, another California court decided that it was not the unauthorized practice of law for an accountant on behalf of a taxpayer corporation to discuss with taxing authorities the settlement of a proposed federal tax deficiency that was caused by the corporation's retention of an allegedly excessive reserve since the accountant asserted that he did not read or cite to the taxing authority any reported case law.63

In another widely quoted decision, West Virginia's highest court asserted its inherent power to regulate the practice of law and held that appearances before the state workers' compensation board by a nonlawyer constituted the unauthorized practice of law, even though an administrative agency rule permitted claimants to appear "in person or by agent or attorney."64 An opposite view of

59 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1994).
60 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (Comment 11) (1994).
64 W. Va. State Bar Ass'n v. Earley, 109 S.E.2d 420 (W.Va.1951). The governing statute authorized the compensation commissioner to promulgate reasonable regulations but the court held that it was beyond the agency's authority to permit nonlawyers to appear for others in a representative capacity.
the role of the court in defining the practice of law was expressed by the Florida Supreme Court in a 1980 case upholding a Florida statute that permitted nonlawyer representation before Florida's workers' compensation board. The Florida court held that the legislature has concurrent power with the court to define the practice of law and can pass laws "in aid of the judiciary."[63]

The Commission heard testimony that in southern New Jersey, it was widespread practice for realtors and title companies to handle all aspects of residential real estate transactions where neither the seller nor buyer was represented by legal counsel, while in northern New Jersey such activity was handled only by lawyers. The UPL Committee of the New Jersey State Bar considered the South Jersey practice to be the unauthorized practice of law. Shortly before the publication of the Commission's report, the New Jersey Supreme Court resolved the issue and unanimously held that the nonlawyer practice of handling residential real estate closings without the involvement of legal counsel does not constitute the unauthorized practice of law so long as brokers and title officers conform to specific conditions, including advising buyers and sellers of the general risk involved in not being represented by attorneys.[66]

The overbreadth of many UPL laws and the vagueness of their definitions soon elicited criticism from both business and academia. For example, then Harvard Law School Dean, the late Erwin N. Griswold, while speaking before the Section on Taxation of the ABA in 1955 about the desire of accountants to expand their activities into areas thought by many lawyers to be the practice of law, said:

The problem is often put in terms of "practice of law." Only lawyers can "practice law," it is said, and if what an accountant is doing is "practice of law," then he is acting improperly.

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[63] The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Courts differ on whether they have inherent power to regulate law-related activities by nonlawyers which are conducted outside of courts, they share power with legislatures, or whether their decisions are subordinate to legislative will. See generally Martine Rammer, Note: Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law? 15 VALPARASIO L. REV. 568 (1981). See also discussion infra Part One, § B3.

[66] In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995) (per curiam). The New Jersey Supreme Court held that the prohibition against the unauthorized practice of law serves to protect the public against unskilled advice but that the prohibition is not automatic. The most important question, the court held, is whether the public interest is served by permitting the conduct, and that determination must be based on practical considerations and common sense, using a complete and detailed record that includes the extent, length of existence, effect and result of the performance by nonattorneys of the activity in question and a showing of the public need for such nonlawyer activity. The court then found that the re-ord before it showed that the nonlawyer activity at issue had been conducted "without any demonstrable harm to sellers or buyers, that it apparently saves money, and that those who participate in it do so of their own free will presumably with some knowledge of the risk...." Id. at 1359. The court determined that the public interest is sufficiently served if advance written notice is given parties of their right to retain counsel and the risk of not doing so. Finally, the court stated, while "we firmly believe the parties should retain counsel... We decide only that the public interest does not require that the protection of counsel be forced upon the parties against their will." Id. at 1360.
I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begets the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practicing law"—and this includes many of those who have been active on unauthorized practice committees—proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is "practice of law" and can only be done by a lawyer.

But this is surely too broad.... Obviously, there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by a lawyer.

It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well known Agpan case. The court has taken a too literal, or semantic, view of the concept of "practice of law," and has not recognized that there are many things that lawyers do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.67

Even though courts have found it difficult to arrive at a generally acceptable definition of the practice of law, the bar at one time found another method of defining the boundaries that could not be crossed by nonlawyers. By negotiating agreements with associations representing other professions, it was possible to lessen the friction that was created through the enforcement of UPL by judicial or quasi-judicial means. Some of the first agreements were negotiated at a local level in the mid-1920s while national agreements, known as "statements of principles," were negotiated by the ABA beginning in the early 1930s.68

The ABA statements of principles were negotiated by "national conference groups" formed to bring together lawyers and representatives of other professional groups with which there was the possibility of conflict with UPL prohibitions. The primary written product of the conference groups were the statements of principles that were intended to govern the interaction between clients, lawyers and the members of the subject nonlawyer profession. The statements were meant to clearly establish what constituted the practice of law.


68 Christensen, supra note 12, at 195–96. The texts of the various Statements of Principles were published in the corresponding year’s volume of the Martindale-Hubbell Law Directory, Id. at 211.
and what did not in a particular professional area of interest. The first ABA agreement of this kind was written in cooperation with the American Bankers Association in 1933. The conference groups were given formal status when the ABA structure was reorganized in 1936.

Over the years, the conference groups included, among others, such varied service providers as accountants, architects, the insurance industry, collection agencies, real estate title companies and social workers. Although several of the conference groups presently continue to perform the function of facilitating communication between lawyers and professional groups with similar substantive interests, there was a movement in the late 1970s and early 1980s to change the character of the Association’s UPL activities. By 1982, the ABA House of Delegates had rescinded all of the 28 statements of principles that had once been in effect.60

5. THE LAST THIRD OF THE 20TH CENTURY: THE GENERAL DECLINE OF UNAUTHORIZED PRACTICE OF LAW ENFORCEMENT

As a practical matter, states have found it increasingly difficult to enforce unauthorized practice restrictions. Businesses and professions that were the primary subjects of UPL enforcement in previous years have resisted the application of UPL laws to their work and have seen their disputed activities gain increased approval from the courts over time. During most of the last third of this century there has been a general decline in the enforcement of broadly defined unauthorized practice of law statutes, although some states still actively enforce them. A few state bars have also recently revived once dormant UPL committees.70


70 ABA, State Legislative Clearinghouse Brieﬁng Book: Unauthorized Practice of Law (1992) [hereinafter ABA State Legislative Clearinghouse Brieﬁng Book]. The Brieﬁng Book includes a report on the results of a 1992 survey of state bar UPL activities. Of the 22 state bars who reported that their committees were then "active," 11 (Arizona, Kansas, Minnesota, Mississippi, Montana, New Mexico, Oklahoma, Oregon, South Carolina, Washington and West Virginia) began functioning after 1981. Id. at Tab D.

The ABA Journal reported in December 1995 that there has recently been "a small revival of UPL enforcement efforts by bar associations." James Podgers, *Crumbling Fortresses: Legal Profession Faces Rising Tide of Non-Lawyer Practice*, 79 A.B.A. J. 51, 56 (Dec. 1995). The Journal article reports specifically on developments in October 1993 in the states of Florida, where the bar authorized its UPL committee to resume seeking civil injunctions against alleged violaters, and Oregon, where the bar approved an assessment of $8 per member to fund the bar’s UPL activities (to be primarily in the area of public education rather than enforcement). Conversely, in 1985, the Arizona UPL statute was permitted by the state legislature to sunset and as of the date of this Report had not been reauthorized or replaced.
The decline in UPL enforcement is dramatized by comparing surveys of UPL activity by state bars taken only twelve years apart. A survey taken in 1980–81 by Stanford Law School Professor for a 1981 law review article on the unauthorized practice of law showed that only seven states had no state agency or state bar committee active in UPL enforcement. In contrast, the survey conducted by the ABA State Legislative Clearinghouse in 1992 found that only 22 states had active UPL enforcement mechanisms.

A national survey of state bars conducted by a State Bar of California committee during 1987 and 1988 received 52 responses out of 54 that were distributed. Only 18 provided estimated or actual data on the number of complaints received. Of the 18, only six received an average of more than one UPL complaint each month. Only the state of Florida reported a heavy caseload at that time.

A number of events have contributed to the general decline in enforcement of broadly written unauthorized practice of law rules in the last thirty or forty years. The principal ones will now be briefly summarized.

The invention of the typewriter revolutionized the practice of law at the end of the nineteenth century as radically as computers have at the end of the twentieth century and encouraged lawyers to hire secretaries. Previously, lawyers had performed clerical work themselves, occasionally assisted by law clerks who were not yet licensed to practice law but were "reading the law" as a way to gain admission to the bar instead of going to law school. Gradually, lawyers began to assign more substantive work to secretaries such as preparing pleadings, checking cites and organizing documents for trial.

In the early 1960s, lawyers began to hire other kinds of nonlawyers assistants to help them with substantive work who were neither law clerks nor secretaries. These legal assistants, or "paralegals" as they were commonly known, began to assume many of the tasks of a substantive nature previously performed by secretaries and law clerks. This development initially caused some debate about whether it was appropriate for nonlawyer assistants to perform work that had previously been considered "lawyers' work" and whether such performance might constitute the unauthorized practice of law. Many lawyers, however, were growing increasingly accustomed to using the services of trained paralegals and the bar organizations became increasingly reluctant to label such ser-


72 ABA STATE LEGISLATIVE CLEARINGHOUSE BRIEFING BOOK, supra note 70.


74 Gary Munroeke, Introduction to ABA, LEVERAGING WITH LEGAL ASSISTANTS: HOW TO MAXIMIZE TEAM PERFORMANCE, IMPROVE QUALITY, AND BOOST YOUR BOTTOM LINE (Arthur G. Greene ed.) s (1994) [hereinafter ABA LEVERAGING WITH LEGAL ASSISTANTS]. The report was published under the auspices of the ABA Section of Law Practice Management.
Paralegals have become very common in twentieth century law practice, and they now constitute one of the fastest growing professions in the country. 16

As the number of federal administrative agency cases expanded in this century, increasing numbers of nonlawyers began to provide direct assistance to individuals concerning their veterans' benefits and other entitlement issues, IRS filings, and other administrative agency matters. Nonlawyers also appeared in representative capacities in some non-individual matters as well. In some agencies, including the Interstate Commerce Commission and the U.S. Patents Office, nonlawyer representation dates back to the mid-nineteenth century. 17 In 1962, Congress provided that both lawyers and nonlawyers could assist Civil War veterans seeking disability benefits, a provision which has been extended to cover veterans of other wars to this day. 18

Although some bar groups initially challenged federal administrative agency practice by nonlawyers, Congress rejected efforts to limit agency practice to members of the bar. The U.S. Supreme Court subsequently held that as a result of that decision, and the federal preemption doctrine, nonlawyers can practice federal agency law without regard to state unauthorized practice rules. 19

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16 John V. Tunney, former U.S. Senator from California, chaired a 1976 subcommittee of the U.S. Senate Judiciary Committee. He stated that a purpose of the subcommittee was to investigate ways to improve the delivery of legal services and that the use of paralegal assistants was an "important component" of that investigation. He noted that the ABA had recently endorsed the use of legal assistants but that critics were concerned that the bar would control their training and that such control "will defeat the impact of paralegals as a cost-reducing device." He noted further that these critics had argued that "what is needed in the legal profession...is more competition with allied professions such as legal assistants." Hearing Before the Subcommittee on Representation of Citizens Interests, U.S. Senate Committee on the Judiciary, 93rd Cong., 2d Sess. 1-2 (July 23, 1974).


18 The history of authorized practice by nonlawyers before federal administrative agencies and the explicit regulation of nonlawyer patent agents which began in 1869 is detailed in the U.S. Supreme Court's decision in Sperry v. Florida ex rel. The Florida Bar, 373 U.S. 379 (1963). See also infra Part One, § B.

19 The present codification of the authorization for nonlawyer agents to assist veterans in pursuing their claims is found at 38 U.S.C. § 5904 (1995).

18 See supra note 77. The Court noted that the Administrative Procedure Act of 1946 itself neither required nor barred nonlawyer representation but held that Congress, when it adopted §6(a) of the Act (now codified at 5 U.S.C. §555(b)), expressly determined not to limit representation before federal agencies to members of the bar, but rather to continue the then-existing practice of nonlawyer representation when authorized by an agency. The legislative history of this provision is discussed at greater length in the Sperry decision and supra Part One, §85 at notes 138-142 and accompanying text.
There has been declining state interest in enforcing UPL statutes and rules. The following comments made in 1991 by the chairperson of the Maryland client protection committee, noting the lack of interest of any state agency or institution in pursuing violators of the UPL statute, are representative:

During the last ten years, virtually all bar associations ... have ceased active investigation of UPL complaints. ... During the past year, the (Maryland) Attorney General and the State's Attorney for Baltimore City each brought one criminal prosecution under the UPL provisions. ... Apparently, these are the only two cases of criminal enforcement against the unauthorized practice of law at least during the last ten years. 40

In 1980, the State Bar of California handled approximately 1,450 UPL investigations, inquiries and complaints, but five years later the Bar suspended enforcement efforts and began referring all matters to the state's consumer protection authorities. 41 Similarly, in 1991, the Florida bar decided to refer UPL prosecutions to the state attorney's office due to the multi-million dollar expense of maintaining UPL enforcement for a large state. In 1993, however, The Florida Bar Board of Governors voted to have the Bar resume responsibility for UPL enforcement because the state attorney's office had given UPL enforcement a low priority and, in general, only pursued matters involving significant public harm. 42

In recent decades, the states' high courts, many of which otherwise assert the judiciary's preeminent role in regulating the justice system under the separation of powers doctrine, have increasingly refrained from a technical approach to UPL, instead employing a standard of actual harm to clients or the public before invoking their inherent power to punish or restrain nonlawyer activities alleged to be unauthorized practice. For example, in a 1978 case, the Supreme Court of New Mexico found that nonlawyers who filled in lawyer-drafted forms for real estate closings were not committing the unauthorized practice of law and stated that the "changeover in the performance of this service from attorneys to the title companies...has (not) been accompanied by any great loss, detriment or inconvenience to the public." In fact, the court added, the prior practice of using lawyers for the services in question "considerably slowed the loan closings and cost the persons involved a great deal more money." 43

42 THE FLORIDA BAR, REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE 5 (1994) [hereinafter THE FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE]. The report stated that "[t]he State Attorney's Offices have shown no significant interest in pursuing UPL violations."
Noting that state prosecutors give a low priority to UPL cases, the Florida Bar Special Committee on Non-Lawyer Practice observed in its 1994 report that even though the Florida bar supported one of the most viable UPL enforcement efforts in the United States, it was questionable whether an even greater effort would be successful. The Committee's report stated that "[t]he Bar's UPL effort is simply unable to deal effectively with this problem (because) the Florida Supreme Court has repeatedly ruled that actual public harm is a prerequisite to a successful UPL prosecution." In state courts have also become increasingly willing to carve specific exceptions for various kinds of nonlawyer practices. For example, the Supreme Court of South Carolina recently ruled that it is not the unauthorized practice of law for nonlawyers to represent others in state administrative agency proceedings in accordance with agency regulations, and to represent without compensation another person in court with the court's approval. The court also held that certified public accountants can represent clients before agencies and in probate courts and that nonlawyer officers, agents or employees (including lawyers licensed in other jurisdictions) may represent businesses in court proceedings even when compensated. Similarly, other courts have allowed legal advice or practice that is widespread in the community; that is incidental to another established business; that involves only routine tasks requiring knowledge of an average citizen; or where the benefits to the public outweigh the risk of injury. The U.S. Supreme Court has also carved out exceptions.

In at least one instance, the public reaction to a state supreme court decision upholding a UPL allegation brought by the bar resulted in change through the adoption of a referendum that amended the state constitution. In 1963, the Supreme Court of Arizona issued an opinion in which it affirmed that title companies and realtors were engaged in the unauthorized practice of law when they prepared deeds and other transfer documents for their customers. The Arizona Association of Realtors then sponsored a proposed amendment to the

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84 The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82, at 5.
85 In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, supra note 51, at 124.
86 See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, 21:8001 et. seq. for a 1984 summary of unauthorized practice of law decisions. The Manual reports that circumstances in which nonlawyers have been expressly permitted to provide legal and law-related services include, among others, proceedings before state administrative agencies, assistance in traffic, small claims, housing and magistrates' courts, and court appearances on behalf of corporations.
87 See, e.g., note 79 and accompanying text regarding exceptions for federal administrative agency practice carried on with the consent of the states. The Supreme Court, applying the First and Fourteenth Amendments, also created exemptions from the state regulatory power over the practice of law for civil rights organizations, labor unions and other nonprofit associations that served as "lay intermediaries" for their members by referring their legal problems to lawyers chosen by the respective organizations. See, e.g., NAACP v. Banton, 371 U.S. 415 (1963).
state constitution that would authorize real estate brokers and salespersons to draft and complete the documents incident to a transfer of property. Known as Proposition 103, it was presented to the voters in November 1962. The proposition received over 300,000 votes, thus the highest total for any such proposition, and was approved by a margin of over 172,000.87

It is now becoming more common for legislatures to inject themselves into the debate about the unauthorized practice of law.86 In 1978, the Supreme Court of Washington issued an opinion holding that nonlawyers who prepared real estate documents for compensation violated that state's UPL rules.85 The legislature, in a move characterized by the court as "a direct response to our [1978] holding,"82 enacted a statute that authorized nonlawyers in businesses involved in the transfer of real estate to draft and complete documents incident to the transaction.85 Subsequently, in 1981, the court held that the statute was an unconstitutional encroachment on the court's inherent authority to regulate the practice of law.86 However, before the dispute could escalate further, the court promulgated a rule that created a limited license for real estate closing officers, thus preserving the disputed activities as being within the definition of the practice of law but recognizing that individuals other than fully licensed lawyers can develop the expertise to participate in limited fashion.85

Subsequently, the court reviewed the history of the conflict in a 1985 case86 and determined that the participation of a nonlawyer in competing the initial sales contract offer on behalf of a prospective buyer did not constitute the unauthorized practice of law, even though the contract, upon acceptance by the seller, settled the respective rights of the parties for that transaction.87 The court reassessed altogether the public policy justification for its earlier rulings and held that all licensed real estate brokers and sales agents could prepare lawyer-approved forms as long as those individuals were held to the same standard of care as lawyers.

86 A listing of measures licensing or otherwise regulating nonlawyer activity in law-related matters which have been considered by state legislatures in recent years is set forth in Appendix C. More than half of the state legislatures have considered such measures.
87 Wash. Bar Ass'n v. Great Western Savings & Loan Ass'n, 586 P.2d 870 (Wash. 1978).
The court's majority opinion explained that it weighed the interests of consumers in reduced costs and increased convenience, and the interests of other licensed vocations in using their expertise, and concluded: "We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal service justifies limiting the public's freedom of choice."

By accepting the standard of actual harm to the public as a means of determining the unauthorized practice of law, the Washington court had completely revisited its position of seven years earlier.

Even when a court has applied UPL statutes to situations involving a substantial risk of harm, or even actual harm, adverse public opinion has sometimes forced the court to reconsider its position. For example, the Florida bar successfully prosecuted Rosemary Furman, a former legal secretary who conducted a business preparing documents for self-representing persons in divorce cases. The decision engendered such adverse public opinion that the Florida Supreme Court subsequently adopted a more permissive rule that allows nonlawyers to assist the public in preparing court-approved legal forms and to give advice about related routine administrative procedures. The 1994 report of The Florida Bar Special Committee on Non-Lawyer Practice assessed this change in the Florida rule:

Once this door was officially open [Florida Supreme Court permission for nonlawyers to complete forms], it became very difficult to limit the activities of non-lawyers who provide legal services to the public. Many independent paralegals make a conscientious effort to stay within the Supreme Court guidelines and avoid UPL activities. Others, however, are not so inclined. Regardless of efforts made by the Bar and its lawyers to fill the needs for affordable legal services, there will be competition for this business by non-lawyers.

Many studies have concluded that the legal profession is not meeting all of the legal and law-related needs of lower and middle-income persons. National consumer organizations such as the American Association for Retired Per-

98 Id. at 634.

99 The Florida Supreme Court upheld the finding of The Florida Bar that Ms. Furman's document preparation business constituted unauthorized practice of law and issued an injunction against the continued operation of the business. The Florida Bar v. Furman, 576 So.2d 378 (Fla. 1990), appeal dismissed for want of a substantial federal question, 444 U.S. 1061 (1980). When Ms. Furman did not end her business as ordered, the bar was successful in obtaining a contempt citation against her. The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984), appeal dismissed for want of a substantial federal question, 469 U.S. 925 (1984). See also infra notes 216–219 and accompanying text.

100 F.A.A. RULES REGULATING THE BAR, Rule 10-2-1. The Rule provides that nonlawyers may "engage in limited oral communications necessary to assist a person in the completion of a legal form approved by the Supreme Court of Florida."

101 THE FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE, supra note 82, at 6.

102 See infra note 122 and accompanying text describing a 1994 national legal needs study. See also Appendix E for a listing of recent state legal needs studies.
sons, Public Citizen, and H.A.L.T. have vigorously campaigned in legislatures and before courts to relax UPL rules on the ground that consumers are not being served by the bar and should have a choice of representatives. In one American Bar Foundation survey, 82% of the respondents who had been multiple users of lawyers agreed that "many cite that lawyers handle—for example, tax matters or estate planning—can be done as well and less expensively by nonlawyers—like tax accountants, trust officers of banks, and insurance agents." 103

Some bar leaders and their associations have also examined the inherent difficulties of enforcing UPL statutes that broadly bar the "unauthorized practice of law." A committee of the State Bar of California concluded in 1988 that "the concept of unauthorized practice has become incapable of meaningful definition and therefore unenforceable. To date at least, no one has been able to redefine what constitutes the practice of law in a manner that permits rational enforcement of unauthorized practice of law statutes." 105

The chair of the Maryland Bar's Client Protection Committee similarly discussed the difficulties of enforcing UPL statutes when they are based on what he and his co-author termed "broad and ambiguous definition[s] of the practice of law." They wrote that a prosecutor would be hard pressed to convince a jury that a real estate broker "injures anyone by simply doing his job." The authors continued:

Further, the defense would challenge the prosecutor's exercise of prosecutorial discretion by pointing out that preparers of tax returns routinely give tax advice and loan officers describe the legal effect of bank notes. Finally, the defense would emphatically demonstrate that the alternative is a much more expensive lawyer who would simply perform the same task. 106

The authors noted that a second reason prosecutors fail to enforce UPL statutes is one of priority, noting that if an activity involves fraud, it will likely be prosecuted "but turf battles will not." Finally, they stated, UPL enforce-

103 See Alan Matrinon, Defining the Practice of Law: Some New Ways of Looking at an Old Question, 4 NOVA L. REV. 363 (1980); Austh, supra note 81. Notwithstanding the rationale of courts and bar associations that the public needs UPL laws for its protection, consumer advocates argue that they serve principally to protect the economic interest of lawyers and that they limit the public's access to what consumers believe, rightly or wrongly, would be lower cost services. Some scholars have agreed. See generally, e.g., Johnston, The Unauthorized Practice Controversy: A Struggle Among Power Groups, 4 U.JAN., REV. 1, 5 (1955) (concluding that UPL cases are brought by lawyers to eliminate lay competition and noting that consumers have not been active in bringing UPL changes).

104 Barbara A. Curran, The Legal Needs of the Public: The Final Report of a National Survey Table 6.8 at 235 (1977). The Curran study was a joint undertaking by the American Bar Association Special Committee to Survey Legal Needs and the American Bar Foundation. See also infra note 122 and accompanying text for results of a 1994 ABA legal needs study.

105 STATE BAR OF CALIFORNIA, REPORT OF THE PUBLIC PROTECTION COMMITTEE, supra note 75, at 5.

106 Stockmeyer and Parham, supra note 80, at 20.
ment fuels the public's perception that UPL provisions "protect lawyers not consumers." 107

In 1992 the Tennessee Board of Professional Responsibility came to a similar conclusion. The Board declined the Tennessee Bar's request to enforce UPL laws on the ground that to do so would seriously undermine its important mission to protect the public from unethical lawyers. The Board stated:

Expanding the Board's jurisdiction to include regulation of the unauthorized practice of law by non-lawyers would unduly cause the Board's confidence and trust by the public to be eroded due to the appearance that the Board's activities were protective of lawyers, adverse to non-lawyers, and tend to create an impression or appearance of conflict of interest. 108

Dean Griswold's 1995 comments about applying broadly defined UPL rules to accountants foreshadowed increasing criticism by legal scholars. 109 In recent years, many legal scholars have written articles criticizing broad-based UPL laws, questioning their basis and inconsistent application, and asking whether, in thwarting an individual's free choice of representation, they impede access to the justice system and are anti-competitive and whether, given the paucity of consumer complaints and the availability of other mechanisms for redress, they are in fact necessary. 110

As a result of the above described trends and events over the last forty years, some state bars, courts and legislatures have recently appointed task forces consisting of lawyers, judges and nonlawyer members with mandates to examine the unauthorized practice laws in their jurisdictions. Appointing authorities have asked these task forces to analyze whether there is a need for regulation, and if so, whether new regulatory approaches should be adopted. Some of these task forces are considering, or have considered, more precisely tailored UPL laws targeting particular conduct, rules specifically licensing certain categories of nonlawyer practice, and whether increased enforcement of existing

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107 Id.
108 Written statement of Tennessee Board of Professional Responsibility as reprinted in TENNESSEE BAR ASSOCIATION, YOUNG LAWYERS' DIV., THE QUARTERLY (Spring-Summer 1993) 3. The article further quoted the Tennessee Board's statement that "it is more appropriate for the legislature to deal with the unauthorized practice of law" since it is the public which is most harmed by the practice than attorneys and it is within the province of the state's police power to address the problem. Id.
UPL statutes is feasible.\textsuperscript{111} Contrary to the general trend, some state task forces have concluded that, in their view, the risk of harm to the public from non-lawyer practice continues to be so grave that efforts to enforce existing UPL laws should be maintained or even increased.\textsuperscript{112}

Finally, although there has been a general decline in enforcement of broadly defined UPL statutes or court rules in the last third of this century, some states have recently adopted more narrowly written restrictions targeting specific conduct to replace or supplement the older UPL statutes or rules.\textsuperscript{113}

B. Nonlawyer Activities in Specific Legal and Law-Related Matters

1. SELF-REPRESENTATION

a. Non-Tribunal Self-Representation

Individuals act on their own behalf without the assistance of lawyers in myriad legal situations outside of courts and administrative tribunals. Although other individuals might choose to have the assistance of a lawyer, these individuals rely largely on their own experience and skills, making their own decisions, for example, about planning, negotiating and entering into contracts (although they may obtain informal advice from others).

Other examples of these everyday legal matters include applying for mortgage financing or other credit; leasing apartments; purchasing or selling cars and appliances (with their attendant warranties and limitations of liability); applying for licenses and permits to drive, marry, remodel buildings or do business; filing tax returns; planning and negotiating insurance, pension and investment agreements; handling school, administrative and governmental benefits problems; and negotiating and signing contracts to buy and sell small businesses or residential and commercial real property.

Even in more complicated business transactions, individuals frequently make agreements and resolve disputes without legal counsel. They also frequently resolve personal disputes with government entities or with private parties on their own. Significant personal and financial risks may be involved and yet there

\textsuperscript{111} The work of some of these task forces is summarized infra at Part One, § E.

\textsuperscript{112} Id.

\textsuperscript{113} The California Bar, for example, has not actively enforced UPL rules for the past ten years. However, with the Bar's support, the legislature recently adopted legislation to deal with the problem of "notarios" or "immigration consultants" who offer their immigration law services to noncitizens. \textit{Cal. Gov't Code} § 22441 (1995). Under this legislation, immigration consultants must provide written contracts and notice to the consultant that the consultant is not a lawyer. Other states have adopted similar statutes. See, \textit{e.g.}, Ill. St. 715 § 502AA (1994) (approved Aug. 12, 1994); \textit{Ariz. Rev. Stat.} § 12-2071 to -2703 (1994) (effective July 17, 1993); and \textit{Ok. Rev. Stat.} § 9.280 (1993) (added to the statutes in 1987).

\textsuperscript{114} See, \textit{e.g.}, \textit{Model Code of Professional Responsibility} EC 3-7 (1986) which states that "(t)he purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so."
are no laws requiring these individuals to have the assistance of a lawyer, how-
ever well-advised (in some circumstances at least) it might be to do so. This freedom to handle one's personal and business matters without resort to a lawyer is a well established feature of American jurisprudence.

b. Self-Representation Before Adjudicative Tribunals

Self-representation in court is also a well-established practice in this coun-
try. Although the appearance of lawyers became more common and self-rep-

resentations less common in many court proceedings in the late 1800s, infor-
mation provided to the Commission established that pro se representation is now extensive before many tribunals. This is especially the case in many family courts. Other tribunals with large or growing number of self-represented persons include small claims proceedings, housing courts, traffic courts, small estate probate courts, bankruptcy courts and civil courts hearing prisoner and employment discrimination claims.

Self-representation has also been common in many federal and state admin-
istrative agency proceedings involving the claims of individuals and their small

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115 The right to self-representation in criminal matters is well-established as a corol-
ary to the constitutional right to counsel. In the federal courts, the right to self-repre-

sentation in both criminal and civil matters is buttressed by a statutory provision in the
United States Code, which states in full: "In all courts of the United States the parties
may plead and conduct their own cases personally or by counsel as, by the rules of such
courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. §
1654 (1994).

116 See ABA, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LIT-

GANT (1994). This report of the Standing Committee on the Delivery of Legal Services
noted that "(i)nterestingly, people—particularly those with moderate incomes—are turn-
ing to self-representation as a method of gaining access to the divorce court. In fact, in
some jurisdictions, there are more parties proceeding on their own in divorce tribunals
than parties represented by lawyers." 1d. at 2.

117 The clerk's office for the U.S. District Court for the District of Columbia reports
that one out of every five plaintiffs in that court files pro se for a total of some 600 cases
per year. 1993 ANNUAL REPORT OF THE CIVIL LITIGATION FUND (see file with the Clerk's
Office of the U.S. District Court for the District of Columbia). To help alleviate the
problem, the District Court in 1992 established a pro bono panel of lawyers practicing in
the Court who agree to be assigned one pro se case each year. U.S.DIST.CT. (D.C.) R.
702.1. In Los Angeles, according to federal Bankruptcy Court Judge Geraldine Mund,
over 50% of the Chapters 7 and 13 bankruptcy filings in 1994 were filed pro se. Con-
sumer Bankruptcy: A Roundtable Discussion, 2 ABI L.REV. 5 (1994). Twenty-five percent
of all civil rights cases filed in the District of Columbia's federal district court are filed by
plaintiffs who are unrepresented and cannot afford to hire private counsel according to
the 1993 ANNUAL REPORT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL
RIGHTS AND URBAN AFFAIRS. The Commission heard that in many landlord-tenant
courts, 99% of the actions have at least one party who is not represented by counsel. See
pro se caseloads in the District's Superior Court).

118 The history of self-representation before administrative agencies is discussed more
fully infra notes 138-142 and accompanying text.
businesses or organizations. This is true despite the fact that not all agency proceedings are an informal, non-adversarial process where formal rules of evidence and procedure are largely inapplicable.119

c. Reasons Given for Self-Help and Self-Representation

Some persons who submitted statements to the Commission asserted that those who choose to represent themselves are people of low or moderate income who believe that the cost of hiring a lawyer for a particular matter is beyond their means or disproportionate to the result to be achieved.

Other witnesses stated that cost is only one of the factors that cause people to choose self-representation. They stated that the presumed simplicity of a matter is another factor and that litigants in all income groups seem often to base their decision to represent themselves upon an assessment of the complexity of their cases.120 They noted also that statutory simplification of law such as no-fault divorces and statutory wills may encourage this perception.

Some witnesses cited, among reasons that some people choose not to employ lawyers, a lack of adequate communication between lawyers and clients and other poor treatment of clients by lawyers. These persons noted the plethora of complaints to lawyer disciplinary agencies about lawyers’ failures to respond to client telephone calls and letters, keep clients informed, promptly disburse funds, clarify the fee arrangement, document or detail billings, or adequately prepare for client meetings and adjudicative proceedings.121 Another stated motive for self-help and self-representation is the simple preference of some individuals to act independently.

Self-help and self-representation occur in many substantive areas of the law. A partial listing of these areas includes family law, debt consolidation, bankruptcy, real estate closings, landlord-tenant disputes, wills, trusts, guardianships and probate, small claims disputes, applications for governmental benefits, public education disputes, real property and other tax assessments, adjustments and appeals, and filing of income and other tax forms.

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119 Walter Grillhoz, Qualifications to Practice Before Boards and Commissions, 15 U.CIN.L. REV. 196, 201 (1941) (describing the original legislative intent that federal administrative agency proceedings be relatively simple ones that would not involve formal rules of evidence and procedure.). See also P. Towbridge vom Bau, Administrative Agencies and Unauthorized Practice of Law, 48 A.B.A. J. 715, 716 (1962) arguing that many kinds of administrative proceedings had by 1962 come to resemble judicial proceedings and that those, at least, should be considered the practice of law and carried out only by lawyers.


121 See ABA, JUST SOLUTIONS: SEEKING INNOVATION AND CHANGE IN THE AMERICAN JUSTICE SYSTEM (Stephen P. Johnson, ed.) 59 (1994) [hereinafter ABA JUST SOLUTIONS Report].
The Commission could find no general study that quantified the extent of self-help and self-representation in the United States. A recent ABA legal needs study, however, surveyed low- and moderate-income households to determine their recent legal needs and what they did when they had legal needs. The study revealed that in response to 38% of the low-income legal needs and 26% of the moderate-income legal needs, no action was taken. In response to another 24% and 23% of the low- and moderate-income legal needs, respectively, the households had tried to solve the problems on their own outside the legal system, but had not sought help from any third party or legal institution. In an additional 8% and 12% of the cases, respectively, low- and moderate-income households with legal needs went beyond self-help and obtained help from a nonlawyer third party outside the legal system (such as a service agency, CPA, tax preparer, block organization, elected official, consumer protection agency or better business bureau). Another 8% and 11%, respectively, went still further and sought help on their own from a mediator, a court or an administrative tribunal. The last 21% and 28% of the low- and moderate-income legal needs, respectively, were brought to lawyers, sometimes after the households involved had tried one or more of the other approaches.122

This, according to this study, when low-income people have legal needs, 38% of the time they take no action and 40% of the time they take action without going to a lawyer; moderate-income individuals in the same situations take no action 26% of the time and take action without going to a lawyer 45% of the time. A more focused study, concentrating on the domestic relations court docket in Maricopa County, Arizona, found that "in 88.2% of the divorce cases filed... in 1990, at least one of the litigants was self-represented. In 52% of the cases, both parties were self-represented."123

2. ASSISTANCE TO SELF-REPRESENTED PERSONS BY OTHERS

a. Informal Advice and Assistance

Informal help with legal problems, coming from neighbors, friends, co-workers, religious advisors, teachers, social workers, law librarians and others who have had experience handling a similar legal problem or who are considered to be reliable sources of information, has not generally been considered unauthorized practice. For example, a neighbor in an apartment building may have successfully withheld rent from a landlord who did not provide heat and may be willing to assist a neighbor when a similar situation develops. Similarly, parents who have fought for legally required special education facilities for

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122 ABA, REPORT ON THE LEGAL NEEDS OF THE LOW- AND MODERATE-INCOME PUBLIC: FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, Table 4-1 at 20 and Table 4-7 at 27 (1994). (Data totals do not add to 100% because of rounding.) The legal needs study was conducted by the Institute for Survey Research at Temple University for the ABA Consortium on Legal Services and the Public.

123 SALIS, BECK & HAAN, supra note 120, at vi (citing data provided by the Superior Court in and for the County of Maricopa, Department of Judicial Information Systems, ADV Feb. 8, 1991.)
their own disabled children might assist other parents of disabled children with comparable objectives. Informal advice and assistance is also provided through established groups and networks—for example, by religious organizations, unions, neighborhood organizations, social clubs and fraternal orders.

In the modern computer age, sources of informal advice and assistance are increasingly available on the Internet and other information highways. Radio and television talk shows are another growing source of informal advice.

Informal advice and assistance is often provided to persons proceeding pro se before administrative and judicial tribunals. Pro se litigants bring their friends, neighbors, relatives, priests, ministers, rabbis, coworkers, union representatives, analysts, social workers and others to both administrative and judicial tribunals for support and advice. These individuals may have experience in a similar matter that is offered to the pro se litigant as advice, or they may merely offer stent support. The Commission heard that this form of informal advice and assistance frequently occurs in cases of battered women seeking temporary protective orders.

While informal advisors do not usually provide formal representation in judicial forums, they are sometimes allowed by the tribunal to speak to or for the pro se litigant, to translate for a litigant or witness who does not speak English, is hearing impaired or otherwise unable to make himself understood to the tribunal, or to provide explanations to the pro se litigant or the tribunal.

Tribunals are more likely to allow informal assistance when the proceedings are relatively informal, for example in such settings as housing court, juvenile proceedings, bail and probation proceedings, hearings for restraining orders in cases of domestic abuse, or small claims court. Many administrative tribunals handling entitlement claims and other individual matters are likely to allow informal assistance as well.

It should be made clear that the general acceptance of such informal forms of advice and assistance to self-represented persons is not conditioned upon the absence of payment to the advice provider. While family members, friends and neighbors are usually unpaid, many religious advisors, teachers, social workers, law librarians, union representatives, co-workers and others often receive a salary for performing such work.

b. Assistance Through Publications and Evolving Technology

1. Self-Help Books and Materials

Assistance through publications and technology to persons engaging in self-representation is increasing and taking new forms. A mushrooming variety of publications, standardized forms, materials and services are available to assist individuals and businesses in completing legal matters that they undertake on their own behalf. These materials may be offered by individuals, commercial or nonprofit organizations, grassroots support groups, or more recently, by the courts and the bar.

There are increasing sources of printed self-help materials that provide instructions, guidance and forms to the public. Tax preparation materials have been published by commercial entities for many years. More recently commercial publishing companies offer self-help books, model forms with instruc-
tions, and other materials on such subjects as bankruptcy, wills, probate and residential real estate transactions. These materials are widely available in bookstores, libraries, stationery stores, drug stores, department stores, retirement complexes and other places readily accessible to the public.

Those who deal in these do-it-yourself kits and other traditional self-help publications have been granted first Amendment protection against claims that the dissemination of such materials constitutes the unauthorized practice of law. Such protection contemplates that the seller gives no individualized advice in response to specific requests for assistance. 125

In recent years legislatures have engaged in developing aids to assist individuals in helping themselves—for example, promulgating standardized statutory documents such as powers-of-attorney and so-called "living wills." Some courts and bar associations have begun to publish model pleadings and forms that can be used by individuals without their consulting a lawyer. 125

ii. Emerging Forms of Technology

The long-heralded computer revolution has made hardware and software inexpensive, reliable and compatible enough to truly revolutionize the delivery of services, including legal services, in the United States. The first advantage of technology in the delivery of service—speed and accuracy—has been enhanced by the advent of very powerful high speed computers with large computer memory and storage capacities that have permitted the development of powerful software applications. To accurately and rapidly perform routine tasks, computer applications are often the best and, as a practical matter sometimes the only choice.

Software is available nationwide in bookstores and computer software shops that provide hundreds of commonly used legal documents. 126 These software packages are available at low prices, and are promoted in advertisements as a way to avoid lawyer's fees. Mass marketing by direct mail and extensive adver-

125 See, e.g., New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App.Div.), rev'd on the dissenting opinion, 287 N.Y.S.2d 422 (1967) (sale of do-it-yourself probate books, including forms, protected by the First Amendment and not the unauthorized practice of law); Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975) (en banc) (sales and marketing of do-it-yourself divorce kits including forms and instructions on how to fill them out, is not the practice of law).

The application of the rationale of these cases to newer high tech types of publications has not yet been widely tested in the courts. The Oregon State Bar, in a recent ethics opinion, opines that the rationale of the earlier cases permits lawyers to join nonlawyers in offering online information services to the public with a disclaimer as to the nature of the limited service since the lawyer does not "personally" provide individualized help. Ot. Et. Op. 1994-137. See infra note 192 and accompanying text. See also infra note 131 for recent articles discussing the relationship of UFL to computer information services.

126 Court and bar innovations are described infra Part Two, §§ B2 and B3.

126 A few examples of the available software from among the many that are on the market are WillMaker 5.0 by Nolo Press, It's Legal 6.0 by Parsons Technology, Personal Law Firm 2.0 by Bloc Publishing and Home Lawyer 2.0 by MECA Ventures, Inc. Legal forms are also now included in Microsoft Word, a popular word processing program that is frequently incorporated into a new computer when it is sold to the consumer.
tising in popular magazines, including airline in-flight magazines, suggests that there is a large market for this software that assists businesses in drafting contracts or individuals in handling such legal matters as bankruptcy, family law, estate planning, probate and tax.

Two software techniques that are now practical are hypertext and multimedia, both of which offer tremendous potential for the delivery of legal services as well as legal educational materials to the public. Hypertext is the ability to create a document, usually with an ordinary personal computer word processor, and mark, for example, each word or phrase that would benefit from a definition and each reference to another part of the same document or other documents. Marked text is identified simply by a change in color or type style, and once marked, the reader of the document can click on the marked text with the computer's mouse or other pointing device and jump directly to the word's definition or to another section of text that provides additional information or otherwise elucidates the marked text. The reader can then return to the initiating section of text and continue reading. Hypertext versions of many state statutes and regulations as well as federal codes and regulations are commercially available.

The second major feature of computer technology is improved communications and access to information. Personal computers and a host of peripheral equipment, including the telephone, now provide anyone access to libraries throughout the world, and to court opinions, press releases corporate financial information, medical research, scholars and experts, and almost any other information source. Commercial electronic networks facilitate legal dialogues and the sharing of work products. Commission witnesses knowledgeable about the computer revolution predicted that massive databases will eventually be available for use in most homes, allowing individuals and businesses to do much of their own research on law-related matters.

127 The Commission learned that the inflight catalog of United Airlines has shown a line of products titled "E-Z Legal Forms."

128 See INFO QUARTERLY: THE FOLIO J. OF ELECTRONIC PUB. 42 (Cara O'Sullivan ed. 1st Q. 1994). Legal service providers can create customized hypertext documents, including practice and procedure manuals, internal training guides for new associates, or explanations of educational materials for clients by use of software such as Jurinnet Corporation's Legal Views, West Publishing Company's Premier and Lotus Development Corporation's SmartText.

129 For example, OPEN (Ohio Professional Electronic Network), an affiliate of the Ohio State Bar Association, provides on-line access to state record databases and arrest records. Of the multitude of commercial on-line services available, among the most familiar are Prodigy, CompuServe, America Online and the Internet. These provide access to E-mail, financial information, news wires, on-line shopping, reference, sports, college and health information, stock quotes, travel services, bulletin boards, chat rooms, database searches, games, graphics downloading, movie reviews, on-line banking, shareware, ticket ordering and special interest areas as well as Internet access through newsgroups, mailing lists, FTP, Gopher and World Wide Web. CHICAGO TRIBUNE, Apr. 3, 1995, at 4.

130 LEXIS Counsel Connect (LCC) is a national information system for corporate and law firm lawyers. Among other things, the system permits participants to exchange electronic mail, participate in discussion groups, and search databases of legal memoranda and briefs.
These witnesses noted that as the public obtains ready access to law libraries, court opinions, statutes, regulations, sample legal forms, practice checklists, and other legal information, lawyers will no longer have a practical monopoly on access to these sources. They predicted that the value of lawyers' services will depend more on their analytical skills, judgment, and experience with legal problems and the justice system, than on presentation of legal information.131

The Commission learned that through its increasing familiarity with commercial voice mail systems, automated teller machines, sophisticated audio and video equipment, electronic "bulletin boards," E-mail and electronic filing of tax returns, the public is being prepared for the introduction of new technologies into the delivery of legal services and can already find consumer-easy software that prepares a simple will as readily as an ATM that dispenses cash.

Court systems have begun to utilize the new technology to assist pro se litigants. Since 1992 in Long Beach Municipal Court, and at the courthouse and shopping centers in Ventura County, California, consumers can use Auto Clerk to complete traffic ticket-related transactions. In several communities, including Phoenix, Arizona, Boulder, Colorado and Gainesville, Florida, the State Justice Institute has funded pilot projects to install interactive touch screen system computer kiosks132 in courthouses and law libraries. The computer generates court-approved forms, individualized to the litigant's case in domestic relations, child support and guardianship matters. Several of the kiosks also provide general legal information on a variety of other subjects, such as alternative dispute resolution, small claims, collection of judgments, garnishments and bankruptcies.133

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131 See generally Jas. Adams, Friend or Fee, ONE STATE BAR BULL (April 1995) (discussing the application of UPL decisions to computer information services and noting that the legal profession has lagged behind medicine where sophisticated multimedia CD-Rom programs analyze symptoms to diagnose ailments and flag harmful drug interactions); Willicks, Professional Malpractice and the Unauthorized Practice of Professions: Some Legal and Ethical Aspects of the Use of Computers as Decision-Aids, 12 RUTGERS COMPUTER & TECH. L.J. 1 (1986) (contending that computer systems capable of arriving at "professional conclusions" cannot as a practical matter be kept away from the public and that concepts of unauthorized practice of law will inevitably have to change); Lorinczi, When Does the Computer Engage in Unauthorized Practice?, 54 A.B.A. J. 379 (1968) (describing ultimately unsuccessful ABA proposal to limit access to analytical computer systems to lawyers). See also Thomas, Unauthorized Practice and Computer Aided Legal Analysis Systems, 20 JURIMETRICS J. 41, 51 (1979) (suggesting that the legal profession may not be the best forum to decide whether a computer program that analyzes the law should be considered the unauthorized practice of law).

132 The computer keyboard, monitor, drive and other inner works are housed in a standing frame that has been referred to as a "kiosk" for easy identification. The use of this term evokes the news and information kiosks found throughout the world where members of the public have immediate access to the material presented.

133 California's Auto Clerk provides a 30-minute small claims video incorporating a mock trial to familiarize users with the trial setting. Arizona's QuickCourt program includes information on alternative dispute resolution, small claims and an overview of the Arizona court system; and, in February 1995, the Washington, D.C. Superior Court began showing its 30-minute probate court video on guardianships, conservatorships and independent estate administration.
The Arizona kiosk, dubbed *QuickCourt*, functions in English and Spanish, communicates on a fourth grade reading level and is periodically updated. It takes the user through detailed calculations to compute standard child support figures. Set up in the Maricopa County Superior Court law library, it handled approximately 14,000 transactions in its first 8 months of operation, and users now have to schedule 45 minute appointments with the law librarian in order to use it.\(^{134}\) The kiosk at the Eighth Circuit Court in Gainesville, Florida, deals with estates and guardianships and at the present time produces either a petition for summary administration (if no real estate is involved) or a disposition of personal property. The Florida court is considering expanding its kiosk into the family law and small claims areas. The State of California is looking at the public access computer terminal for use in family law, probate, small claims, landlord/tenant and dispute resolution areas. At the present time there is no charge to use the grant-funded kiosks.

The Commission heard that in a second phase of development, Arizona’s *QuickCourt* will become a partnership between the court and the private developer. In this phase, the user will pay time on the hardware to use the software network which will be owned by the developer.\(^{135}\) When the projected 150 kiosks are in place throughout Arizona, they will include new informational segments on conservatorships, guardianships, name changes and small claims. Pricing will be designed to minimize user expense and it is expected that the technology will be periodically improved to enhance the responsiveness of the hardware.\(^{136}\)

The Commission learned that the computer hardware that constitutes the court kiosks would have been prohibitively expensive just a few years ago but today costs only $20,000 to $25,000. The Commission heard testimony that some courts are comparing the costs of kiosks to the cost of court personnel and law library staff and are finding kiosks to be more cost effective. Some witnesses stated that just as banks have found automated teller machines to be cost effective when compared to the personnel cost of human bank tellers, courts

\(^{134}\) The Maricopa County court system also has a Self-Help Center structured to help litigants proceed pro se to the fullest extent possible by supplying information and assistance with court forms and procedures. Telephone assistance, in addition to giving menu-driven responses and referral information, is capable of generating simple English language forms that can be downloaded via modem to a personal computer or sent on a diskette.

\(^{135}\) North Communications of Marina del Rey, California developed Arizona’s *QuickCourt* software under the direction of the Maricopa County Court. Earlier, IBM had developed a State Justice Institute-funded pilot project in Boulder, Colorado that calculated child support. In Utah, the legislature has appointed a Kiosk Committee to begin the Utah *QuickCourt* kiosk project, which is a partnership between North Communications and the Administrative Office of the Courts in that state. The project contemplates operating five kiosks throughout the Salt Lake City area that will offer information on divorce and small claims matters. Telephone interviews with Cheryl Reynolds, Project Director, State Justice Institute (Mar. 6, 1995) and with Caroline Green, Account Executive, North Communications (Mar. 7, 1995).

\(^{136}\) Although the prototype *QuickCourt* kiosks were disk-operated, the newer versions will be converted to a digital system that can accommodate faster and easier installation and updates by CD-ROM.
and agencies will find that the delivery of legal information and assistance via kiosks and other technological means, in many areas, is equally cost effective.

c. Scrivener and Typing Assistance to Self-Represented Persons By Document Preparers

Document Preparers—sometimes called "scriveners"—type or word process forms or documents, or translate from one language to another, using information provided by an individual who intends to represent himself or herself in a legal matter. Document preparers are being used by individuals in such matters as divorces, probate actions, guardianships, name changes, wills and bankruptcies. Document preparers operate in a variety of settings, including at homes, in storefront offices and in commercial buildings. Both commercial companies and non-profit consumer groups have established document preparation services with offices in several states. Representatives of the companies, as well as their customers, testified that document preparers charge what they believe to be modest fees for their document preparation services.

Most self-styled "document preparers" testified at Commission hearings that they simply fill out forms as directed by persons representing themselves, while other witnesses, most of whom were not document preparers, claimed that some document preparers also provided legal advice. 137 The Commission does not know the extent to which people who call themselves typists, scriveners or document preparers limit themselves to filling out forms as instructed by the customer. While for analysis purposes, the Commission's definition of a "document preparer" does not permit the giving of advice, it may be difficult to find a true "document preparer" under the Commission's definition. Under the Commission's analysis, a person who prepares documents and provides advice regarding the selection of the form or an appropriate answer to a question on a form is not a "document preparer" but rather is a "legal technician."

3. NONLAWYER ASSISTANCE AND REPRESENTATION IN ADMINISTRATIVE AGENCY MATTERS AND PROCEEDINGS

Many federal and state administrative agencies allow nonlawyers to give advice and assistance with forms and to represent parties in agency proceedings. Representation is allowed either through informal practice or formal agency regulations. Nonlawyer representation is typically provided in agencies handling a large volume of individual matters such as unemployment com-

137 So long as scriveners and typists do not give individual advice, the courts have generally held that their services are not the unauthorized practice of law. See, e.g., The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978); State Bar of Michigan v. Crumey, 249 N.W.2d 1 (Mich. 1976) (sales and typing of legal forms by nonlawyers permitted if typing services are limited to copying information provided by customer); In re Thompson, 574 S.W.2d 365 (Mo. 1978) (sale of divorce kits is not the practice of law). In these cases from the 1970s, the respective state supreme courts found that the publication and distribution of self-help instruction books and blank forms did not constitute the unauthorized practice of law. However, all agreed that if any personal individualized advice or substantive assistance were to be provided, such advice or assistance would constitute unauthorized practice. See generally Annotation, Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law, 71 A.L.R.3d 1000 (1976).
pensation and tax matters, although some agencies dealing with commercial matters also permit nonlawyer representation. Representation may be permitted even in complex matters and in adjudications.138

Federal administrative agencies permitting nonlawyer representation cover a wide variety of subject areas.139 In general, the practice of federal agencies handling a high volume of matters involving individuals as parties is to permit a choice of either a lawyer or nonlawyer representative.

The legislative history of the Administrative Procedure Act of 1946 (APA) reveals that Congress affirmatively decided that federal agency practice should not be limited solely to lawyers but, rather, that each agency should be permitted to continue the then long-standing practice of determining its own admission rules.140 Accordingly, Congress provided in section 6 (a) of the original Act that agencies could, in their discretion, continue to authorize nonlawyer representation.141

In 1963 the U.S. Supreme Court unanimously ruled that where a federal agency has admitted a nonlawyer to practice before it, the same is prohibited under the Constitution's Supremacy Clause from prohibiting the nonlawyer to carry out that practice within the state. Further, the Supreme Court's ruling was

138 See generally vom Baur, supra note 119, at 715. See also Gelhorn, supra note 119, at 200 and Rhode, Policing the Professional Monopoly, supra note 71. F.Thorowbridge vom Baur, who has written extensively on the history of federal administrative agencies, wrote in 1953 that while as many federal agencies allowed nonlawyer representation as did not, there was no correlation between the complexity of the matters generally brought before the agency and whether the agency required representation by a lawyer. F. THOROWBRIDGE VOM BAUR, STANDARD OF ADMISSION FOR PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES B (1953). See also Remmert, supra note 65, at 590.

139 See vomBaur supra note 119, at 716-17 (reporting that in a 1953 survey of 46 agencies that conducted adversary proceedings, 32 permitted nonlawyers to serve as trial counsel). In a 1984 survey of federal administrative agencies, an ABA committee found that 31 agencies permitted nonlawyer representation of parties appearing before them. The agencies included the Comptroller of the Currency, the Immigration and Naturalization Service, the Internal Revenue Service, the Interstate Commerce Commission and the National Labor Relations Board. Many of the responding agencies reported that only a small number of nonlawyers actually appeared on behalf of parties even though the practice was permitted. ABA, RESULTS OF THE 1984 SURVEY OF NONLAWYER PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES (1985). The survey was conducted by the ABA Standing Committee on Lawyers' Responsibility for Client Protection.

140 A discussion of the legislative history of the Administrative Procedure Act's implicit authorization for nonlawyers to represent parties before federal administrative agencies is found in Sprerry, supra note 77, at 396.

141 560 of the 1946 Administrative Procedure Act (originally 5 U.S.C. § 1005 and now codified at 5 U.S.C. § 555(b) (1994)) stated:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding....This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.
held to extend to all activities carried out within the state which are integral to practice before the federal agency.\(^{142}\) Conversely, where an agency has not authorized nonlawyer practice before it, the federal government is not deemed to have preempted the regulatory field.

As a result of the Administrative Procedure Act's legislative history and the Supreme Court's Sperry decision, throughout the nation nonlawyers provide services directly to the public for many federal administrative agency matters. Perhaps the most familiar nonlawyer service is tax preparation, with its attendant advice, selection of proper forms, and assistance with subsequent audits. Similarly, the Commission learned that nonlawyers also increasingly provide services to the public in connection with Social Security Administration matters, which includes the giving of advice, help in filling out forms, gathering documentation, filing claims and appearing in agency proceedings, including appeals.

4. NONLAWYER ACTIVITIES IN DELIVERING LEGAL AND LAW-RELATED SERVICES DIRECTLY TO THE PUBLIC

a. Businesses, Unions and Governments

Notwithstanding the spread and vigorous enforcement of UPL laws with the advent of the Depression,\(^{143}\) many businesses providing legal and law-related services to the public outside of a courtroom continued to operate and grow, and most continue today (although they may not all exist in all jurisdictions). These for-profit businesses include, among others, tax preparation services, depository collection agencies, title examination companies, accounting firms and trust departments of banking institutions. As previously noted, they have continued to flourish because of (1) the difficulty in defining the terms "practice of law" and "legal advice"; (2) the ability of nonlawyer businesses to fill the vacuum of unmet legal and law-related needs; (3) the insistence by the public on their continuance with increasing support from legislatures and courts; and (4) constantly evolving technology that has greatly expanded the opportunities for nonlawyer businesses to deliver services directly to the public.

Nonlawyer businesses delivering legal and law-related services to the public are numerous and at least some of them exist in every state. For example, H & R Block offices, which prepare tax returns, help select forms, answer

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\(^{142}\) Sperry, supra note 77, at 385. The Court found that a nonlawyer patent agent, who was registered with the U.S. Patent Office, could not be proscribed for violation of the state's prohibition against the unauthorized practice of law, even though it was conceded that the "preparation and prosecution of patent applications for others constitutes the practice of law." Id. at 383. The Court rejected the bar's contention that the federal authority extended only to activities performed in the nation's capital, stating "[t]he bulk of practitioners are now scattered throughout the country" and "if practitioners were not so located...they could not so easily consult with the inventors with whom they deal [and] their effectiveness would often by considerably impaired." Id. at 389-90. There is also authority to the effect that even without an act of Congress, a party to an administrative proceeding probably has a right to be represented by an agent or attorney. See 33 Op.Att'y Gen 17, 19 (1921). See also Mantz v. French, 21 N.E. 945 (Mass. 1889); Remmert. supra note 65, at 559.

\(^{143}\) This period is described supra, Part One, § A 4.
questions and offer advice and assistance in connection with the returns, exist in virtually every county and city in the country. Similarly, financial institutions that prepare wills and trusts, and give financial planning and pension advice, exist in virtually every major community. So too do debt collection agencies. In some jurisdictions, nearly all title work is done by title companies. Not every state allows realtors to handle the paperwork involved in closings of residential real estate sales but it is well settled practice in many jurisdictions.  

For-profit businesses were not the only entities in the first half of this century to deliver legal and law-related services to the public. Labor unions obtained U.S. Supreme Court approval for their programs that advised workers concerning their legal problems and referred them to legal counsel who were employed by the unions or whose fees were paid by them. Today, unions continue to refer their members to lawyers, but in a number of jurisdictions nonlawyer union members also serve as representatives and advocates for other union members in a wide variety of situations including discipline and employment discrimination grievance proceedings, labor negotiations, arbitrations and administrative agency proceedings.

While governmental entities employ tens of thousands of lawyers, and substantial numbers of paralegals, they also employ untold numbers of nonlawyers whose role is to provide legal information and resolve legal disputes. To the extent these nonlawyers are providing assistance to the government itself, as administrators, managers and executors of government activity, the situation is analogous to the assistance provided to business organizations by their employees and the representation can be viewed as a form of self-representation. To the extent that their role is to represent the government in an adversarial proceeding, under the supervision of a lawyer, they are performing as traditional paralegals. In many other circumstances, however, the government employee is providing assistance to citizens who are looking to the government for guidance, benefits or other help. Examples of these employees include police officers, IRS information agents, welfare workers, public housing managers, and building inspectors, to name a few. Governmental employees usually perform their duties pursuant to guidelines and training in which lawyers have had important involvement.

While it may seem strange to characterize it in this way, government employees are regulated. They must meet government-set employment qualifications, maintain skills and meet performance standards under supervision of other government officials. In addition, they are subject to removal from their

144 See supra notes 66 and 88-98 and accompanying text.


146 Some states have expressly forbidden nonlawyer union representatives to appear on behalf of others in administrative agency proceedings on the ground that such representation constitutes the unauthorized practice of law. See, e.g., Flores v. City of Glendale, 463 F.2d 67 (9th Cir. 1972). An amendment to the state supreme court rules has been proposed by the Arizona bar which would permit nonlawyer representation before state administrative agencies. This proposal is discussed in this Report's section on Recent Efforts by States to Examine Nonlawyer Practice. infra at Part One, § E.
occupations for poor performance or misconduct and, at least to a significant degree, they work in settings which provide consumers with relevant forms of protection and remedies.

b. Nonprofit Entities, Grassroots and Other Community Organizations

Organized religious entities, charities and nonprofit advocacy organizations also give advice to members of the public about their legal rights. As in the case of labor unions, they may refer individuals to legal counsel who are employed by the organizations or they may refer them to lawyers who provide services on a pro bono basis.

A large number of nonprofit organizations also provide legal advice and assistance through nonlawyer employees or volunteers. One of the largest of such groups is 'veterans' organizations. Many church-related entities officially recognized by the Immigration and Naturalization Service provide nonlawyer assistance to immigrant members of their congregations or communities and others attempting to obtain immigrant status. A broad range of other nonprofit groups provide nonlawyer assistance to individuals in housing, welfare, disability and other entitlement matters. The nonlawyers are often trained or supervised by lawyers employed or retained on an ad hoc basis by these groups. Community-based advocacy of this kind has a long history. The National Welfare Rights Organization (NWRO) was founded during the 1960s on the idea that welfare recipients could learn welfare law and then effectively secure their own and each others' benefits within the welfare system. Welfare "lay advocates," trained by NWRO and by legal services lawyers, were so successful that they inspired creation of tenants' groups, parents' associations and similar coalitions.148

During the past two decades, many similar organizations, legal services programs and bar associations have developed methods for helping self-representing individuals advocate on their own behalf and on behalf of others. These include housing law programs in which tenants pay a nominal fee and receive advice and materials from nonlawyer volunteers,149 pro se clinics staffed by both lawyers and paralegals which provide advice and assistance to low- and moderate-income persons150 and programs that offer free telephone advice on a


149 For example, the Massachusetts Tenants Organization annually handles thousands of requests for advice about rent deposits, housing conditions and evictions. The University of Baltimore School of Law helped to found the Tenant Advocacy Project, which obtained statutory permission to use nonlawyer advocates in the local housing court. Md. St. Gov't Code Ann. §§ 1607.1 (1944) Organizations within the state such as the University of Maryland Law School, the Public Justice Center and the Legal Aid Bureau support this initiative by training and certifying tenant advocates to appear against landlords' agents.

150 Individuals facing legal processes are given forms and explanatory materials, trained in their use, assisted in completing them, and encouraged to return with additional questions. See, e.g., Elizabeth Thomas, Self-Help Plus: A Pro Bono Program for Pro Se Family Law 17 CLEAVINGHOUSE REVIEW (Summer 1983).
broad array of legal problems from trained nonlawyers working with lawyer supervision.\textsuperscript{151}

The Commission also learned about newer grassroots and community organizations. In many communities there has been a shortage of lawyers to handle the specialized problems of battered women, particularly those who are unable to pay legal fees. Mutual support groups have been formed in which the nonlawyer participants provide each other with information about the rights of battered women, help them put together the information needed to file complaints, accompany them to state and local agencies or to prosecutor’s offices to file their complaints, or to court where they provide silent support and, when requested by the court, speak on behalf of the battered women. Similar mutual support programs have been established for victims of other crimes. Another type of organization is exemplified by groups of fathers who believe that current enforcement of custody, support and alimony laws unfairly favors mothers, and who have therefore organized to press for stronger enforcement of their rights.

Another grassroots mutual support movement consists of parents of handicapped children. The Commission heard from many persons who reported a shortage of lawyers in their communities willing to handle problems connected with school placement of handicapped children. In response, the parents created a multi-state grassroots nonprofit organization, the Parents Information Center (“PIC”), which provides information, counseling and advocacy for parents of such children. They reported that the organization has developed a rigorous instructional program (two years of training and an additional year’s practicum) to train nonlawyer volunteer advocates. The level of expertise of the advocates is reported to be high and, according to testimony, exceeds that of most lawyers, who ordinarily lack training and experience in the very specialized area.

c. New Types of Businesses

While many nonlawyer businesses the Commission learned about long ago in this century, a considerable number have been established in more recent years. Some may have been started many years ago in some communities and only recently begun in others. Preparation of documents for residential real estate closings by licensed nonlawyers, for example, has only recently been explicitly permitted in some jurisdictions although this activity is of longer standing in other states.\textsuperscript{152} Other relatively new businesses include challenging real estate assessments, representing injured persons in their claims to insurance companies, and helping debtors develop debt consolidation plans and negotiate installment payments with creditors.

A frequent subject of discussion during the Commission’s hearings were businesses that provide typing and other form preparation services to self-representing persons and also provide advice about which forms to use and

\textsuperscript{151} The Legal Advice and Resource Center (LARC), sponsored by the Boston Bar Association, which receives thousands of calls each year, is an example of such an organization.

\textsuperscript{152} See, e.g., supra notes 66, 83, 88–89, 91–98 and accompanying text.
how to fill them out. Occasionally representation is also provided in connection with the documents that have been prepared (e.g., in tax preparation services).

There is no single generic term that covers all of the newer document preparation and advice businesses. They were described by various individuals as paralegals, independent paralegals, advocates, community advocates, representatives, technicians, legal technicians, form preparers, document preparers, typists, consultants or notarios. For purposes of this report, the Commission uses the term "Legal Technician" to refer to those document preparers who also give advice concerning which forms to use and/or advice about how to fill them out.

These businesses exist in many states, providing assistance in a variety of subject areas, including uncontested "no-fault" divorces, child support enforcement proceedings, low-asset personal bankruptcies, small estate probates, social security applications, name changes, visas, extensions of stay and other immigration matters, applications for credit and eviction complaints and defenses.

There are no official data concerning the number of document preparation services that also provide advice. An article in the Arizona Bar's journal estimates that there are 75 nonlawyer document preparers in Arizona, some of whom provide advice as well as other services for a range of matters including filing of divorce and bankruptcy petitions, and the creation of trusts, wills and corporations. Some legal technicians told the Commission that they are franchising their businesses in several states. One individual estimated that by the turn of the century there will be 50,000 independent legal technician businesses preparing forms and providing related advice. This activity has also been the focus of reports by state bar groups. An Arizona State Bar task force interviewed judges who told of people being significantly harmed by the work of unlicensed legal technicians. An Arizona Bar Journal article reported on this testimony as follows:

Each of them had instances of people not being divorced when they thought they were, folks not having rightful custody of their children, bankruptcies that went bad and deeds that changed the way people thought they were getting property.

At the same time, Arizona's Better Business Bureau agreed with legal technicians providing document preparation services, who claimed that such services were largely complaint-free. The Bureau had opened files on each of the document preparation businesses but had received no complaints. (All but two of the businesses cited in an Arizona Bar Journal article had received the Bureau's highest rating.) The State Bar, however, reported that it had received more than


154 Some of the studies and reports by states recently examining nonlawyer practices within their jurisdictions are discussed infra at Part One §E of this Report.

155 Calle, supra note 153, at 11.
250 complaints against legal technicians and that it receives an average of 50 complaints a year that cause "actual harm."¹⁵⁶

A number of persons representing bar associations or UPL enforcement entities advised the Commission of examples of legal technicians who had been negligent or provided bad advice, and of unscrupulous persons who had fraudulently held themselves out as lawyers, or had failed to deliver promised services. The fraudulent activity was said to occur with particular frequency in immigration matters and in the area of "living trusts."

The Commission also heard from judges and administrative law judges who cited both good and bad experiences with litigants who had used the services of legal technicians. They were in general agreement that where legal technicians are not properly trained and experienced, their services to pro se litigants slow court proceedings, delay the requested relief or judgment being sought, and cause great administrative inefficiency. In response to the poor quality of some services, one judge had developed a training program for legal technicians and another had undertaken to have his court develop model forms itself.

Some judges and administrative law judges observed that there is likely to be a greater difference in administrative efficiency and results obtained between trained and untrained legal technicians than there is between lawyers and nonlawyers. Similarly, several judges stated that legal technicians who are trained and experienced help courts to be more efficient and are a service to pro se litigants who, when they are proceeding entirely on their own, are often likely to cause delay and other administrative inefficiency. For example, in referring to massive case backlogs in so-called "mass justice" agencies such as the Social Security Administration, the Acting Chair of the Administrative Conference of the United States wrote that pro se claimants cause great inefficiencies and qualified nonlawyer representation can help provide relief to the system as well as to the individual claimants.¹⁵⁷

Statements offered by legal technicians themselves evidenced the disparity in the levels of training and experience among them. Similarly, a wide array of legal training materials, sample documents and even proposed ethical guidelines for nonlawyers ranged from excellent to very poor. The diversity of their backgrounds mirrored the range of views concerning training, experience and licensing criteria for legal technicians.

5. NONLAWYER ACTIVITY IN ALTERNATIVE DISPUTE RESOLUTION

Both lawyers and nonlawyers are engaged in alternative dispute resolution (ADR) (sometimes referred to as appropriate dispute resolution), and increasing numbers of lawyers are offering mediation services as adjuncts to their law practices. In response to this development, in 1993 the ABA created a new Section of Dispute Resolution and 19 other ABA entities currently have ADR subcommittees. At the same time, such nonlawyer professionals as architects, psychologists, psychiatrists, scientists and business persons are increasingly serving as arbitrators and mediators in ADR programs.

¹⁵⁶ Id. at 13–14.
¹⁵⁷ Witten statement to the Commission on Nonlawyer Practice from Sally Katzen, Acting Chairman of the Administrative Conference of the United States, Aug. 29, 1994.
Although negotiation, mediation and arbitration are the three most common forms of ADR, other ADR mechanisms include neutral evaluation, mediation-arbitration, private judging and mini-trials. In general, ADR activities fall into two broad categories: those that are private, where the participants employ and pay for the services, and those that are court-authorized, court-mandated or authorized by a special statute. Private dispute resolution has the longer history, embracing several different categories of activity, including negotiation, mediation and arbitration.

Contract discussion between labor and management is a prime example of private negotiation, in which individuals or groups resolve differences themselves or through their agents. Nonlawyers are frequently active in negotiations representing themselves or serving as agents for one or both of the parties in a dispute. Their conduct has been largely unregulated and is generally not considered the practice of law.

Mediation involves the utilization of a neutral person who assists disputing parties in reaching an agreement. The parties may attend a mediation with a lawyer or with a nonlawyer, or they may attend without any representation. As is the case with negotiation, mediators are often nonlawyers.

Arbitration is a more complex process of private dispute resolution in which the arbitrators decide the conflict for the parties. One of the oldest arbitration services is the American Arbitration Association (AAA), founded in 1926, which provides a broad array of services including both arbitration and mediation. Approximately one third of the Association's arbitrators are nonlawyers.

A growing segment of the public is now viewing ADR as a preferred way to adjudicate disputes.138 Judicial Arbitration Mediation Services of California, for example, which offers mediation, arbitration and mini-trials, concluded 13,000 cases in 1993.

Parties to arbitration may choose their arbitrators. The President of AAA told the Commission that disputing parties sometimes choose lawyers and sometimes nonlawyers, depending largely on the nature of the case. He noted as examples that AAA arbitrators hearing no-fault or uninsured motorist claims tend to be lawyers, but that almost no lawyers serve in cases involving the textile industry or in maritime disputes because the general custom in those fields is to employ nonlawyer who have commercial experience. He noted that construction industry disputes are often heard by panels composed of architects, engineers and business executives as well as lawyers.139

After the Supreme Court's 1987 decision in Shearson/American Express v. McMahon upholding the use of mandatory arbitration clauses in securities

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138 Participants at the ABA's 1994 Just Solutions Conference sponsored by the ABA (most of whom were nonlawyers) reported that ADR was gaining popularity as a way to access the justice system. Reasons given for its popularity were that it is often less costly, provides disputants with a menu of resolution options and can be more satisfying than formal litigation because it involves greater personal involvement in the resolution. The conferees also noted that some disputes may require formal adjudication. Further, where parties are not equal in bargaining power, an adjudicatory system may be preferable. ABA JUST SOLUTIONS REPORT, supra note 121, at 25–26.

139 Statement to the Commission on Nonlawyer Practice by Robert Coulson, then-President of the American Arbitration Association, August 5, 1993.
cases, both lawyers and nonlawyers experienced in securities matters offered their ADR services. Recently, an ad hoc group, the Securities Industry Conference on Arbitration, of which most members are lawyers, recommended a series of ethical requirements for nonlawyers representing clients in arbitration and attempted to foreclose all nonlawyer participation in securities ADR. Because small investors have increasingly been using nonlawyer arbitration services in their claims against brokerage firms (largely on the ground that they are less costly than those offered by lawyers), the proposal to bar nonlawyers from representing investors has met with resistance by the Consumer Federation of America, the American Association of Retired Persons and the American Association of Individual Investors.160

Paralleling the use of private ADR procedures, courts and administrative tribunals are also now using mediation and arbitration procedures. In some instances, parties (both represented and pro se) are requested, or even required, to meet with court- or agency-approved mediators before submitting their matters to adjudication by the tribunal. Sometimes the mediators are employed by the tribunal; in other instances they are trained volunteers.

In the District of Columbia both local and federal courts have used trained mediators since the early 1980s. They were initially employed in the Citizens Complaint Center, operated by the District’s Superior Court, the U.S. Attorney’s Office and the District’s Office of Corporation Counsel, in an effort to screen and resolve disputes that would otherwise end up in criminal or civil court proceedings. The wide range of volunteers who act as mediators includes non-college educated community organizers, tenant leaders and parent-teacher association officers, as well as college presidents, business persons, academics and lawyers.161

The degree of knowledge, advanced training and experience necessary to offer ADR services, either as a representative of clients or as a neutral, is the subject of ongoing discussion. The Society of Professionals in Dispute Resolution (SPIDR) issued a report in 1989 discussing the optimal educational,

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160. Sinofzi, “Bring in the Lawyers! Investor Groups Say Absolutely No Way!” Wall St. J., May 11, 1994, at B-10. The article reports that the ad hoc Securities Industry Conference on Arbitration proposed a plan to bar nonlawyers from the conference on the ground that lawyers are needed to protect the public from incompetent representation and because nonlawyers do not have any supervisory entity, malpractice insurance, attorney-client privilege, or ethics or advertising codes. The article reports that the consumer groups opposed the ban because it would eliminate a relatively cheap alternative for those with small claims who believe that they cannot afford to hire a lawyer. The consumers group was reported to have testified that “An investor is not protected from ineffective or incompetent representation simply because his or her representative has a law degree.” The article notes that the number of arbitration cases at the National Association of Securities Dealers has claimed about 84% since 1987.

161. Following on the success of the Citizens’ Complaint Center experience, the District was named one of four cities to participate in the “Multi-Door Dispute Resolution”, an ABA-based pilot project. The pilot project provided screening for cases in the civil divisions of the Superior Court, and training for both volunteer mediators and for Superior and Federal Court judges in ADR techniques. The District’s courts now routinely refer many kinds of civil cases to the trained mediators for both mandatory and voluntary mediation.
training and experiential qualifications for persons who act as neutrals in vari-
ous ADR settings. The report concluded that the optimal qualifications vary
according to the disputes and that the greater the choice the parties have over
the dispute resolution process, program or neutral, the less mandatory the
qualification requirements should be. The report also noted that advanced
degrees in law or other substantive areas may not be as useful in some ADR
contexts as years of particularized experience with the kind of problem to be
resolved. The SPIDR report concluded that there is no single answer to what
constitutes a qualified neutral and recommended that organizations in partic-
ular fields establish qualifications for neutrals based on performance rather
than on paper credentials.

C. The Growth of the Paralegal Profession

The paralegal profession is a relatively new one. The number of traditional
paralegals performing substantive legal and law-related work has been steadily
increasing in the last two decades. The paralegal profession has been identified
by the U.S. Department of Labor Bureau of Labor Statistics as one of the
fastest growing and most secure of the professional occupations it catalogues.
As of 1992, there were 95,000 persons employed as paralegals. During the
next ten years, the Bureau states that the employment of paralegals is expect-
ed to grow much faster than the average for all occupations. ... Job opportu-
nities are expected to expand as more employers become aware that paralegals
are able to do many legal tasks for lower salaries than lawyers.

163 REPORT OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION COMMI-

164 Id. at 11, 15–16.

165 The SPIDR report notes that under Rule 703 promulgated pursuant to the
Magnuson Moss Consumer Product Warranty Act, the scope of issues a private dispute
resolution program can decide, the timing of the decisions, the training of neutrals, ser-
vice funding and record keeping are all regulated and that some suggest that such regu-
lation of programs can be an effective way to ensure quality of dispute resolution services
without limiting the entry of individual neutrals into the field. Id. at 10. The report
reviews other forms of regulation. It notes, for example, that mandatory disclosure is
required by Minnesota's Civil Mediation Act. That statute requires any person perform-
ing mediation services to provide potential parties with a written statement of qualifica-
tions, education, and training before commencing mediation. Failure to do so is a petty
misdemeanor. Id. at 8.

Ethical codes also exist in various specialized areas for both lawyers and arbitrators. An
ABA-AAA Code of Ethics for Commercial Arbitrators has been proposed; and an ABA-
AAA Code of Professional in Dispute Resolution Code for Commercial Mediators is being
drafted. A Code for Labor Arbitrators developed by the AAA and the Federal Mediation
and Conciliation Service is already in effect; and the National Academy of Arbitrators
has also developed a set of standards for its members. All of these codes are voluntary
standards designed to enhance the quality of the dispute resolution process.

166 Id. at 18.

167 Id.
The principal employers of paralegals in the private sector are law firms. Other employers include insurance companies, estate and trust departments of financial institutions, real estate firms, title insurance companies, and corporate legal departments, as well as nonprofit organizations such as unions, professional and trade associations, charitable organizations, and consumer and advocacy groups. The second largest employer of paralegals outside the private sector is the federal government. Other public sector employers include courts, legal services programs, public defenders, prosecutors, and state and local governments. Evidence of the ethical propriety of employing paralegals was implicit in Ethical Consideration 3-6 of the ABA Model Code of Professional Responsibility, which stated that delegation of tasks to lay persons "enables a lawyer to render legal services more economically and efficiently." The EC further stated that such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product.158

The American Bar Association has long encouraged the employment of paralegals with lawyer supervision and accountability for their work. In 1968 the ABA created the Special Committee on Lay Assistants for Lawyers to encourage the utilization of and increase the training for nonlawyer assistants to help lawyers better discharge their professional responsibilities. Today, the Standing Committee on Legal Assistants serves as a successor to that committee.169

1. WORK PERFORMED BY PARALEGALS

As the paralegal profession has developed, legal assistants employed by lawyers and organizations have gradually assumed more of the work previously performed by lawyers (and sometimes by secretaries) such as retrieving, filing and producing documents. A report of the ABA Law Practice Management Section states that while some of this delegation may have come at the expense of associate attorneys, "much of it is simply freed lawyers to perform complicated, nonsensine work more effectively."167

Increasingly, lawyers have delegated substantive work to paralegals. The ABA's definition of legal assistants contemplates delegation of substantive work, stating:

A Legal Assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, government agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work; which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.171

158 Model Code of Professional Responsibility EC 3-6 (1986).
167 Gary Munneke, ABA Leveraging with Legal Assistants, supra, note 74, at x.
171 ABA, Minutes of the Board of Governors 5 (Feb. 6-7, 1986). The Board approved a policy statement on legal assistant regulation based on a position paper submitted by the Standing Committee on Legal Assistants which included this working definition of a legal assistant.
Over 175 nonlawyers who provide or wish to provide legal services, either as paralegals or legal technicians, spoke at the Commission's hearings either as individuals or on behalf of paralegal organizations. Examples of the work they perform include interviewing clients, drafting simple wills, conducting title searches, handling residential real estate closings, probating estates and preparing bankruptcy petitions and tax forms; they also render litigation support services such as drafting of pleadings, preparing summaries of depositions, collating documentary evidence, and preparing responses to discovery requests. Paralegals reported that they perform substantive tasks that, in their absence, would be performed by lawyers.

Some of these paralegals stated that they regularly appear in a representative capacity in federal and state administrative agencies—for example, in social security, immigration, veterans administration, unemployment compensation, workers' compensation and other benefit proceedings. Many reported that paralegals working in organizations providing free legal services to low and moderate income persons handle extensive administrative law caseloads, including full evidentiary presentations in adjudicative proceedings, for thousands of clients every year.

The United States Supreme Court in a 1989 decision refers to the delegation of substantive legal work to paralegals as well-established, stating:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses, assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal. 172

The Commission's record establishes that lawyers increasingly assign substantive legal and law related work to traditional paralegals.

2. Increasing Paralegal Independence

a. Freelance Paralegals

In some jurisdictions, traditional paralegals independently contract their services with law firms, government agencies and other organizations. There are also employment agencies that provide paralegals to lawyers as temporary employees on a contract basis. Commonly known as "freelance" or "contract" paralegals, these persons have usually had prior paralegal experience of the traditional type, and developed special skills in one or more substantive areas.

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172 Missouri v. Jenkins, 491 U.S. 274, 288 n. 10 (1988) (holding that a federal civil rights act provision which gives district court discretion to award "a reasonable attorney's fee" to successful plaintiff refers not only to work performed personally by members of the bar, but also refers to the work of paralegals where it is the prevailing practice within a jurisdiction to bill separately for paralegal services.)
Freelance paralegals offer their services to lawyers or other legal providers and not directly to the general public. In many instances, the freelance paralegal provides services solely for the benefit of the lawyer or the lawyer's organisation or government agency. In other instances, the paralegal provides services to the law firm's or agency's clients on the same basis he or she would provide them if employed in-house by the lawyer or organization.

Those who supported this practice stated that freelance paralegal practice benefits both lawyers and the public by allowing lawyers to employ paralegals on less than a full-time basis, thereby eliminating some of the overhead costs that would otherwise be passed on to their clients. Courts have also upheld this practice.\(^{173}\)

b. Paralegal Services Not Directly Supervised by a Lawyer But For Whom a Lawyer Is Accountable

Although a number of persons appearing before the Commission stated that the employment of paralegals in the traditional manner insures that a lawyer supervises their services, the Commission heard substantial commentary from traditional paralegals that lawyers do not always provide such supervision.

The Commission heard reports that in certain instances paralegals employed by lawyers effectively provide 100% of the legal services delivered to clients, including direct client contact, with minimal lawyer supervision. They offered examples of interviewing clients and preparation of client documents such as real estate closing papers, divorce pleadings, bankruptcy forms, probate documents and government benefit application forms.

The absence of daily supervision of a paralegal's work, including direct contact with clients, was not seen as an abdication of the lawyer's responsibility: in many instances, the employing lawyers provided initial training and subsequently relied upon their assessment that the paralegals' skills were sufficient to assure the quality of the work assigned to them. In other instances, paralegals reported that they received no training from their employing lawyers but, rather, had received their training on previous jobs.

A number of paralegals stated that they were considered specialists within a law firm for certain practices with which the firm's lawyers were unfamiliar, such as real estate closings, title searches, some kinds of litigation support, probate work or tax preparation.

In these circumstances, depending upon the paralegal's prior training, a lawyer might be sufficiently confident in the paralegal's skills that the lawyer

\(^{173}\) In 1992, the New Jersey Supreme Court overruled an opinion of the UPL Committee of the New Jersey State Bar and held that adequately supervised freelance paralegal services do not constitute the unauthorized practice of law. In Re Opinions 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962 (N.J. 1992).

Freelance or contract paralegals should not be confused with legal technicians who, under this Report's definition, provide services directly to the public. In some jurisdictions, those persons whom this Report defines as legal technicians are referred to as paralegals or independent paralegals, and sometimes the terms are used interchangeably to describe any nonlawyer who provides or wishes to provide legal or law-related services.

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could conclude that he or she did not have to provide either additional training or continuing direct supervision of the paralegal’s work. The practical result is that a significant number of lawyers today apparently do not provide either training or direct supervision of the work performed by the paralegals they employ or retain.

Lawyers who retain or employ paralegals have traditionally borne an ethical responsibility to supervise the paralegals’ conduct and to bear accountability for it. The cornerstone of the lawyer’s obligation in this regard has traditionally been the law of agency.174

Some courts and bar associations have recently developed guidelines to assist lawyers in effectively utilizing paralegal services.175 These guidelines are intended to provide lawyers with a reliable basis for delegating responsibility to paralegals. The guidelines are addressed to lawyer conduct and not directly to the conduct of the paralegal. However, the country’s two largest paralegal organizations, The National Association of Legal Assistants (NALA) and the National Federation of Paralegal Associations (NFPA), have adopted codes of ethics to guide paralegal conduct in the delivery of legal services.175

2. PARALEGAL EDUCATION AND CERTIFICATION

Where once paralegals were trained on the job and often entered the profession with no advanced formal education, paralegals now routinely hold college degrees. Many have post-graduate degrees.177 An increasing number of paralegals have graduated from paralegal programs that teach legal procedure and substantive law. Under the auspices of its Standing Committee on Legal Assistants, the ABA House of Delegates currently con-

174 For example, in State v. Barrett, 483 P.2d 1106 (Kan. 1971), the court held that secretaries and other persons act as agents for lawyers employing them and that lawyers are therefore responsible for the nonlawyers’ work product. See infra notes 86–188 and accompanying text for additional discussion and case authority on this point.

175 See ABA, MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES (1993) (A list of states having similar guidelines is contained in the appendix to the Model Guidelines; subsequent to the publication of these Model Guidelines, Indiana also adopted guidelines.).

176 See NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC., CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY (rev. 1988); see also NATIONAL FEDERATION OF PARALEGAL ASSOCIATIONS, INC., MODEL CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY (1993).

177 The NALA 1993 National Utilization and Compensation Survey Report shows that forty percent of its respondents hold bachelor degrees and twenty-two percent hold associate degrees. The NFPA 1993 Findings of Paralegal Compensation and Benefits Survey reported that fifty-five percent have a bachelor’s degree, six percent have a graduate’s degree and less than one percent hold a Ph.D or a J.D. Sixty percent received paralegal training in addition to attending college, while twenty-four percent received paralegal training as part of their college curriculum.
ducts a program through which paralegal education programs may obtain ABA approval.178

There are approximately 700 paralegal education programs in the United States. Paralegal training programs are offered in undergraduate departments of colleges (bachelors degree programs); community colleges (associates degree programs); and various proprietary institutions (certificate and degree programs). Four university programs offer a masters degree in legal assistant studies.179

Many paralegals addressed whether there should be minimum licensing or certification requirements for paralegals. Some favored minimum educational requirements and/or skills testing to establish who can use the title "paralegal," noting the importance of educating the public about the specialized work that modern paralegals perform.180 Others saw no need for regulation because lawyers, in effect, regulate traditional paralegals through their working relationship with them. Thus far, state bars and governments have declined to adopt mandatory licensing or certification schemes for paralegals.181

In the early 1970s, the ABA Committee on Legal Assistants began studying whether the state should license or certify paralegals. Eventually, the ABA Board of Governors adopted a policy statement that licensure of paralegals is unnecessary since the lawyer through whom the paralegal provides services is fully liable to the client and responsible to the public. The statement went on to say:

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178 Two hundred paralegal training programs in the country have obtained ABA approval under the ABA's voluntary approval procedures according to the ABA Standing Committee on Legal Assistants. Guideline G-102 of the Guidelines and Procedures for Obtaining ABA Approval of Legal Assistant Education Programs, as amended in 1992, states that "there should be a number of ways in which a person can demonstrate competence as a legal assistant, one of which is the completion of an approved program."

The ABA Standing Committee on Legal Assistants (SCOLA) has encouraged increased paralegal education. In the 1970s, SCOLA's predecessor committee developed standards for approval of formal paralegal educational programs. SCOLA also sponsored a series of National Conferences for Legal Assistant Educators that led to the formation of a paralegal educators' organization known as the American Association for Paralegal Education (AAPFE).

179 Universities offering masters degrees in legal assistant studies include Marymount University in Arlington, Virginia; Sanganon State University in Springfield, Illinois; and Webster University in St. Louis, Missouri.

180 There was considerable discussion and some disagreement by the various paralegal witnesses, and the paralegal organizations to which they belonged, as to what the criteria for examining, licensing or certifying paralegals should be.

181 In 1977 both Michigan and California legislatures failed to approve proposed legislation that would have created a mandatory certification program for paralegals. From 1977 through the early 1980s, state and local bar associations in Illinois, Texas, Ohio, North Carolina, Missouri and South Dakota created special committees to explore the regulation of traditional paralegals through licensing or certification that minimum standards had been met. For varying reasons the committees determined that such regulation was not appropriate. The Oregon State Bar had established a certification program in 1974 but between 1975 and 1979 only 31 persons applied to take the examination and the program was abolished in 1980.
Further, in the view of the Standing Committee, despite professed limitations upon its purpose, voluntary certification of minimal legal assistant competence has the potential to evolve into licensure which the Committee is of the view has no inherent benefit and many disadvantages.\textsuperscript{182}

In rejecting a mandatory certification program that would test minimal skills, the Position Paper on Legal Assistants adopted by the ABA Board of Governors did not reject programs of voluntary certification of legal assistants' advanced proficiency in specialized areas of legal practice.\textsuperscript{183} In 1993, the Supreme Court of Texas authorized the Texas Board of Legal Specialization (TBLIS) (which administers lawyer specialty certification programs) to administer a voluntary specialty certification program for Texas paralegals.\textsuperscript{184} NALA and NFPA also have voluntary certification programs.

D. Nonlawyer Accountability to Consumers

Although the Commission has not undertaken extensive research, it appears that there are some reported judicial decisions regarding the liability of paralegals, union representatives and the writers of self-help publications. A traditional paralegal is generally considered by the courts to be an employee and agent of the employing lawyer. The lawyer "employer remains liable for acts

\textsuperscript{182} See supra note 171.

\textsuperscript{183} The Position Paper adopted by the Board of Governors recommended that any voluntary certification of advanced paralegal proficiency in specialized areas of practice, if undertaken, should be supervised within each state by a broad-based board that includes lawyers, paralegals, educators and members of the public. The ABA Board of Governors concluded, however, that the ABA was not the appropriate entity to initiate or sponsor such voluntary certification of advanced paralegal proficiency.

\textsuperscript{184} Texas Board of Legal Specialization, 1993–1994 Legal Assistant Specialty Certification Information Packet offering voluntary certification of specialties in family law, personal injury, trial law and civil trial law. The Board established general standards and other requirements that paralegals must meet prior to taking the certification examination. Once certified, paralegals must demonstrate participation in continuing legal education, including one hour of ethics per certification year. The National Association of Legal Assistants has offered a voluntary certification program since 1976. A Certified Legal Assistant (CLA) professional credential is awarded upon successful completion of an examination testing a broad base of general knowledge and skills as well as knowledge of substantive law. As of April 1994, over 13,000 persons had participated in the program with over 6,500 having achieved the CLA designation. Evidence of continuing education in substantive areas of the law is required to maintain the CLA designation. NFPA is finalizing development of a Paralegal Advance Competency Exam (PACE). PACE is a two-tiered, multi-sectional evaluation of advanced paralegal skills and knowledge. Tier one will be comprised of an evaluation of the integration of general knowledge which is common to all paralegal practice. Tier two will be comprised of an evaluation of knowledge directly related to specific areas of law. PACE is not entry level testing of the profession. Education and work experience criteria must be met in order to be eligible to take the Exam.

Information on NALA and NFPA certification programs is set forth in greater detail in Appendix D.

Information on NALA and NFPA certification programs is set forth in greater detail in Appendix D.
and omissions under the normal rules of respondeat superior," and may be sued directly and named as a defendant in an action to recover damages inflicted by a paralegal's negligence. Lawyers may also be disciplined for failing to supervise the paralegals they employ. Neither of these theories of recovery, however, establishes a client's claim directly against a paralegal. Although some lawsuits have attempted to rely upon the theory that a lawyer's paralegal bears a fiduciary relationship to the lawyer's client, authority is not settled on the subject. Suits naming paralegals as defendants in their own right, particularly those suits that allege fraudulent or negligent conduct, have been decided both in favor of and against plaintiffs.

Counsel have rarely held nonlawyer union representatives to the standards of accountability of lawyers when they represent other union members. In that situation, courts have opined that union members have no cause of action for legal malpractice, and have suggested that review of the legislative intent of allowing nonlawyers to represent employees leads to the conclusion that nonlawyer employee representatives need not meet a lawyer's standard of care.

185 Mallen & Smith, LEGAL MALPRACTICE, § 5.5, n. 1, at 277 (3d ed. 1989). See also a tentative draft of an American Law Institute Restatement which states: "A law firm and each of its principles is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual authority." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (TENT: DRAFT No. 7, 1994).

186 See, e.g., Musselman v. Willoughby Corp., 337 S.E.2d 726 (Va. 1985) (appellate court upheld trial court's judgment of lawyer's legal malpractice and breach of fiduciary duty for failing to make certain disclosures to clients and for permitting untrained paralegal to oversee finalization of documents). Additionally, lawyers have been held liable for the work of independent contractors in certain instances. See, e.g., Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y. 1992) (attorney has nondelegable duty to client to exercise care in assuring proper service of process by independent contractor-process server and may be held liable to client for process server's negligent service of process.).

Quoting the Restatement on Agency, a tentative draft of the Restatement on the Law Governing Lawyers, supra note 185, at §79, comment c, states:

A firm and its principals are not liable to the client for the acts and omissions of independent contractors except when a contractor is performing the firm's own nondelegable duty to the client, but the firm is liable for its own negligence in selecting or supervising such contractors and for directing tortious conduct. See Restatement, Second, Agency Secs. 351, 356 and 358.

187 The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) (lawyer suspended for 90 days for failing to supervise paralegal's activities in handling immigration matters); cf. Monroe v. State Bar, 396 P.2d 577 (Cal. 1964) (en banc) (attorney responsible for failure to carefully supervise disbarred attorney he employed.)

188 Compare, e.g., Divine v. Giancola, 635 N.E.2d 581 (Ill. App. Ct. 1994) (paralegal who was alleged to have "waved undue influence upon employer lawyer's client held not to have thereby breached a fiduciary duty to client) and Palmer v. Westmeyer, 549 N.E.2d 1202 (Ohio Ct. App. 1988) (paralegal held not liable in legal malpractice action because she was not a lawyer) with Bowes v. Transamerica Title Insurance Co., 675 P.2d 193 (Wash. 1983) (lawyer supervising layperson who is engaged in the unauthorized practice of law may be held to the same duties and standard of care as an attorney) and Busch v. Flanagan, 837 P.2d 483 (Nev. 1992) (law clerk may be subject to a legal malpractice claim if law clerk attempts to provide legal services).

Attempts have been made to subject authors and publishers of self-help materials to liability under both product liability and UPL theories. Courts have been generally unsympathetic, however, to applying product liability law to publication of such materials. Courts have found, for example, that a reference book containing harmful information upon which a reader relied to his detriment was not a "product" for the purpose of imposing liability under a product liability theory. Courts have also been generally unwilling to characterize publication of self-help materials as the unauthorized practice of law. Once a seller begins to explain or recommend particular forms and to make judgments about how a particular individual should complete them however, courts have found the seller to be practicing law. It remains to be seen whether the rationale of past UPL decisions will be applied by the courts to the proliferation of modern-day legal self-help materials such as interactive computer programs.

Because, under this approach's definition, legal technicians and document preparers are not agents or employees of lawyers, no theory of vicarious liability is applicable to make lawyers liable for their actions. As in the case of paralegals, however, a few courts have found nonlawyers liable in malpractice where they performed legal functions or claimed to offer work products that were legally valid.

190 See, e.g., Winter, v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991).


192 See, e.g., Oregon State Bar v. Gilchrist, 538 F.2d 913 (9th Cir. 1975) (en banc) which held that the sales and marketing of do-it-yourself divorce kits is not the practice of law so long as there is no personal contact in the nature of advice or other assistance. In a recent ethics opinion, the Oregon State Bar opined that the Oregon Court's decision in Gilchrist does not bar a joint venture for profit between a lawyer and a nonlawyer to offer an online information service to the public. Or.Eth. Op. 1994-137. The service in question provides customized information by generating responses from a database through the use of "decision-tree" software. The Oregon Bar reasoned that the service "is essentially no different that the information contained in a self-help legal book or divorce kit." Id. The opinion notes that in Gilchrist the Oregon court required that a person be actually involved in making recommendations and concludes: "In an online service, the customer who operates the legal software, whether on a personal computer or online using an information service, is the one doing the customizing, much as does the reader of a legal self-help text or one completing a do-it-yourself legal kit." The opinion states that an online service should feature a prominent disclaimer that clarifies the limited nature of the service being provided so as to avoid the creation of any expectation on the part of the consumer that the relationship is analogous to that of attorney and client. Id. at note 2.

193 See supra note 188.
Nonlawyers providing services directly to the public may be liable to the public under common law warranty, fiduciary, tort and contract principles in the same way that other businesses are, as well as under consumer protection statutes. Attempts to recover against nonlawyers by holding them accountable under state consumer protection statutes, however, usually requires more than a showing that the nonlawyer's action constituted the unauthorized practice of law. Unauthorized practice itself has been held not to constitute a per se violation of consumer protection statutes.  

E. Recent Efforts by States to Examine and Regulate Nonlawyer Activities and to Fashion Appropriate Regulatory Approaches

Legislation has recently been introduced in more than half the states to establish regulatory schemes for new forms of nonlawyer businesses operated by legal technicians. Also, in several states, bars, courts and consumer groups have participated in broad-based inquiries into the nature and extent of nonlawyer activities and have published reports of their findings and recommendations. This section summarizes the content and history of some of the reports examined by the Commission as illustrative of the varying considera-

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194 Compare Hangman Ridge Training Stables, Inc. vs. Safeco Title Ins. Co., 652 P.2d 296 (Wash. Ct. App. 1982) (although the nonlawyer violated the state's unauthorized practice of law provisions, there was no causal connection between the unauthorized practice of law breach and the plaintiff's resulting damages and a violation of the state's unauthorized practice of law prohibition was not a per se violation of the consumer protection act); and Banks v. Dist. of Columbia Dept. of Consumer and Regulatory Affairs, 654 A.2d 433 (D.C. App. 1993), (nonlawyer who misrepresented himself as a lawyer or as one possessing skills similar to those of lawyer was subject to charges of unlawful trade practices under consumer protection statute).  

195 In Oregon, for example, the Oregon State Bar appointed a Legal Technician Task Force in 1991 after legislation had been introduced in the Oregon legislature licensing some types of nonlawyer practice. In 1992 the Oregon State Bar recommended its own legislation that would allow "limited law advisors" (LLAs) to be licensed and regulated by the state's supreme court. The proposed legislation would allow LLAs to work on residential landlord/tenant law, name changes, wills for estates under $300,000, summary dissolutions of marriage, no-asset Chapter 7 bankruptcies, and powers of attorney for health care. LLAs would be allowed to give advice but not allowed to represent clients in court. The proposed legislation would establish a licensing board to be appointed by the state's supreme court which would have the authority to investigate complaints. Malpractice insurance and contributions to a client security fund would also be required. ABA BAR LEADER 21, (Sept.-Oct. 1993). As of the date of this Commission's Report, the proposal had not been acted upon by the legislature.  

Legislation to license legal technicians to provide designated services has also been drafted by legislatures in a number of other states, including Arizona, California, Illinois, New Mexico, Texas, Washington and Vermont. See generally Appendix C to this Report.
Arizona has no UPL statute or enforcement entity. Although the state had adopted a UPL statute in 1933 providing for criminal prosecution of anyone engaged in the unauthorized practice of law, the Arizona legislature allowed the statute to sunset in 1985. Arizona had never prosecuted anyone under the statute, although the courts had granted injunctive relief to the bar on several occasions. 197 Rule 31 of the Arizona Supreme Court Rules describes those whom the state licenses to practice law but contains no mechanism for enforcing unauthorized practice apart from use of the court’s inherent contempt powers for persons appearing in court. The Court limits its investigation of unauthorized practice to those activities occurring in court. 198

The Arizona State Bar Task Force on UPL spent more than two years considering nonlawyer law-related activities and submitted its report to the State Bar in 1993. 199 The task force concluded that the unmet legal needs of the Arizona public were great, and, as a result, there was a rapidly increasing number of nonlawyers providing legal services directly to the public. The Task Force had also learned from its interviews with judges and others of instances when

196 Individual Commission members received by transmittal letter dated May 26, 1995 a copy of the Final Report of the Ad Hoc Committee on Nonlawyer Practice of the New York State Bar. See FINAL REPORT: NEW YORK STATE BAR ASSOCIATION AD HOC COMMITTEE ON NONLAWYER PRACTICE (May 1995). However, because the Commission had already concluded its deliberations, the Commission as an entity had no opportunity to review and consider that report.

197 Bruce Hamilton, Viewpoint, ARIZONA ATTORNEY 36 (March 1994) (explanation of the legislative history of Arizona’s UPL law by the executive director of the Arizona Bar.)

198 The Arizona Supreme Court’s Rule 31, entitled “Privilege to Practice Rule,” was adopted in 1953 (and originally was Rule 27).

There are few recently reported Arizona cases on unauthorized practice. One of the few areas in which the Arizona Supreme Court consistently opined before the UPL statute sunsetted involved representation by nonlawyers before administrative agencies. Although the Court’s rules allowed corporations to be represented by nonlawyer officers in specified administrative proceedings, the Court had refused to allow nonlawyer representation generally in administrative agency proceedings. See Flores v. City of Glendale, 463 P.2d 67 (Ariz. 1969) (en banc) (holding that because nonlawyers cannot represent others before administrative entities a personnel board properly refused to permit an employee’s labor union representative to represent an employee). This case was subsequently followed in Hunt v. Maricopa County Employees’ Merit-System Commission, 127 Ariz. 259 (1980). The Arizona Bar’s 1994 petition to amend the rules of the Arizona Supreme Court proposes amending the rules to provide expressly that nonlawyers may represent others before state administrative agencies where authorized by the agency. Petition to Amend Arizona Rules of the Supreme Court (January 28, 1994). As of the date of the Commission’s report, the proposed rule change had not been acted upon by the Court.

199 An extensive discussion of the task force’s findings and conclusions is contained in the March 1994 issue of Arizona Attorney.
members of the public had sustained significant injury by turning to unlicensed document preparers. 200

The Task Force concluded that (1) there were members of the public who would have gone to lawyers and whom legal aid did not serve; (2) some document preparers were providing a helpful service to that portion of the public; and (3) there needed to be some standards of competency and accountability for anyone assisting lay people in the preparation of legal documents. The Task Force recommended that the state formalize both the regulation of the unauthorized practice of law and the licensing of "Non-Lawyer Legal Technicians" (NLLTs) because of the need to balance the harm to the public from the unauthorized practice of law against the public's need for access to the courts. 201

The Task Force report called for strict licensing of legal technicians and set forth detailed recommendations for licensing requirements: that NLLTs meet educational standards, pass examinations, be subject to formal discipline process, meet continuing education requirements, and offer proof of financial responsibility. 202 In addition, the Task Force proposed that the regulations require licensed legal technicians to provide all prospective customers with written disclosures about themselves and their services at the outset of the relationship. 203

The Task Force recommended that once licensed, NLLTs should be allowed to prepare and file without lawyer supervision specifically defined legal docu-

200 See comments of Sarah R. Simmons, then-President of the state bar, as quoted in Jim Calle, Bar Seeks to Protect Public with Non-Lawyer Practice Rules, ARIZONA ATTORNEY 10, 11 (March 1994).

201 The task force had also recommended that traditional paralegals who are supervised by lawyers be given expanded responsibilities, including the right to appear in designated court proceedings without the supervising lawyers being present. However, this provision was deleted by the Arizona Bar's Board of Governors from its final recommendations. Id.

202 So-called "independent paralegals" had drafted their own licensing legislation and proposed it to the legislature earlier in 1993. That measure would have created and regulated a new statutory class of providers to be referred to as "legal technicians." The bill set forth qualifications and application procedures for certification. The bill also set out, with specificity the authorized services and duties of a certified legal technician. The measure proposed legislative creation of a Board of Legal Technicians to be comprised of three professional members, two public members and one legal educator. This Board would establish and enforce certification requirements, hear complaints, and have authority to suspend or revoke certification. The legislation was referred to the Judiciary Committee of the Arizona Senate in February 1993 but the bill was not reported out of committee and it died at the end of the 1993 legislative session.

203 Information that NLLTs would be required to provide their customers upon first contact included, among other things: (1) a statement that the NLLT is not a lawyer, not licensed to practice law, and not allowed to give legal advice; (2) a list of the services to be performed with estimated time for performance and the method by which the fees for such services will be calculated; (3) a statement that the customer has the right to rescind the contract and seek legal advice; and (4) a statement of the NLLT's qualifications. NLLTs would also be required to display a sign containing the NLLT's license number, a statement that the NLLT is not a lawyer, and the information about where complaints against the NLLT's services can be made.
ments including health care powers of attorney, living wills, applications for name changes, affidavits for the transfer of title to real property and for collection of personal property, and documents for residential real estate transfers, landlord/tenant proceedings, Chapter 7 bankruptcies involving only unsecured creditors and no real property assets, uncontested default dissolutions of marriage, guardianship of minor proceedings, and incorporations.

The Task Force also recommended that the Arizona legislature enact a law that would make it a misdemeanor to engage in the unauthorized practice of law. The report recommended that the statute authorize the attorney general to enforce the statute and that civil remedies also be available.

The then-President of the State Bar wrote in the Arizona Bar Journal that the proposal was "a fair, yet bold, approach to the twin needs of access to our justice system and public protection from incompetent providers of service."

On January 25, 1994 the Arizona Bar's Board of Governors approved filing a petition to the Arizona Supreme Court which contained proposed amendments to the Court's rules along the lines recommended in the task force report. The Bar expressly provided, however, that its support for the rules change was contingent upon legislative passage of a new UPL statute regulating NLLTs and making it a misdemeanor to engage in unauthorized practice. As of the date the Commission's report was written, neither the Arizona Supreme Court nor the state legislature had implemented the proposed rule changes.

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204 Legal technicians in Arizona were reported to object to the list as too limited. See Calle, supra note 206, at 13.

205 The Arizona Senate Commerce Committee had considered adoption of a new general unauthorized practice of law bill (SB 1414) introduced in 1993 by Senator Marc Spitzer, a Phoenix Attorney. The Committee, however, refused to propose adoption of any general UPL statute in the absence of regulations licensing nonlawyers to provide limited services. One of the senators stated that the UPL bill was "the lawyer protection act" and claimed that there is "an incestuous relationship between the Court and the Bar." Hamilton, Bar Briefs, 28 Arizona Attorney 33 (May 1993). Senator Spitzer noted that "Lawyers are not well-liked in the Legislature. They didn't see the consumer protection aspect. The saw it as a feather-bedding." Id. at 14. The Arizona legislature did pass legislation, however, in April 1993 to deal specifically with the activities of so-called "immigration consultants." Ariz.Rev.Stat. §§ 12-2071-2073 (1994) (effective July 17, 1993). The statute defines the term "immigration consultant" and identifies those who may represent people seeking help with immigration and naturalization problems. The statute also defines the "unauthorized practice of immigration and naturalization law" and makes it a misdemeanor to violate the act's provisions. The Attorney General is authorized to enforce the statute and civil remedies are also provided for.


207 See Arizona State Bar Bar, supra note 198.

208 See Arizona State Bar OK's Non-Lawyer Practitioners, Bar Leader 4 (March–April 1994).
In California, it is a misdemeanor to engage in the unauthorized practice of law, which includes advertising or holding out as entitled to practice law when not an active member of the California Bar. There have been many judicial decisions in past years interpreting the state's governing UPL statute in which the California Courts have delineated on a case-by-case basis what constitutes the practice of law and unauthorized practice. For example, the courts have held that nonlawyers may represent clients in worker's compensation proceedings and before the California Public Utilities Commission, but corporations cannot appear in court represented by their officers. Similarly, the California courts have held that a "scrivener" who only fills in the blanks on a real estate form in accordance with information furnished by the parties is not engaged in unauthorized practice but is so engaged if the scrivener selects the document.

The State Bar has not investigated UPL complaints since 1985, however, and thus there is little current enforcement of the statute. There have been few relevant judicial decisions in recent years. The legislature on the other hand, has recently been very active. Among other measures considered by the legislature was a bill introduced in the 1993–1994 session that would require all legal technicians to register with the Department of Consumer Affairs and require the Department to report to the legislature after three years its conclusions as to whether the state should regulate nonlawyer providers. The legislature adjourned, however, without passing the bill.

The subject of nonlawyer practice has had a long tortured history within the California state bar. In the mid-1980s, the bar's general counsel reviewed the status of unauthorized practice and recommended enforcement through a streamlined UPL committee that would issue cease-and-desist orders, initiate streamlined injunctive and contempt procedures, and promulgate UPL advisory opinions subject to Board review and Supreme Court approval as is done in the state of Virginia.

After public comment and consideration of the proposal, however, the bar's board of governors refused to approve the plan, questioning its cost effective-

209 See, e.g., Himmel v. City Council of the City of Burlingame, 336 P.2d 996 (1948); For corporate ratings, see Eagle Indemnity Company v. Industrial Accident Commission, 18 P.2d 341 (1933); Consumers Lobby Against Monopolies v. PUC, 603 P.2d 41 (1979).


211 Assembly Bill No. 1287 (1993). The bill was introduced by Assemblywoman Gwen Moore on March 3, 1993. Specific questions that the Department of Consumer Affairs was to address were: (a) whether there is a need for regulation; (2) if so, what agency should regulate; (3) whether there should be nonlawyer education and training requirements; (4) whether there should be nonlawyer examinations, and if so, what the content should be; (5) what scope of nonlawyer services should be provided; (6) what is an appropriate title for nonlawyer providers; (7) whether nonlawyer providers should post a bond or carry malpractice insurance; and (8) whether a consumer security fund should be established.
ness given its substantial cost and the bar's tight budget constraints. Instead, the bar suspended investigation of UPL complaints pending the board's review of the bar's role in UPL enforcement.

In 1986 the bar's board of governors appointed an eight-member Public Protection Committee consisting of four lawyers and four nonlawyers to hold hearings and investigate whether public harm was likely to result from the provision of legal services by nonlawyers whether the harm was substantial enough to warrant regulation; what form, if any, such regulation might take; what entity or entities would enforce the regulations; how the state would fund the regulation; and what an appropriate timetable would be for implementing any regulation. The Committee was further charged with addressing specified areas of nonlawyer activities such as family law, immigration and landlord/tenant law and asked to develop proposed standards that might permit nonlawyer activities.

Subsequently, after convening public hearings throughout the state, the Committee issued its report in 1988. The Committee concluded there was a need for the types of services nonlawyers offer and concluded that they benefited the public. At the same time, the Committee determined there was a risk of harm from uncontrolled activities of such nonlawyer practitioners. The Committee recommended that California replace traditional UPL statutes with more tailored legislation that would (1) prohibit nonlawyers from claiming to be lawyers; (2) register nonlawyers as "legal technicians" with an entity other than the state bar; (3) provide civil redress (including recovery of fees paid), injunctive relief and criminal penalties for violations of the new regulations; and (4) require legal technicians to disclose in their advertising that they are not lawyers.212

A separate board of governors committee reviewed the report of the Public Protection Committee and recommended to the board that it accept the findings of the report and appoint a commission to develop standards for training, licensing and regulating legal technicians, and to identify an entity to be responsible for the regulation. The board of governors agreed with this recommendation and appointed a ten-member State Bar Commission on Legal Technicians in November 1989.

The Commission on Legal Technicians issued its report in 1990.213 It recommended that the state's supreme court adopt a new rule that would identify a class of nonlawyers as "independent paralegals" to provide services in specific areas (initially in the areas of family, bankruptcy and landlord/tenant law). The Commission also recommended that the bar's board of governors propose legislation that would (1) authorize the state's Department of Consumer Affairs to administer the licensing scheme for nonlawyers; (2) establish specific criteria for licensing, including minimum education and/or experience levels; (3) require continuing legal education for license renewal; and (4) provide for complaint investigation, discipline, client security funds, civil rede
dies, mediation and arbitration. The report also recommended that the Supreme Court make changes in the professional code of conduct governing lawyers that would expand the attorney-client and work product privileges to cover independent paralegals, and revise rules relating to referral fees and fee splitting.

The board of governors referred the Commission's report to the board's Committee on Admissions and Competence, which subsequently drafted a proposed court rule authorizing creation of a five year pilot program permitting nonlawyers to perform limited legal services in the landlord/tenant area with standards to be set by a newly created Board of Legal Technicians. The state's Department of Consumer Affairs would be charged with administering the program. After considerable debate, however, the bar's board of governors voted at its August 1991 meeting not to approve the pilot program.

While the bar was undertaking its various studies, the California legislature examined a number of bills to license and regulate legal technicians. After failure of a 1991 legislative measure to register and regulate nonlawyers providing legal and law-related services to the public, the state bar appointed a new Task Force on Legal Technicians in August 1992. The bar charged this task force with responsibility for studying the failed legislation as well as the viability of the proposed landlord/tenant pilot project program rejected by the board in 1991.

Subsequently, the Task Force on Legal Technicians concluded that the licensing scheme proposed by the legislature in 1991 had many deficiencies and fewer safeguards than the bar's own earlier Commission proposal. The task force's final report, issued in 1993, recommended that the bar and judiciary undertake a survey of pro se litigants (called pro per litigants in California) to determine the quality of their work, scope of services provided, and their education, experience and training backgrounds. The report further recommended that the bar encourage increased services by lawyers to persons of modest means and to that end sponsor legislation giving tax deductions for pro per time, financial incentives for the formation of prepaid group and individual legal services plans, and amendment of attorney fee statutes to permit recovery of fees for paralegal services delivered with the supervision of attorneys.

The report also recommended that the bar itself assist lawyer referral service programs in the state to establish reduced fee panels; encourage courts, law schools and bar associations to set up and advertise the availability of law clinics that utilize the services of supervised paralegals and offer assistance on a sliding fee scale; educate the public as to the benefits of using ADR to resolve disputes; and help develop neighborhood dispute centers in cooperation with local bar associations and legal service providers that would assist pro per clients on a no-fee or sliding fee scale.

214 See, e.g., Assembly Bill No. 1287 (1991). supra note 211. As of the writing of this Commission's report, the California legislature had enacted neither a general licensing scheme nor a registration system for legal technicians.

215 STATE BAR OF CALIFORNIA, FINAL REPORT OF THE BOARD OF GOVERNORS TASK FORCE ON LEGAL TECHNICIANS (August 1993).
In early 1994 the Bar's Board appointed a new Pro Per Task Force to investigate ways in which the bar might initiate the establishment of clinics and other pro bono projects to provide free and sliding-fee scale assistance to self-representers, as well as establish interactive video kiosks for their use.

**FLORIDA**

The Florida Bar has vigorously enforced the state's unauthorized practice laws for many years and the Florida Supreme Court has issued many unauthorized practice decisions over the last twenty-five years. The Court has enjoined, as unauthorized practice, evaluating and preparing legal forms with advice or instructions as to their use and drafting legal instruments for particular purposes such as incorporation documents, pension plans, employment agreements, health plans, trust agreements, warranty deeds and closing statements in real estate transactions.

In the 1980s, Florida successfully prosecuted under its UPL statute Rosemary Furman, a former legal secretary who operated a business preparing documents for self-representing persons in divorce cases, and subsequently obtained a contempt citation against her when she continued to operate her business.218 The Furman case was widely discussed in the Florida and national media. That resulted in such adverse public opinion for the bar and court that the Florida governor granted Ms. Furman a pardon, and the state's Supreme Court devised new rules permitting document preparers to assist the public with court approved forms. The new rules also permitted document preparers to give advice regarding related "routine" administrative procedures.219 As the direction of the Florida Supreme Court, the Florida State Bar has prepared an extensive set of forms for divorce, support, visitation, protective orders, landlord/tenant, step-parent adoption and other matters. By court order, the forms, with accompanying instructions, are made available to the public at courthouse, libraries and various commercial outlets. A recent report by the Florida Bar's Special Committee on Non-lawyer Practice notes that since the court liberalized its rule, form preparation services by legal technicians have proliferated.220 The report further observed that the bar's UPL efforts have been unable to control the proliferation, stating:

The Florida Supreme Court has repeatedly ruled that actual public harm is a prerequisite to a successful UPL prosecution. The State Attorney's Offices have shown no significant interest in pursuing UPL violations. Until this year, the standing board policy was to refer all UPL prosecutions to the State Attorney's Office, thereby effectively abandoning meaningful UPL enforcement.221


220 The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82, at 6.

221 Id. at 5.
In 1991 the Florida State Bar appointed an *ad hoc* Legal Technician Study Committee to examine the activities of legal technicians and advise whether they needed to be specially regulated. Its 1992 report, based on testimony of 50 persons at four public hearings and written statements and other information, contained eleven findings:

1. The legal profession is not meeting consumers' demand for low cost legal services.
2. Legal technicians are proliferating in Florida.
3. Legal technicians are providing a broad variety of legal services to the public.
4. The Florida Bar’s UPL enforcement program has not deterred or prevented the activities of legal technicians.
5. There is no regulation of legal technicians and no uniformity respecting their qualifications, education, training or experience.
6. The state requires a form of regulation for legal technicians to protect the public.
7. Legal technicians overwhelmingly oppose any regulation by the Bar.
8. Lawyers generally oppose regulation of legal technicians because they do not wish to legitimize their activities.
9. Under the Florida Constitution, the judiciary has sole authority to regulate the practice of law.
10. Institutional barriers exist which inhibit the provision of low cost legal services by lawyers.
11. Unregulated activities of legal technicians result in demonstrable public harm.

The *ad hoc* Committee made four recommendations:

1. The bar should consider removing institutional barriers (such as ethics and advertising rules) which inhibit the provision of low cost legal services by lawyers.
2. The bar should promote alternative methods of providing low cost legal services to the public (such as offering reduced fee panel referral services).
3. The state’s Supreme Court should impose limited regulation of legal technicians through a simple registration or limited licensure program.
4. The Bar should reevaluate its UPL program to facilitate meaningful enforcement of unlicensed practice of law activities.

The Florida Bar Board of Governors next appointed a Special Committee on Non-Lawyer Practice to consider ways to implement the Study Committee’s recommendations. The Special Committee met throughout the state to receive comments and analyze the study. It then issued its own 266 page report with recommendations in June 1994.

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220 FLORIDA STATE BAR, REPORT OF THE LEGAL TECHNICIAN STUDY COMMITTEE (June 1992).
221 THE FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE, supra note 82.
The Special Committee's report recommended that the state's supreme court, in cooperation with the governors of the bar, create a committee composed of lawyers and nonlawyers to consider nonlawyer practice issues on an on-going basis. The report concluded that one of the primary goals of a new standing committee should be "to remove roadblocks to lawyer involvement in the delivery of affordable legal services to the public." The report stated:

The proliferation of non-lawyers engaged in the delivery of affordable legal services results from consumer demand which the lawyer of Florida are simply not meeting. This uncontrollable growth of non-lawyer practice in areas of divorce and estate planning (wills, living trusts), as well as landlord/tenant, immigration and bankruptcy, reflects the fact that there is a void in the delivery of legal services for a whole segment of the marketplace.\textsuperscript{222}

The report recommended that the new standing committee explore innovative delivery systems for use by lawyers such as reduced fee panels and advanced technological programs stating:

The large number of law school graduates joining the legal system every year provides an ideal opportunity for encouraging lawyer involvement in the delivery of affordable legal services. With proper education and training, recent law school graduates who have found it increasingly difficult to find employment in the traditional practice of law should be able to compete effectively with non-lawyers already offering these services.\textsuperscript{223}

The report discussed in detail several of the existing ethical restrictions in the Florida Supreme Court's rules governing the legal profession that may inhibit lawyers' involvement in innovative systems for delivering affordable legal services to the public. The ethical rules discussed in detail included those governing fee-sharing with nonlawyer staff and rules prohibiting a lawyer from agreeing with a client prospectively to limit the lawyer's liability for malpractice.

The report also set forth in detail three practice models, each involving lawyers working with paralegals: (1) a law firm owned by lawyers that employs "reasonably trained and supervised" nonlawyer employees to assist firm clients in the completion of legal forms and to provide information and advice in connection therewith at lower cost; (2) a lawyer-owned business offering "form preparation services" through nonlawyer employees; and (3) a lawyer-assisted entity providing form preparation services in which lawyers are available to receive referrals of legal problems the entity cannot handle.\textsuperscript{224}

Observing that many routine services do not really require the use of a lawyer, and that many individuals simply prefer dealing with nonlawyers, the report urged that the bar acknowledge the inevitable continuation of nonlawyer practice and request the Supreme Court to promulgate a limited licensing scheme for what it termed "independent paralegals." The state bar's board

\textsuperscript{222} Id. at 5.

\textsuperscript{223} Id. at 7.

\textsuperscript{224} Id. at 155.
of governors rejected the report's recommendations at its meeting in June 1994 and determined instead to increase the Bar's UPL enforcement efforts. 225

MINNESOTA

In 1991 the Minnesota legislature passed a bill requiring the state's supreme court to study "the feasibility of licensing independent "specialized legal assistants." The court appointed a committee consisting of judges, lawyers and traditional paralegals. The court appointed committee considered the issue (although it did not hold public hearings) and recommended in February 1994 that completely independent paralegals not be licensed. Instead, the committee recommended that the role of traditional paralegals be expanded by the device of a registration scheme for freelance paralegals who would work with the supervision of lawyers. The committee's report stated that "it would be extremely difficult to identify instances in which a lawyer would never be needed." 226

Although a legal assistant may be competent to prepare a simple deed after it is determined that the client needs a deed, preparing the deed is a small part of the legal service rendered. Determining that the deed is what the client needs is the more significant service provided by an attorney. 227

The committee further concluded that licensing independent legal assistants would require setting up a separate regulatory system and be too costly. Nor was the committee convinced that a nonlawyer's services would cost less than a lawyer's. The report stated: "It was not apparent to the committee how a specialized legal assistant could reduce overhead costs without reducing the quality of service provided." 228 The committee concluded, however, that allowing traditional paralegals who work with the supervision of a lawyer to deliver expanded services could cut the cost of some legal services and provide an adequate level of regulation at the same time. It proposed a registration scheme under which freelance legal assistants could register to provide services with the supervision of a lawyer. The committee concluded that because lawyers would be responsible for the registered legal assistant's work, the disciplinary procedures already in place for lawyers should be sufficient regulation. The committee recommended, however, that a lawyer supervise the work of no more than two freelance legal assistants.

225 The Board of Governors did not issue a report stating its reasons for rejecting all of the Special Committee's recommendations. A summary of the Florida bar board's meeting quoting statements by various members is contained in the June 15, 1994 issue of THE FLORIDA BAR NEWS at 5-6. Among the reasons reported were concerns about the impact of nonlawyer practice on the employment of lawyers, especially recent law school graduates. Id. Also see Florida Bar Board Rejects Proposals for Legal Technicians, Bar. LEADER 8 (Nov-Dec. 1994).

226 As reported in Bar LEADER 5 (Sept-Oct. 1994).

227 Id.

228 Id.
The areas of law in which the Minnesota committee report suggested registered legal assistants should be permitted to operate included landlord/tenant matters, simple wills, uncontested probate proceedings, elder law, unemployment compensation, family law, residential real estate transactions and consumer protection. Finally, the report recommended that registered legal assistants would have to satisfy both educational and experiential criteria and observe the same continuing education requirements as lawyers.\textsuperscript{229} The Supreme Court subsequently advised the legislature that it would accept the committee's recommendations.

\textbf{NEBRASKA}

The Nebraska State Bar's UPL Committee submitted a report to the bar's governing body in April 1994. In explaining the report's findings, the then president of the Nebraska Bar wrote: "Nebraska has virtually no enforcement mechanism whatsoever.... [H]istory has demonstrated that County Attorneys are most reluctant to prosecute under [the state UPL statute]."\textsuperscript{230} He further noted the report's conclusion that: "Laymen are rendering legal advice and providing legal documents to members of the public without having the knowledge or training necessary to properly advise the individuals." Relying on the UPL Committee's report, the Nebraska State Bar Association filed a petition in 1994 with the Nebraska Supreme Court asking the court to provide, by rule, for the regulation of the unauthorized practice of law and to adopt the rules drafted by the Bar's UPL committee. The bar's proposal stated that the Court could require the state bar to undertake some or all of the expenses of a new court-approved UPL enforcement system.\textsuperscript{231}

\textbf{NEVADA}

In 1992 during the course of a UPL case against a nonlawyer document preparer named Greenwell,\textsuperscript{232} the State Supreme Court directed the State Bar to investigate whether legal services were available to low and middle-income Nevada residents, and to determine whether it would be appropriate to authorize nonlawyers to deliver designated services. The bar appointed a commission to conduct the requested investigation, and it in turn commissioned a study of legal needs in Nevada. The subsequently published Nevada Legal Needs Study revealed that:

``Sixty percent of all Nevadans of moderate or low income have had legal problems during the past year, but had no legal help of any kind nor

\textsuperscript{229} Minnesota Supreme Court, Report of the Specialized Legal Assistants Study Committee (Feb. 18, 1994).

\textsuperscript{230} \textit{Lawrence H. Yoas, Unauthorized Practice of Law Report Approved}, NSBA NEWS 2 (June 1994). See also NEBRASKA STATE BAR ASSOCIATION, FINAL REPORT: UNAUTHORIZED PRACTICE OF LAW COMMITTEE, April 15, 1994.

\textsuperscript{231} As of the date of this Commission's Report, the Nebraska Supreme Court had not adopted the bar's proposal.

received any assistance. Of those households with no legal representation, 26.4% tried to handle the problems themselves, while 25.8% believed that lawyers and legal remedies were too expensive or that a lawyer could not help their situation.228

In September 1994, the bar's commission, commonly known as the "Greenwell Commission," presented its recommendations to the bar's board of governors that the Nevada legislature be requested to strengthen the state's UPL statute (by imposing civil penalties) and that a mandatory pro bono system should be adopted by the bar so that lawyers themselves could meet unmet legal needs. The commission proposed that the mandatory pro bono program serve both moderate income persons as well as indigents and require every lawyer to contribute 20 hours a year to serving low and moderate income persons or, in lieu thereof, to contribute $500.00. The mandatory pro bono proposal was submitted by the bar's board of governors to the state's supreme court but was subsequently withdrawn in the face of opposition to the mandatory pro bono scheme by rank and file bar members.

LOCAL BAR ASSOCIATIONS

Some city and other local bar associations are also examining nonlawyer activities in their jurisdictions. A report was recently published by the Committee on Professional Responsibility of the Association of the Bar of the City of New York.229 This report gives an overview and preliminary assessment of the activities of the bar in relation to nonlawyer practitioners. The report preliminarily endorses a "deregulated licensing approach that permits greater nonlawyer practice in specified areas but establishes minimal requirements" for public protection.230


229 Association of the Bar of the City of New York, Committee on Professional Responsibility, Prohibition on Nonlawyer Practice: An Overview and Preliminary Assessment (March 1995).

230 Id. at 34. See also supra note 196.
Part Two: Analysis, Conclusions and Recommendations

Part Two of the Report is organized around the Commission's major conclusions. Section A sets forth the conclusion that increasing access to affordable assistance in law-related situations is an urgent goal of the legal profession and the states. Following from this conclusion, Section B details many actions that lawyers, bar associations, courts, law schools and governments can take to improve access, and includes four of the Commission's primary recommendations.

Section C sets forth two other major conclusions reached by the Commission and adds a fifth primary recommendation. The first conclusion is that protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal of the legal profession and the states. Second, that when adequate protections for the public are in place, nonlawyers have important roles to perform in providing affordable access to justice. In sum, both access to justice and protection of the public are equally important goals to be served.

Section D deals with nonlawyer activity that lies beyond current legal authority and the first five recommendations. This section is grounded in the Commission's most fundamental conclusion, which is that each state has a unique culture, a specific legal history, a distinct record of experience with nonlawyer activity and a current economic, political and social environment that will affect its approach to the varied forms of possible nonlawyer activity. As a result, the final and most important recommendation of the Commission is that each state should develop its own careful analytical examination to determine whether and how to regulate the forms of nonlawyer activity that exist or are emerging within its borders. As states consider the Commission's recommendations set forth in Part Two, it should be kept in mind that protection of the public is an urgent goal to be served when new programs, rules and policies are devised to increase access to justice.

A. Increasing the Public's Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States

Lawyers belong to a profession described by Roscoe Pound in 1902 as "the pursuit of a learned art as a common calling in the spirit of public service, no less a public service because it is incidentally the means of a livelihood." "Service" as an integral component of a lawyer's calling historically embraces two principles: first, lawyers individually are expected to provide highly skilled,
independent and loyal legal advice and assistance to every client; second, as a member of the profession, each lawyer is responsible for making certain that the justice system works for all.

Stories are legion about known and unknown heroes of the law who have provided service to clients above and beyond expectations—putting in long hours, striving for excellence, and often reducing, or even foregoing, fees. It is for such reasons that most people appreciate the services of their lawyers who serve the highest goals of their profession.

To insure competence, loyalty and professional independence, the legal profession adopts enforceable rules of ethics that govern lawyers' duties to clients and the public and subjects itself to the authority of professionally-staffed disciplinary bodies established by the states' highest courts.26 In the event of client harm through negligence, fraud or misappropriation, lawyers are accountable in tort or disciplinary action. Thus, the legal profession recognizes that not only must it strive to open the doors to the justice system, but that it must meet that obligation by providing competent representation.

The rapidly increasing number of new law school graduates entering the legal profession has received widespread attention.22 They are working, as they always have, in a variety of settings: as private practitioners, in government, in business, in academia, and in nonprofit organizations. Notwithstanding this surge of new lawyers, substantial numbers of low and moderate income persons do not hire lawyers to meet their law-related needs. Instead, they go without help, represent themselves, or turn to nonprofit agencies or nonlawyer providers.

26 The legal profession has also established clients' protection funds to reimburse those clients who have been defrauded by the occasional disfellowship by a lawyer. Since 1986, three of the milestones in the development of professional standards have been the ABA Model Rules of Professional Conduct, approved by the House of Delegates in 1983 (AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (1994)), the Report of the Commission on Evaluation of Disciplinary Enforcement (McKey Report), approved by the House of Delegates in 1992 (AMERICAN BAR ASSOCIATION, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992)), and the amended Model Rules for Lawyer Disciplinary Enforcement, approved by the House of Delegates in 1993 (AMERICAN BAR ASSOCIATION, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (1993)).

22 In 1970, there were an estimated 355,000 lawyers in the United States. In the next twenty-five years, the estimated number doubled to over 750,000. In the 1965-66 academic year, 56,510 students were enrolled in law schools by the 1991-92 academic year, the number of law students had climbed to 129,580. In 1966, some 13,000 lawyers were admitted to the bar for the first time, while in 1991, 43,000 were admitted to the bar for the first time. The number of ABA-approved law schools grew from 112 in 1948 to 176 in 1991. ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP—LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 13-15 (1992) (hereinafter ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION) (citing statistics set forth in AMERICAN BAR FOUNDATION, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT and in ABA 1991 REVIEW OF LEGAL EDUCATION AND ANNUAL REPORTS OF LAW SCHOOL ADMISSION SERVICES and also citing statistics provided by the ABA Membership Department and found in the 1990 U.S. Census figures.)
Although nearly half of all U.S. households find themselves in situations that could be addressed by the civil justice system, a major 1994 survey by the ABAs Consortium on Legal Services and the Public found that 71% of the situations facing low-income households and 61% of those facing moderate-income households are not being brought to any part of the justice system. Another 8% and 11%, respectively, are being brought to courts, mediators or administrative tribunals without a lawyer having been retained. Only in 21% and 28% of the situations, respectively, are lawyers retained. Other studies have produced similar conclusions.

Various factors influence the decision to forego legal services. With regard to low-income needs, in the Consortiums 1994 study the two most frequently cited reasons for not using the legal/judicial system were the belief that it would not help, and cost concerns. For moderate income needs, the most com-

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238 ABA, Report on the Legal Needs of the Low- and Moderate-Income Public: Findings of the Comprehensive Legal Needs Study, Table 4-1 at 20 and Table 4-7 at 27. The legal needs study was conducted by the Institute for Survey Research at Temple University for the ABA Consortium on Legal Services and the Public. The study also found that both low- and moderate-income households are more likely to be satisfied with the ultimate resolution of a matter if it is brought to the legal/judicial system for a solution than if it is not. Id. at 32 (Figure 4-2).

The conferences attending the ABA 1994 Just Solutions Conference, most of whom were nolo lawyers, pointed out that just solutions to problems do not always entail adversarial proceedings in a court of law and that mediation, negotiation, court facilitated self-help and other justice system mechanisms can also bring about just solutions. They recognized, however, that in many instances, traditional adjudication is the optimal approach. See ABA Just Solutions Report, supra note 121, at 24, 29.

239 Barbara Curran conducted the seminal study of legal needs in 1977 and found that the legal profession addresses only 24 to 28 percent of the significant legal problems of all adults. Curran, American Bar Foundation, The Legal Needs of the Public, supra note 104, at 161 [hereinafter Curran, Legal Needs Study]. See also American Bar Association, Two National Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally 38 (1989); see also supra note 232 and accompanying text for a 1994 study commissioned by the State Bar of Nevada which yielded similar results.

240 Wayne Moore, Director of the nonprofit Legal Services for the Elderly program and former member of the ABA Standing Committee on Lawyer Referral and Information Services, analyzed the Curran Legal Needs Study, supra note 239, and reported that it showed that people with legal problems who do not go to lawyers fall into two basic categories: Those with unmet needs and those with unmet needs. In the first category are persons who do not realize their problem has a legal solution, or who prefer to use a different problem solver (an accountant or a legislator, for example). The second category of persons not using lawyers consists of those who forego legal assistance because they fear the cost, do not know how to find a suitable lawyer, or have some other similar reason. See Moore, Access to Legal Services: Intake, Diagnosis and Referral Procedures, paper presented at the ABA National Conference on Access to Justice in the 1990s, 1-4 (May 1985), on file with the author and with the ABA Division for Legal Services [hereinafter Moore, Access to Legal Services Paper]. Moores paper reports that other studies for the American Association for Retired Persons surveying a cross-section of older Americans have shown that unmet needs are greater than unmet needs, and that the bar needs to do more to help the public understand when they have problems for which legal solutions are needed, and how to obtain legal help. Id. at 2-3.
mon reasons given for not using the legal/judicial system were that the situations were not really problems, that they didn't think the legal/judicial system would help, or that the households were able to handle the problem on their own.\textsuperscript{241}

Other studies have also found that persons of modest means frequently forego legal assistance because they decide that their problems or needs do not warrant paying the amounts that they expect to be charged.\textsuperscript{242} As a former Florida bar president noted in her comments on the Florida Bar's two year study of nonlawyer practice, cost is not that often the factor as much as the perception that lawyers do not give clients sufficient value to justify the cost.\textsuperscript{243}

Nevertheless, the actual cost of legal services also appears to play a role in discouraging individuals from using lawyers. The Commission heard testimony and examined reports that the cost of using the justice system, particularly legal fees, is often too expensive for people of modest means. In discussing how extensive this phenomenon is, a 1990 Pennsylvania Bar Association study on legal needs in Pennsylvania reported that:

[These people, many of whom hold minimum wage jobs, are struggling to eke out an existence. They pay a large percentage of their income for minimal shelter. They often have no health insurance, and, after paying for necessities, have nothing left.... It is clear that there is a large population between the bottom economic stratum of people who are eligible for free legal services...and those in the middle class who can afford at least some legal representation. This group of the near poor is virtually denied any legal representation.\textsuperscript{244}]

\textsuperscript{241} ABA Consortium Legal Needs Study, supra note 238, at 26 (Table 4-6).

\textsuperscript{242} A 1990 study conducted for the Lawyer Referral Services of Orange County by University of California Professor James W. Meeker determined that almost one-third of the Service's clients who had legitimate legal problems that required help beyond initial consultation did not retain a lawyer after an initial consultation because they could not afford the fees. Another one-third were referred to lawyers but failed to keep their appointments. The report notes that it is possible that the third which failed to keep appointments were only seeking information in the first place and never intended to consult a lawyer and that it is also possible that they were dissuaded by the cost of the lawyers' fees that were quoted them by the referral service. However, the study only interviewed those persons who kept appointments and since no follow-up of those who did not keep their appointments was made, the reasons for the failure can only be surmised. Meeker, REPORT TO THE LEGAL AID SOCIETY OF ORANGE COUNTY'S LAWYERS REFERRAL SERVICE LEGAL AID SOCIETY OF ORANGE COUNTY, Lawyers Referral Service: Perspectives of Panel Attorneys and Clients on Legal Needs 3 (1990) [hereinafter ORANGE COUNTY LAWYER REFERRAL SERVICE LEGAL NEEDS STUDY].

\textsuperscript{243} Patricia A. Seitz, Nonlawyer "Practice"—Follow-up, Remarks During Panel Presentation at the Meeting of the National Conference of Bar Presidents, ABA (annual Meeting, New Orleans, La. (1994), tr. 29 (transcript available from National Conference of Bar Presidents and from ABA Center for Professional Responsibility).

Other state bars similarly report that the needs of low and moderate income persons remain unmet and that nonlawyer providers increasingly offer services to meet those needs. For example, the Florida Bar Special Committee on Nonlawyer Practice concluded: "The proliferation of non-lawyers engaged in the delivery of affordable legal services results from consumer demand which the lawyers of Florida are simply not meeting." 245 In Arizona, the state bar's executive director offered the following comment about nonlawyer practice:

Though many lawyers are underemployed or unemployed, tens of thousands of Arizonans and millions of Americans cannot afford a lawyer. Non-lawyers...have sprung up as a result of this unmet market—nature abhors a vacuum. 246

Many studies establish the magnitude of the unmet legal needs among the nation's lowest-income persons, showing that as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it. 247 The Commission has included in its record many such surveys released since 1987, and these statistics are daunting—nearly 3,000,000 legal problems annually for which no assistance was obtained in New York state; 248 800,000 neglected legal problems in Illinois in 1987; 249 over 320,000 each year in Massachusetts 250 and an estimated 19,000,000 such problems nationwide in 1988. 251 These numbers and similar statistics have

245 FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE, supra note 82 at 5. Similarly, in 1989, the State Bar of California appointed a ten member Commission on Nonlawyer Practice after a prior committee concluded that "there is an overwhelming need on the part of the state of California residents for better access to the generally law dominated processes of government, particularly the courts." STATE BAR OF CALIFORNIA, REPORT OF THE PUBLIC PROTECTION COMMITTEE, supra note 73, at 7.

246 Bruce Hamilton, Viewpoint, ARIZONA ATTORNEY 36 (March 1994). The New York State Bar Committee examining nonlawyer practice similarly observed in its written statement to the Commission that the number of pro se litigants is on the rise, causing problems for the judiciary, the judicial system and the litigants alike. The Committee stated, "The individuals involved often do not meet the income standards to qualify for free legal services or pro bono volunteer assistance, but, nevertheless, cannot find lawyers to represent them at affordable rates." Written statement of New York State Bar Committee on Nonlawyer Practice to the ABA Commission on Nonlawyer Practice 3 (August 1994).

247 See, e.g., a 1989 study of low-income senior citizens in Wisconsin which found that only 18% of legal problems were being handled by the legal profession. The Spengenberg Group, WISCONSIN ELDER LEGAL NEEDS STUDY 1, THE FINAL REPORT OF THE ABA COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY 42 (April 1991). See generally Appendix E to this Report: Legal Needs Studies 1985-1995.

248 Spengenberg Group, NEW YORK LEGAL NEEDS STUDY 1 (1989).


250 Massachusetts Legal Services Corporation, MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION 6 (1987).

deeply concerned the organized bar, which has fought to preserve the federal Legal Services Corporation and institute local legal services projects, and whose members have selflessly provided pro bono assistance to those in need. In spite of these efforts, the number of unmet legal needs for the country's lowest income persons remains high.

The Commission views with special concern the continuing problem of inadequate legal help for indigent persons who cannot afford to pay for that help. The Commission's report, however, is concerned primarily with persons who are ineligible for free legal aid but who avoid lawyers because: (a) they cannot afford the lawyers' fees that will be charged for their particular problem; (b) the costs do not seem worth paying when balanced against the perceived risks of not hiring a lawyer and other demands on their scarce resources; or (c) because of their antipathy to lawyers.

In this connection, we call attention to the continuum of income levels among the citizenry. There is no bright line delineating ability or inability to pay lawyers' fees. Ability to pay legal fees is dependent not only upon income but upon factors and circumstances that vary greatly among individuals. Thus, the individual who can afford the cost of representation at a traffic court hearing may be unable to defend against a social security claim of overpayment, challenge or defend the probate of a will where there are few valuable assets at stake, or investigate and litigate a dismissal from employment through trial and appeal.252

In an ideal justice system, all people along the continuum between poor and rich would be able to obtain just solutions either through self-representation or from affordable sources that provide appropriate help.253 The Commission,

252 Attorney fees are available under fee shifting statutes to reimburse a plaintiff's lawyer in an employment case but only where a civil rights or other statutory claim is presented and, additionally, only when the claim is successful. In these circumstances, it is often difficult to find lawyers to handle employment matters even in claims under federal statutes where there is the possibility of earning a court awarded fee. The Washington Lawyers' Committee for Civil Rights and Urban Affairs, which assists the U.S. District Court for the District of Columbia in finding volunteer lawyers to represent civil rights plaintiffs who file pro se, reports that 25% of all civil rights plaintiffs in the district court file pro se because they have been unable to obtain legal assistance. Annual Report of the Washington Lawyers' Committee, supra note 117.

253 Harvard Law School Professor Gary Bellow, one of the co-founders of the modern legal services movement, has compared the differences between the federally subsidized legal services system in this country and those in European and Canadian systems. He observes that the other systems chose "to raise eligibility levels quite high, much higher than we have in the United States, in order to create a more or less a degree of sliding fee compensation with it, and to extend service through a larger segment of the bar by using paid compensation." In referring to the original concept of a federally subsidized legal services program, he stated: "We always assumed that within about ten years we would have built enough of a base that we would begin to shift towards bringing in more eligible clients on the one hand and a larger number of paid members of the bar on the other. As in 1975, 1976 and 1977, when those of us now aging began to suggest those ideas to the existing legal services establishment, we were surprised to find how militantly it was opposed." Remarks at the Symposium on Legal Services in Other Countries: A Comparative Review, University of Md. School of Law, Tr. 39, April 15, 1993. See also Bellow, Legal Services in Comparative Perspective, Md.J. Of Contemp. Legal Issues 317, 375 (1994) for similar comments.
like other bar, court and public entities that have examined this issue, has
found that they cannot.

ABA studies essentially agree that the numbers of people underserved by the
legal profession are significant. The ABA Commission on Professionalism
noted in its 1986 report that "one of the most intractable problems con-
fronting the legal profession today is the lack of access by the middle class to
affordable legal services."254 A 1990 ABA report noted that even though per
capita income increased in the 1980s, the cost of basic needs also increased
with the result that increasing numbers of moderate-income persons are
unable to afford personal legal services.255

The Commission heard many witnesses cite as a reason not to employ
lawyers the perceived or actual high cost of their services.256 State bar reports
on nonlawyer practice have also reported that the legal needs in their re-
spective jurisdictions were not being met by the legal profession.257 However, the
Commission received testimony that in some communities lawyers offer
reduced fees and are available and affordable.258

Based upon the findings from numerous legal needs surveys, state bar
reports, and the weight of its witnesses' testimony, the Commission finds that
when the nation is viewed as a whole, there are currently insufficient sources:

254 ABA, "...IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING
OF LAWYER PROFESSIONALISM, supra note 1, at 301.

255 ABA, CIVIL JUSTICE: AN AGENDA FOR THE 1990S (1991), a report on the Con-
ference on Access to Justice in the 1990s sponsored by the ABA Consortium on Legal
Services and the Public and Tulane University. The high cost of the justice system has
been frequently cited by bar leaders as deterring the public's utilization of it. In 1986 the
President of the American Bar Association wrote that "many middle income Ameri-
cans...find themselves unable to assert their legal rights because they cannot afford to do
so. According to some estimates, as many as 100 million Americans find themselves in this
er, the President of the National Legal Aid and Defender Association, has observed that
"[e]ach year the number of people who are unable to pay for their own lawyers but are
ineligible for free legal services increases." He advocated in 1989 that the ABA direct its
attention to the needs of both low- and moderate-income persons. See Powers, Creative
and Innovative Funding for Legal Services to Poor and Moderate Income Persons, paper pre-
viewed at the ABA Conference on Access to Justice in the 1990s sponsored by the ABA
Consortium on Legal Services and the Public and Tulane Law School (May 1989).
(Paper is available at the ABA Division for Legal Services.)

256 University of Wisconsin law professor Marc Galanter observes that the American
justice system "is very well suited for organizations, but it is perhaps on the wrong scale
for use by individuals, even well-to-do individuals. For the person just interested in get-
ing a result in their own case, it's a crushingly expensive system to use." Professor
Galanter was quoted in Podger, Chasing The Ideal, 80 A.B.A. J. 57 (Aug. 1994).

257 See, e.g., the 1994 study of Nevada's legal needs, supra note 235 and accompany-
ing text.

258 The Commission heard that in some parts of the country, especially in some small-
er communities, lawyers tend to know personally the community's inhabitants and to
provide services for both complex and routine matters, and also to provide them to a
wide range of income groups. Moreover, these services are often provided at modest fees
or even pro bono.
of affordable legal help for all low- and moderate-income persons, and that the needs of large numbers of such persons are currently unmet. 259 This conclusion raises a deep concern about the gap between our commitment to equal justice and the reality that so many citizens cannot obtain legal assistance. As an associate presiding judge of Arizona's Maricopa County Superior Court has noted, "we have a crisis of representation." 260 This crisis, says a UCLA law professor, "[puts] the whole legitimacy of the justice system in question." 261

The profession's leaders have always promoted equal access to justice and have sought solutions for the ever-present problems of cost, complexity and delay. From Roscoe Pound, who addressed these problems at the turn of the last century, to California Judge Earl Johnson, the former head of the first national legal services program, who advocates that everyone who needs a lawyer or other appropriate advocate should have one, 262 the profession has strived to adhere to Learned Hand's admonishment: "Thou shalt not ration justice."

Yet, the goal of equal access to justice remains unmet. In part, this is because the legal system faces new challenges, including dramatic changes in both substantive law and procedure. Federal and state laws have established numerous new causes of action for both businesses and individuals. Disability rights, environmental regulations and consumer protection laws are but a few examples. Procedural rights have also expanded in areas ranging from denials of social security and welfare benefits to revocations of drivers' licenses and dismissals from high school. 263

Enforcement of claims and rights has added greatly to the burdens on the justice system. The number of social security disability claims, for example, has jumped 130% since 1989, from 1.5 million to 3.5 million per year. 264 Today, there is unprecedented demand on courts, especially in domestic relations matters. In 1990 alone, approximately 2.35 million people were divorced in the

259 The Commission's conclusion that large numbers of low-and moderate-income persons are not being adequately served by the existing justice system is also supported by statistics concerning pro se representation before tribunals, state bar tasks forces examining nonlawyer practice within their respective jurisdictions, written statements of bar leaders, legislators and judges, and articles in both scholarly journals and the popular press.

260 Rebecca A. Albrechts, as quoted in Podgers, Chasing the Ideal, supra note 256, at 58.

261 Carrie Menkel-Meadow, as quoted in Podgers, id.

262 See generally Earl Johnson, Right to Counsel in Civil Cases: An International Perspective, 19 Loyola L.Rev. 341 (1985) and Thronum and the Lions; A Plan for a Constitutional Right to Counsel for Low-Income Civil Litigants, 4 Bar Leader 17 (ABA 1978) (discussing four-city study showing that civil defendants represented by counsel were almost six times more likely to succeed than unrepresented defendants.) Judge Johnson served as executive director for the prototype national legal services program established in the 1960s by the Office of Economic Opportunity.

263 See, Geoffrey Hazen, Ethnic, Nat'l. L. J., February 14, 1994, 17, col. 1 (discussing the explosion in substantive and procedural rights in recent decades.)

264 ABA Judicial Administration Division, Report accompanying Recommendation submitted November 29, 1994 for consideration by the House of Delegates at the February 1995 Midyear Meeting. The report further notes that the Office of Hearings and Appeals of the Social Security Administration projects 500,000 additional requests for hearing per year for the next three years.
United States, increasing greatly the caseload in domestic relations.\textsuperscript{265} Sixty percent of all civil cases filed in the United States are family related. Yet only a small portion of our legal resources are dedicated to these cases. Fewer than twenty percent of judges are assigned to them.\textsuperscript{266}

In many communities there appear to be few, if any, lawyers experienced or willing to handle certain types of cases—for example, those of handicapped children seeking alternative school placements, battered women seeking temporary protective orders, claimants challenging denial of disability and unemployment claims and cases involving veterans’ claims and criminal child neglect, which often carry very low statutory fee limitations. These legal problems are also infrequently addressed in traditional law school curricula. Additionally, as a former President of the American Association of Law Schools has observed, too many lawyers are fluent only in the English language.\textsuperscript{267} This leaves the bar ill-equipped to counsel and assist the dramatically growing numbers of non-English speaking new residents of our country.\textsuperscript{268}

The Commission also learned that in some practice areas, lawyers often limit the matters they will handle. For example, in personal injury law, witnesses reported that few lawyers will handle automobile or other property damage claims of a few hundred (or even a few thousand) dollars.\textsuperscript{269}

The economic reality is that even though the need for legal services has surged, many lawyers confront sobering and markedly increased costs in operating a practice. The cost of a legal education has risen steadily over the last two decades, forcing some lawyers into debt which must be repaid while main-

\textsuperscript{265} Vegge, Divorce Litigants Without Lawyers, The Judges’ Journal (Spring 1994) 8. See also ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED, supra note 116 on whose findings Dean Vegge relied. The report of the Standing Committee on the Delivery of Legal Services cites national vital statistics showing that in 1990 reported divorces were nearly half the number of reported marriages with 2,448,000 marriages and 1,175,000 divorces. Id. at 1 (citing Monthly Vital Statistics Report, U.S. Dept. of Health and Human Services, Vol. 39, No. 13, p. 3, August 28, 1991.).

\textsuperscript{266} ABA FAMILY ADVOCATE, Vol. 17, No. 4 (Spring 1995).

\textsuperscript{267} Thomas D. Morgan, Oppenheim Professor of Law, George Washington University School of Law, remarks at the ABA National Conference on Professional Responsibility, Naples, Fla. (May 28, 1994).

\textsuperscript{268} Statistics provided by the Demographics and Statistics Branch of the Immigration and Naturalization Service show that nearly one million immigrants had their status legally adjusted to permanent resident in 1992 and over 904,000 in 1993. Nearly one-third of these persons were residents of California. (These figures do not include aliens who are in this country illegally.)

\textsuperscript{269} An Arizona Court of Appeals judge recently wrote:

Mr. Smith and Ms. Jones, who attach great personal importance to what is to the system a routine contract or employment problem, have neither the wallet nor the stomach for our justice. Most major law firms today will not take civil cases valued under $50,000.

Rudolph J. Gerber, Who Cares?, 79 A.B.A.J. 112 (January 1993) (Listing remedies to improve access to legal services, including courthouse assistance to self-represented persons and allowing some document preparation services to operate.)
aining a law office with adequate support staff, sufficient legal malpractice insurance, research capabilities and technological support. The high costs of these debts and overhead expenses have made it difficult for many lawyers to provide traditional legal services at fees that are affordable for low- and moderate-income clients.

The Commission recognizes, of course, that there are many lawyers expending great effort to serve people of modest means at affordable prices. Although the goal of universal access to sources of affordable help is still before us, it is a credit to the legal profession that it is constantly striving to meet that goal. The last three decades have witnessed a substantial number of innovations for delivering legal help to the public: legal aid programs supported by governmental funding; lawyers’ contributions of pro bono services or financial contributions in lieu thereof; high-volume techniques pioneered by legal clinics; group legal plans, including prepaid legal insurance; lawyer referral and information services; lawyer advertising; large-scale use of paralegals by lawyers; computerized information retrieval and document preparation; fee shifting statutes; contingent fee arrangements; and public interest law firms and organizations. Although some segments of the bar initially resisted some of these developments, they are now well-established features of the nation’s justice system. Nonetheless, as stated earlier, the Commission concludes that as a general matter low and moderate income persons as a group have significant legal problems and needs that the justice system is not currently meeting. The Commission is persuaded that continued innovation is essential.

The challenge of bringing about reform need not be a daunting one. Lawyers are renowned for their skills at helping their clients adapt to new changes in law and society, and they can and must use those same skills to develop innovative ways of delivering their services to moderate-income persons. The legal profession has the creativity and ability to meet this challenge and must meet it.

Speaking of the varied new suggestions for methods of improving legal services delivery, a former chair of the ABA Section on Litigation struck an optimistic note: “Some will resist any changes...[describing them]...as tearing at the fabric of justice and at the professionalism of, or even need for, lawyers. The opposite is true. Making the justice system more accessible, faster, more service-oriented, less acrimonious, is a win-win situation.”

B. The Practicing Bar, Bar Associations, Courts, Law Schools and Governments Should Continue to Improve Access to Justice.

A challenge facing the legal profession, and the justice system as a whole, is to find new cost-efficient ways in which lawyers can provide services to those in need. The task of developing these situations does not rest exclusively at the threshold of a lawyer’s office, but requires concerted efforts by all who are involved in the justice system, from law schools, to judicial and administrative tribunals to legislative bodies, because each plays a role in the way in which our

270 See generally Morgan, The Evolving Concept of Professional Responsibility, supra note 110.

271 Seeley, Opening Statement, LITIG. MAG. (Spring 1994).
legal system has been constructed. A global approach to the problem of providing greater access to the legal system is also required in order to maintain competently rendered services.

The legal profession is committed to the continued improvement of the legal justice system. Bar leaders have spoken out frequently on the need to make the justice system accessible and affordable for all citizens, and the bar has taken concrete steps to advance that goal. Today's challenge to the profession is how to make the system even more accessible and affordable to persons with low- and moderate-incomes.

Many lawyers, bar associations and courts currently provide affordable assistance to persons of modest means through a variety of programs. Some programs are in the experimental stage; others have been operating for several years. Many of them are innovative. All of them are designed to adjust the profession's delivery of legal services to a rapidly changing world in which technology, self-representation, globalization, alternative dispute resolution and crowded courts are creating paradigm shifts in the way the public accesses the justice system. The Commission recommends that the American Bar Association, state, local and specialty bar associations, the practicing bar, courts, law schools and the federal and state governments should continue to develop and finance new and improved ways to provide access to justice to help the public meet its legal and law-related needs.

1. THE ROLE OF THE PRACTICING BAR

a. Development of More "Consumer-Friendly" Law Offices

Accessible Services. Steps that some lawyers are taking to make their services more accessible to the public include: (1) locating their offices in convenient places such as shopping malls; (2) offering night and weekend hours, which are especially helpful to families where both parents work during the day; (3) employing multilingual lawyers and support personnel; (4) providing child

272 Canon 8 of the ABA's governing ethical rules long provided that "Lawyers Should Assist in Improving the Legal System" and the aspirational goal set forth in the Model Code of Professional Responsibility (which was the Association's model ethics code from 1969 to 1983) stated: "The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements." Model Rule 6.1 of the ABA's current Model Rules of Professional Conduct also anticipates that lawyers will contribute a portion of their time to "improving the law, the legal system, or the legal profession."

273 Within the ABA many entities have been concerned with delivery of affordable services to persons of modest means, including, among others, the Standing Committee on Delivery of Legal Services; the Consortium on Legal Services and the Public; the Sections of General Practice and Law Practice Management; the Special Committee on Solo and Small Firm Practitioners; the Young Lawyers Division, the Standing Committees on Lawyer Referral and Information Service, on Legal Assistance for Military Personnel; on Lawyers' Public Service Responsibility; on Legal Aid and Indigent Defendants; on Professionalism; on Group and Prepaid Legal Services; the Commission on Advertising and on Legal Problems of the Elderly, the Division of Bar Services and the Center for Partnership Programs.
care; and (5) ensuring that offices and telephone systems are accessible to persons who have disabilities.274

Reduced Fees. A number of witnesses suggested that lawyers undertake a serious review of "the basis for their hourly rate and the potential cost for providing a particular service for a fixed fee."

The editor of the General Practice Section's law journal has written that "The fact is, the cost of many legal services is simply too high; people go without because they cannot afford to pay a lawyer." The editor offers a number of ways in which the bar can increase public awareness of the value of lawyer services and retain clients. Among the measures he suggests is a reevaluation of the fees that lawyers charge, stating:

In a traditional economic model, the cost of services fluctuates according to the purchaser's ability to pay. Lawyers seem incapable of following that model. The cost of legal services has more to do with emotions, competition, and ego than sound economic principles. Few lawyers have undertaken a serious review of the basis for their hourly rate or the potential cost of providing a particular service for a fixed fee.275

Group legal clinics, which began operations in the 1970s, offer flat fees for many services needed by individuals and families, including wills, bankruptcies, real estate closings and divorces. Today, increasing numbers of lawyers are also advertising fixed fee services.276

Improved Service. As discussed in Part One of this Report, lawyers' fees are not the only reason growing numbers of people are failing to turn to lawyers for help with their legal problems. Lack of adequate and understandable communication between lawyers and clients and other poor treatment of clients, such as failure to return telephone calls promptly and to document billings, also result in alienation of clients.277 Many practitioners are adopting the "total

274 In 1994, the ABA Standing Committee on Delivery of Legal Services to the Public assembled an extensive database of law firm, bar, court and other projects which are delivering affordable legal assistance to the public. This database is available on a floppy disc and the Delivery Committee plans to update it periodically.

275 William I. Weston, Shooting Ourselves in the Foot (Again), THE COMPLEX LAWYER 38 (Fall 1993).

276 One study for the ABA Standing Committee on the Delivery of Legal Services to the Public suggests that advertising of fixed fee services by individual lawyers and law firms has contributed to the decline of multi-city legal clinics. See Gerry Singsen, REPORT ON THE SURVEY OF LEGAL CLINICS & ADVERTISING LAW FIRMS (1990). The study identifies as a principal reason that legal clinics have not multiplied the fact that law firms and even solo practitioners are able in the post-Bates era to advertise their own office practices and to copy computer-based high volume, low cost practice techniques, and this has allowed them to successfully compete with the earlier established clinics which depend on high volume to maintain economic viability.

277 See discussion on self-representation in Pt. One § B.1 of this report. Numerous public opinion polls in recent years have shown that lawyers have slipped badly in public esteem. For example, the Louis Harris polling organization found in the early 70's that 24% of the public had "high" regard for lawyers but that figure in recent years has declined to 8%. As reported in ABA JUST SOLUTIONS REPORT, supra note 121, at 27. One lawyer's partial explanation for this result is high lawyers' fees and poor treatment of clients. See generally Sol. Lercwitz, THE BETRAYED PROFESSION (1994).
quality management techniques from modern businesses, which stress service to the consumer by everyone in the organization, beginning with the person who answers the telephone. These "consumer friendly" initiatives have the potential to result in both greater client satisfaction and also in greater utilization of lawyers by the public.279

b. Limited Assistance by Lawyers to Clients and Self-Represented Persons

Lawyers have long provided ad hoc advice to persons representing themselves. Such ad hoc advice is given, for example, to persons representing themselves in traffic and small claims courts, in small estate probates and in routine administrative agency proceedings.

Some lawyers have begun to formalize these ad hoc arrangements, advertising that for a modest fee they are available to provide initial counseling and advice to self-representing persons, or other limited representation, which services they sometimes term "unbundled" services or "risk sharing." Some of these lawyers provide court or other standardized forms as well as instructional materials on how to fill out the forms, while others provide model pleadings.280 Some law firms make their libraries available to self-represented persons, and one small firm has even set aside a library for the exclusive use of self-represented persons.281

A recent innovation by some practitioners is to establish telephone assistance systems on 900 lines. They charge customer fees by the amount of time spent on the telephone. These lawyers may advertise their availability to provide

279 The American bar association established a Total quality management task force in 1993 under the auspices of its section of law practice management, which in turn has published materials for use by law firms of all sizes. See The quest for total quality management, 79 A.B.A. J. 52 (November 1993).

279 The ABA center for partnership programs has produced a 23 minute video which provides practical tips for improving client services. It provides answers to questions such as: "How can I make myself more available to clients when my schedule is already too busy?" "What are some simple office procedures my staff can begin using today to convey concern?" "How can I redesign my firm's invoices to help clients understand what they are paying for and avoid fee disputes?" ABA COMMISSION ON PARTNERSHIP PROGRAMS, ONE CLIENT AT A TIME (1994).

280 The ABA standing committee on delivery of legal services has prepared a computer disc a national listing of lawyers (as well as bar associations and other organizations) currently offering limited representation to clients. DATABASE OF PROGRAMS FOR CREATING ACCESS TO JUSTICE FOR MODERATE INCOME AMERICANS (1994).

281 For example, Lowell Halvorsen, former president of the Washington State Bar and a family law practitioner, permits self-represented persons to use his firm's library. See Lawyers coach clients to do legal work, THE WALL ST. J. (Oct. 15, 1993); See also James Podgers, Rediscovering the Middle Class, 80 A.B.A. J. 64 (Dec. 1994) quoting Forrest Moonen on his firm's library that is used exclusively for self-representing clients and stating: "The library contains books, periodicals, videotapes and other materials that clients may use in researching their cases, as well as on such general topics as financial planning and real estate."
advice only or their willingness to provide step-by-step telephone guidance to
those representing themselves.282

The Commission learned that legal services programs are now educating
their lower-income clients how to represent themselves—in eviction proceed-
ings, for example—as a way of coping with the programs’ enormous backlogs.
"Unbundling" services assists clients only in aspects of cases for which they
need the skilled help of lawyers. Other tasks are left to the clients to perform
(although they may also employ nonlawyer assistants).283 Unbundled service
may consist of review of a client’s file for advice purposes, review of a legal doc-
ument before filing by the client, drafting of a settlement agreement for a pro
se divorce or other discrete tasks that are less complete than full-service tradi-
tional representation.

The founding partner of a three person law firm in Los Angeles, concen-
trating on family law, stresses that providing unbundled services is fiscally
sound for the firm at the same time as it satisfies clients, at least partly because
unbundled services are paid for as they are rendered.

Unbundling today is a growing practice method of providing legal
access…. With successful pro se unbundling experience, clients are gain-
ing confidence in taking responsibility to determine the scope of legal
work to meet identified legal needs. Clients are learning when, how often,
and how extensively to consult a lawyer. Clients are better recognizing that
pro se legal access can be augmented by legal advice provided by lawyers
who supplement not dominate the management of their case.

The lawyer is expected to advise and diagnose incipient legal trouble—
not necessarily to do all the routine work…. Once diagnosed, it is
becoming accepted practice for the client to decide whether to act, whether
a professional is required, and if so, what type of professional should be
retained. If a lawyer is needed, the client has a choice whether the diag-
nosing lawyer or another lawyer will do the required legal work.

The partner analogizes his role to that of the family doctor in an individual’s
health care:

The result of this evolution is that clients are beginning to view their fam-
ily lawyer as a primary family legal health care provider: a helper and a
family resource to be consulted to insure legal health both when problems
arise and preventively at regular intervals….284

282 Clients of all income levels are using telephone assistance systems. For example, Divorce Helpline is a 900 telephone line for advice, mediation and assistance to persons representing themselves in divorces. Ed Sherman, the California lawyer who authored How To Do Your Own Divorce, runs the service. He acknowledges that pro se divorces lit-
igants who receive extensive telephone guidance will find that the services are not cheap. He asserts, however, that money is not the primary reason people use the helpline.

283 Podgers, Rediscovering the Middle Class, supra note 283, at 64.

284 Forrest S. Mosten, The Unbundling of Legal Services in Family Law 58, 60 (1994) paper distributed at the Doing Well by Doing Good: Delivering Legal Services to the For-
gotten Middle Class, a program presentation of the ABA Standing Committee on Deliv-
The public is now reported to be asking for unbundled services as the result of advances in technology. For example, *The Wall Street Journal* reports on a client who used a computer bulletin board that offered do-it-yourself legal forms. The client used the forms to draw up incorporation papers for a corporation he was establishing and then asked a local lawyer to double-check the work.285

In "task sharing," the lawyer maintains overall control of a case but delegates specific tasks to the client to perform. One Connecticut lawyer who has adopted the concept suggests that sharing tasks with clients, in addition to saving them money, brings persons into the office who would otherwise not use a lawyer and gives them a sense of involvement and control that makes the lawyer-clients relationship more consumer friendly.286 She states that even clients with high personal incomes appreciate this approach.287 Although assigning her clients appropriate tasks from research to drafting to typing and photocopying, the lawyer reviews every document and court filing, and she maintains that avoids some of the ethics and professional liability problems that arise with unbundling tasks.288

Limited representation, through pro se assistance, unbundled service or delegated tasks might not be compatible with every lawyer's philosophy or style of practice. As a former Florida Bar president points out, most law schools train lawyers from the first day of law school to believe that for the lawyer herself to provide anything less than comprehensive assistance is unethical or malpractice.289

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286 Jared Wool, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, *The Wall St. J.*, Oct. 15, 1993. The article also reports that Barbara S. Shea of Fairfield County, Connecticut has trademarked "Court Coach," her approach to providing legal services, and states that Shea's approach "give(s) lawyers a chance to compete with lower priced paralegal services and legal how-to-books, both of which have proliferated in the past decade as lawyers' fees have climbed."

287 Podgers, supra note 281, at 65.

288 Edgar Cahn, one of the original theoreticians for the modern legal services program, argues in a visionary thesis that all persons should be able to contribute their services in exchange for "Time Dollars" that can then be used to purchase other goods and services. See generally *Time Dollars* (1992) and *Reinventing Poverty Law*, 103 YALE L.J. 2133 (1994).


Malpractice insurers may not yet be ready to insure less-than-complete representation. A *Wall Street Journal* article on reduced representation practices notes that "legal-malpractice insurers are queasy" and quotes one insurer as saying that "such arrangements may make attorneys vulnerable to legal-malpractice suits if clients make mistakes after receiving some legal advice." However, the same article reports, that other attorneys interviewed for the story reported that they do have malpractice insurance. Wool, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, supra, note 286. This view was echoed by Joel Henning, an officer of Highbrand Inc., a law firm consulting company, who states "a lot of lawyers, especially litigators, think that unless they can be fully responsible and manage a case in all its particulars, that they don't want to be involved at all." Id.
But the former chair of the ABA Standing Committee on Delivery of Legal Services argues that "more and more entrepreneurial lawyers are going to see there is a huge market in serving people who cannot pay for soup-to-nuts representation and do not need soup-to-nuts representation."206

c. Prepaid Insurance Plans

Prepaid insurance plans provide an opportunity for lawyers to increase their volume of clients while at the same time offering legal help to plan participants at reduced costs.207 An insurance premium generally averages less than $150 a year for family for the simplest plan.208

Proponents of prepaid insurance plans suggest that many lawyers have failed to appreciate the potential that the plans have for building their practices at the same time that they increase the public’s access to affordable legal

206 Sara Ann Determan quotation reported in Woo, Entrepreneurial Lawyers Coach clients to Represent Themselves, supra note 286.

207 Rule 7.3(d) of the ABA Model Rules of Professional Conduct, which has been adopted by most states, permits lawyer participation in all types of prepaid plans so long as the plans are not owned or controlled by the lawyer and the lawyer does not engage in in-person solicitation of individual participating members. See also ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 87-355 (1987) (opining that the participation of a lawyer in a for profit prepaid legal services plan is permissible under the Model Rules although the participating lawyer must ensure that the plan is in compliance with the Model Rules and that his own participation is as well.)

There is considerable variety among legal service plans. Plans can cover either personal or business legal services and within each category choice of different plans include referral/discount, access, or comprehensive plans. These plans are described in a pamphlet published in 1988 by the American Prepaid Legal Services Institute entitled Opening the Door to Affordable Legal Services.

A referral/discount plan is the simplest plan. It refers a group member to a lawyer or law firm recommended by the group leadership, and the lawyer provides free or low cost advice with additional services according to a fee schedule, or at a discount from the lawyers’ customary charges. The member’s annual fee, if any, is the only cost to the group or the individual member. This plan has the advantage of advertising the firm’s name and of creating an inducement to contact the law firm.

The basic access plan offers unlimited legal consultation usually via a toll free number and often review and preparation of simple legal documents, third-party letters, phone calls to adverse parties and brief in-office consultations. Referral attorneys who work at a discount can also provide services beyond the basic benefits for additional fees. The access plan is the usual model for prepaid plan coverage. The comprehensive plan, designed to cover 80-90% of the average individual’s legal needs in a given year, is commonly offered by insurance carriers or as part of an employee benefit program. Conceptually similar to health insurance, the comprehensive plan coverage includes both in-office and court work in most areas of the law including wills and estates, consumer problems, landlord-tenant, real estate transactions, domestic relations, bankruptcy, representation before administrative agencies, civil disputes and some criminal matters.

208 This average cost of a prepaid insurance premium as of 1995 was provided to the Commission by Alec M. Schwartz, Staff Director of the ABA Standing Committee on Group and Prepaid Legal Services and Executive Director of the American Prepaid Legal Services Institute.
help. Most plans currently provide legal services to groups but prepaid legal insurance policies are currently being developed for individuals without group sponsorship.235 This development will allow a much greater number of persons the opportunity to receive the benefit of prepaid legal insurance plan services in the future.

About one-half of plan participants are covered through plans of unions or employers,244 and prepaid programs of credit card companies25 cover many others. Some state governments cover employees.256 Bar associations can also sponsor plans.297 Nationwide, prepaid plans cover an estimated 18.5 million persons and involve about 20,000 lawyers as of August 1994.236 Lawyers in traditional general practices have been slow, however, to recognize the favorable economics and client acquisition opportunities presented by participation in prepaid legal service plans according to the American Prepaid Legal Services Institute (API), an ABA-sponsored nonprofit organization. API advises practitioners on how to get started in the prepaid

235 It is anticipated that individual legal insurance, packaged to cover simple legal matters and fortiﬁous risk, and marketed through credit card, point of sale and account debit programs, will become extensively available through commercial carriers in the next ﬁve years. In 11 European countries legal expense insurance sold to individuals is a $4 billion dollar (U.S. dollar) business.

244 United Auto Workers Legal Services Plan is the largest plan covering a user group available through unions or employers.

245 The Signature Group subsidiary of Montgomery Ward & Co. and the American Express Corporation offer prepaid credit card programs.

256 Public sector employees are frequently covered by group legal services plans. About 88,000 employees of the State of California employed by the executive branch and independent state regulatory agencies are eligible for a recently instituted legal services plan administered by Des Moines-based Midwest Legal Services. The Florida Department of Commerce and Parole Commission plans are also administered by Midwest. Texas Legal Protection Plan, an afﬁliate of the Texas State Bar, administers a plan for the Texas Department of Protection and Regulatory Services. See infra note 297 regarding bar association plans. New York City provides funds for Municipal Employees Legal Services, a self-administered plan of AFSCME District Council 37.

257 In 1980 The Florida Bar provided seed money and staff support to create a Florida nonprofit corporation now known as Florida Lawyers Legal Insurance Company ("FLLIC"). FLLIC entered into a contractual relationship with Midwest Legal Services to act as a sponsor of its prepaid legal insurance plans and policies, and provided a panel of lawyers throughout the state to deliver legal services under the plans and policies. Presently a panel of more than 1,000 lawyers deliver services to an estimated 60,000 insureds in Florida through FLLIC. Since 1992 the State Bar of Texas, through an afﬁliate organization, the Texas Legal Protection Plan (TLPP), has sponsored a prepaid legal plan for a group of over 8,000 Texans using a statewide panel of more than 1,500 participating lawyers.

258 ABA STANDING COMMITTEE ON GROUP AND PREPAID LEGAL SERVICES, Informational Report to the House of Delegates, August 1994.
field. A Seattle lawyer who participates in a plan observes: "Prepaid legal care affords the opportunity to have a consistent and steady client referral and it definitely balances out reduced attorneys' fees." Another participating lawyer says to the bottom line on the subject: "Some attorneys fear that the plans will steal their business, but that's not the case. These people would not use attorneys at all without the plans. We are actually increasing the total pool of business."

The Executive Director of the nonprofit Legal Counsel for the Elderly program agrees that prepaid insurance plans "offer the greatest possibility for dramatically increasing client access to legal services." Based on surveys conducted for the American Association of Retired Persons, he concludes that they alleviate customer fears of lawyers more than any other delivery systems as they are commonly affiliated with a trusted entity. He speculates that people do not consult lawyers because they fear lawyers' fees and "attorney entanglement," which will cause them to purchase additional services at additional fees; they fear the judicial system; they do not trust lawyers; and they are not sure their problem requires lawyer services. Prepaid plans, he states, address consumer fears by allowing unlimited free consultation with a lawyer and advance notice of any additional fees for services, which are usually flat fees.

Some members of the bar have expressed concerns about the quality of service prepaid plans provide. One concern is whether the brevity and impersonality of the lawyer-client interaction in some plans—those based on telephone consultations, for example—will result in inadequate or improper advice or the client misdiagnosing the problem. They also question whether there will be unrealistic expectations on the part of members based on inflated and unclear marketing of the plan's services.

Experienced plan lawyers, however, assert that the plans maintain quality because mediocre service may trigger loss of an entire group rather than an individual client. As a result, they claim, group members get better service than

259 American Prepaid Legal Services Institute 541 N. Fairbanks Court—15th Floor, Chicago, IL, 60611-3314, 312/988-5751, has a complete list of plans in operation in the U.S. API advises the practitioner who wants to get started in the prepaid field to participate as a provider in another party's plan as that minimizes financial risk and loss of "good will" that might arise from defects in design or administration of a plan centered exclusively on the lawyer's firm, introduces the lawyer to the variety of arrangements possible, and helps the lawyer realize that location is not always the determinative factor as plans must respond to participant's needs no matter where they arise. In urging a lawyer to start his own plan for local client groups API suggests canvassing locally owned businesses, credit unions, fraternal groups, church groups, chambers of commerce, writer's groups, labor unions, professional societies, trade associations, banks and civic organizations. See AMERICAN PREPAID LEGAL SERVICES INSTITUTE, On Your Own—Getting Your First Group, 14 API NEWS BRIEFS, 1–2 (Sept. 1994) [hereinafter cited as Getting Your First Group].


262 Moore, Access to Legal Services Paper, supra note 240, at 8.

263 Id. at 8.
a nongroup member might receive. Further, they note that with unlimited quality telephone advice available to a plan member, the client is often able to participate in solving his or her own problem at the lawyer's direction. Finally, they maintain, legal plans encourage the participants to seek legal advice at an early stage of a problem and that can prevent the escalation of the problem to the crisis point.  

4. Improved Productivity Through Technology

The advent of the personal computer in 1981 was a watershed event that changed American culture and, along with it, the practice of law and the delivery of legal services. Now, over a decade later, the American Bar Association Legal Technology Resource Center in its most recent surveys of law firms has found that 95% of lawyers in smaller law firms and 74% of in-house counsel use computers and that 86% of midsize law firms have a lawyer using a desktop workstation.

Any major word processing software application can be used to create sets of documents, and lawyers have made heavy use of these applications. Specialized commercial legal software, often created by lawyers, utilizing the advanced features of word processing applications such as complex macro and merge routines, has also become available. This software enables lawyers to eliminate the non-productive time required to create these specialized applications on

394 American Prepaid Legal Services Institute, Getting Your First Group, supra note 299, at 8 (quoting Seattle lawyer David Sadick).

395 A multi-tiered framework of regulation, designed to protect consumers of legal services, governs the operation of legal services plans. The conduct of practicing lawyers is regulated at the state level by the courts and state bar associations, and most state rules permit, with some conditions, lawyer participation in legal services plans. Whether a plan is structured as individual, association sponsored, voluntary enrollment, or employer-funded determines whether it may be subject to regulation at the state and/or federal level. It is a question of state law whether a plan is a form of insurance, subject to regulation by state insurance commissioners. Some states have developed regulations to deal specifically with the unique nature of legal services while others continue to apply to these plans the same regulations placed on casualty insurers. Employer-funded legal service plans are federally regulated by two statutes: Labor Management Relations Act of 1947 (Taft-Hartley) which requires an employer to bargain for legal service benefits if the union so wishes and places restrictions on the use of plan funds that prevent a plan from, among other things, paying for an action against its funding employer and Employee Retirement Income Security Act of 1974 (ERISA) which requires specific kinds of reporting and disclosure to members of employer-funded plans, imposes fiduciary responsibilities on plan trustees and administrators, and prohibits certain transactions involving plan assets. See Dalgren, supra note 301, at 76-79.

396 ABA LEGAL TECH RES CTR., SURVEY OF AUTOMATION IN SMALLER LAW FIRMS, SURVEY REPORT 4 (1994).

397 ABA LEGAL TECH RES CTR., SURVEY OF AUTOMATION IN CORPORATE LEGAL DEPARTMENTS SURVEY REPORT 5 (1993).

398 ABA LEGAL TECH RES. CTR., AUTOMATION IN MIDSIZE LAW FIRMS SURVEY REPORT vi. (1992).
their own. The ABA Technology Clearinghouse can provide lists of software designed to execute specific legal tasks in a number of practice areas.308

Applying technologies mentioned earlier in this Report, hypertext is a technique through which lawyers can link together related text from a variety of sources. For example, a hypertext version of the Internal Revenue Code permits the lawyer to read a section of the Code, follow a hypertext link to another code section or regulation mentioned therein, and return to the initial code section. Multimedia, on the other hand, would more likely be used for courtroom demonstrations and exhibits, accident recreations, preservation of testimony, law firm marketing and other uses.

When thinking of technological access to legal research, lawyers usually envision LEXIS®, WESTLAW®, Shepard's®, Commerce Clearing House® or other online legal services, but major changes in legal publishing have resulted from the introduction of compact disk information storage ("CD-ROM"). Entire libraries of legal information can be stored on a small 5 inch CD-ROM disk that, produced at trivial cost, saves the natural resources required in traditional publishing. Used in the office computer, CD-ROM libraries do not require the physical space, lighting, environmental controls and other features of regular libraries. They can be mailed overnight to other locations or, combined with telephone/modem access, can be accessible from remote locations via computer 24 hours a day.309 CD-ROM legal products have rapidly become successful with lawyers because of their reasonable cost and convenience, but these same qualities have also expanded nonlawyer access to legal information.310 Teleconferencing, voicemail, facsimile machines and cellular telephones enhance office communications, including that of a law office. ABA/Net and several other online services offer subscribers bulletin boards on topics ranging from corporate and business, probate, real estate, LEXIS® and WESTLAW®, and lawyer search by specialty and location to AT&T® Mail's e-mail, fax and telex capabilities.311 Several lawyers are beginning to use online

308 For example, a late 1994 request to the ABA Technology Clearinghouse for sample lists of software produced 41 titles in Real Estate, 8 in Family Law, 10 in Bankruptcy, 27 in Collections, and 26 in Estate Planning, Wills & Trusts and Fiduciary Accounting. The ABA Journal reported that the chair of the Computer User Groups of the General Practice Section promotes as a general tool the use of HotDocs 2.0 by Capsoft as reasonably priced software which creates a highly automated document. See 81 A.B.A.J. 71–72 (Feb. 1995).

309 The ABA Technology Clearinghouse can provide a CD-ROM packet which includes a beginner's guide, reading list and directory listings, and a comparison of the search interface of major legal CD-ROM publishers.

310 A major New York law firm recently created a multimedia program regarding sexual harassment to train officers and employees of its clients regarding both the substantive law of sexual harassment and the human resources guidelines for the prevention of sexual harassment. See Report on Shadlen & Arps, Wall St. J., October 1994.

311 On-line services are also available to clients. CompuServe of Columbus, Ohio, for example, offers The Legal Forum, where in 50,000 subscribers can enter legal questions, comments, and responses, access a library that stores information files, and exchange dialogue in the "conference room." America Online of Vienna, Virginia also offers its subscribers a "legal chat" forum.
communication networks to solicit business, locate out-of-town lawyers, and send drafts of legal documents to colleagues.\textsuperscript{133}

Law firms can also be structured around technology. Clients of a labor law firm in San Francisco can obtain legal information by telephone via automated answers to questions. After payment of a signup fee of $250 to $350, clients of the boutique labor law firm receive a directory listing hundreds of stock questions about labor law. A client needing an answer to one of the stock questions will call the LawLine telephone service, provide identification by number, and enter the number of the stock question from the directory. A prerecorded voice will provide one to three minute answer, and may possibly direct the caller to other related questions. The cost per call is approximately $2.00 per minute with prepared memoranda and forms also available at low cost via fax machine. LawLine, which combines sophisticated voicemail equipment with a computer database of legal information, has the ability to predict routine questions that may have standard answers because it limits its service to a single substantive area, in this instance, labor law. LawLine cannot provide answers to all labor law questions, but the automated system does appear capable of dispensing substantial legal information quickly, accurately and with maximum efficiency.\textsuperscript{134}

Computer technology has also permitted the creation of a "virtual law firm" by connecting experienced lawyers throughout the country to provide legal research services for a fixed fee. The Legal Research Network, based in Los Angeles, claims to be able to generate research by a specialist with experience in the area for a fee substantially less than that charged by most law firms. A data bank of prior memoranda permits quick responses of high quality research. The Legal Research Network may be an extended example of telecommuting opportunities permitted by technology, but it is also a variation on the creation and maintenance of legal memoranda files for internal use by almost every lawyer or law firm. Individual lawyers and law firms take pride in their own qualities and capabilities, but access to pre-existing research and to recognized experts and specialists through electronic networks may presage significant structural changes in the practice of law. Sophisticated business clients may use the electronic technology to shop legal expertise and price. Law schools may develop practice-oriented research centers staffed by legal experts similar to those found in medicine. Law school clinics could become laboratories for testing methods for research, analysis and delivery of legal services leading to adoption or emulation by practicing lawyers.\textsuperscript{135}

One Commission witness, an owner of a software company, warned that

\textit{[If] the ABA does not lead the profession across the electronic frontier, the reputation of the legal profession will continue to decline in the eyes of the consumer and leadership will pass to other sectors of our society.}


Today’s average law firm—labor intensive, high priced, inaccessible to all but the most wealthy—reminds me of yesterday’s mainframe computer. Like IBM, the legal profession is locked into a paradigm of service that works for only about 10% of the United States population. And look at what has happened to IBM in a period of just five years. If IBM is to survive, an idea that was unquestioned only five years ago, it will have to reinvent itself.

And so will the legal profession.... If the profession does not creatively deconstruct to respond to the real need for legal access at reasonable cost [then] new technology, coupled with the right of people to represent themselves, will restructure the delivery system for legal services on its own. 306

e. Expanded Utilization of Paralegal Services By Lawyers

A primary recommendation of the Commission is that the range of activities of traditional paralegals should be expanded, with lawyers remaining accountable for their activities.

The American Bar Association’s definition of a legal assistant contemplates a lawyer delegating substantive legal work to a nonlawyer for performance while retaining supervisory responsibility for the nonlawyer’s work product. 317

The U.S. Supreme Court has recognized that there is a “gray area of tasks that might appropriately be performed either by an attorney or a paralegal.” 318 Yet, many lawyers resist delegating substantive work. The editor of the General Practice Section’s Journal, speaking of this reluctance to delegate, wrote:

There is much to admire in a system that divides work according to a formula based on lowest cost and greatest skill. If a paraprofessional can deliver equal service at a lower cost, then he or she should be allowed to do it. If a paraprofessional can deliver services that do not require the direct intervention of an attorney, then that, too, is appropriate. 319


317 See supra text accompanying note 171 for the ABA definition of a legal assistant, as approved by the Board of Governors.

318 Missouri v. Jenkins, supra note 172 and accompanying text.

319 William L. Weston, supra note 275, at 10. See also Morgan, supra note 110, at 709 for a statement of similar views. See also Gary Bellow, Legal Services in Comparative Perspective, supra note 253, at 376. Professor Bellow, who heads a legal services clinic at Harvard Law School and is a pioneer in the modern-day legal services program, writes:

In every place where we have done experiments, we have been able to teach paralegals to do large amounts of legal services work as well as, and sometimes better than, their lawyer counterparts.... [I]t makes no sense to have a national delivery system in which lawyers often outnumber paralegals two to one. We should not only be altering these ratios but also developing a form of “free standing” paralegalism not unlike nurses practitioners in medicine. Such development may be on the horizon in many areas of private practice. They ought to be on the agenda of the legal aid system as well.
The ABA Section of Law Practice Management recently published a man-
ual on how solo practitioners and small firms can have more productive and
profitable law practices through greater utilization of paralegal services.230
The manual recounts the dramatic changes that have taken place in the law
firm market in recent years and contains practical tips on how solo practi-
tioners and small firms can survive economically in the 1990s. It then con-
tends that lawyers who most completely integrate paralegals into their prac-
tice will best be able to deliver the high-quality and cost-efficient legal
services that the moderate-income public is demanding. The manual states
that too often lawyers are overqualified for their tasks and do not delegate
enough substantive work to paralegals who could efficiently and competent-
ly handle the tasks at a lower cost to these clients.

Traditionally, lawyers have been overqualified for much of the work they
have performed. The lawyer whose hourly rate is modest for effective
courtroom persuasion may seem very expensive for searching through a
box of documents back at the office…. Under present market conditions, clients are no longer willing to have all
the work performed at lawyer's rates. Associate rates that once provided a
solution to the high cost of legal work now contribute to the problem.
Because of this, the legal assistant profession has become one of the fastest
growing in the nation. Lawyers are beginning to recognize that they will
be able to produce a greater volume of legal work if they shift a larger por-
tion of work to nonlawyers.231

Several people who spoke before the Commission drew an analogy
between legal paraprofessionals and medical paraprofessionals. They noted
that the medical profession now uses paraprofessionals extensively and that,
for example, nurse practitioners may prescribe medication pursuant to estab-
lished protocols, nurse midwives participate in the birthing process, and
teeth may be cleaned and x-rayed by medical assistants, saving the time of
the doctor or dentist for diagnosis, judgment, advice and operation. These
individuals suggested that the legal profession should adopt this model more
extensively.

In support of this proposition, the federally funded Legal Counsel for the
Elderly (LCE) finds there are many client services that paralegals can ably per-
form without lawyer assistance. LCE's director contends that using govern-
ment funds for legal services to pay attorneys to handle these quasi-legal needs is a misuse of scarce resources and fails to reach enough persons in need of help.232 He notes as an example the sometimes onerous task of applying for
medical care reimbursement, stating:

230 ABA, LEVERAGING WITH LEGAL ASSISTANTS, supra note 74.
231 Id. at x.
232 See Moore, Improving the Delivery of Legal Services for the Elderly: A Comprehensive
Approach, 41 EMORY L.J. 805, 836, 845 (Summer 1992) [hereinafter Moore, Improving
the Delivery of Legal Services for the Elderly].
Many seniors cannot manage the paperwork required for third-party payment of medical bills. Primarily, this involves reimbursement from Medicare and from private insurance like Medigap. An extended illness requiring both doctor visits and hospital care can generate high bills and many notices. Sorting them out and determining what has been paid, what is still owed, and why certain items were not covered by insurance can quickly become confusing. ... The helper must determine whether nonpayment ... resulted from mistake, or the incomplete or inaccurate submission of information to the insurer. The helper must often go to the client’s home to gather information. Such a case can easily take ten to twenty-five hours to resolve. The Wisconsin study showed that 11.1% of all older people experience medical paperwork problems each year ....

LCE has experimented with using volunteers supervised by an attorney to handle these cases. While the program worked well, it was too expensive. The better model is to use volunteers supervised by nonlegal staff while relying on legal staff for training, reviewing cases to identify legal issues, and representing clients in cases requiring fair hearings or other legal services.323

The LCE model functions much like the traditional lawyer-paralegal relationship in a private law firm where the lawyer retains responsibility and accountability for the nonlawyer's work product.

Some of those who spoke before the Commission suggested that lawyers utilize the services of nonlawyer assistants in other innovative ways to save time and reduce costs to clients. Several lawyers recommended, for example, that court rules be changed to permit paralegals to appear in court for their law firm employers on some routine matters such as calendar calls and on uncontested matters such as small estate probate hearings. These lawyers asserted that this change would reduce costs to the lawyers' clients who would be billed at the lower paralegal rate.324

One recent development, reported to be especially helpful to solo practitioners and smaller firms, is the employment of freelance paralegals on a contract basis. Solo practitioners or small law firms who cannot afford a full-time

323 Id. at 846–47.

324 Other suggestions for expanded roles for paralegals included: taking records depositions, signing form pleadings, obtaining routine court orders and handling personal bankruptcies. The ABA Coordinating Committee on Immigration has recommended that paralegals employed by law firms be accredited by the Immigration and Naturalization Service to provide services in immigration matters even when fees are charged by the firms, a recommendation which this Commission endorses. See infra note 414 and accompanying text. A committee appointed by the Minnesota Supreme Court in response to a legislative mandate recommended to the court that an authorized and registered class of "specialized legal assistants" working under the supervision of lawyers be permitted to perform some functions now reserved to lawyers, such as appearance in court for certain specified ministerial tasks. MINNESOTA SUPREME COURT, REPORT OF THE SPECIALIZED LEGAL ASSISTANTS STUDY COMMITTEE 20 (1994). See discussion supra at text accompanying notes 226–229.
paralegal may employ on a contract basis part-time or case-by-case services of paralegals. The paralegals may work either through temporary employment agencies or out of their own offices. Under these arrangements, the lawyers still provide either supervision or accountability to the client for the paralegal's work.225

Officials of national paralegal associations reported to the Commission that the substantive work provided by trained and educated paralegal professionals is far ranging and includes most areas of the law. The employment of paralegals who have specialized substantive expertise can, therefore, benefit firms of all sizes by providing help to clients in their areas of expertise.226

The Florida Special Committee on Non-Lawyer Practice proposed model structures for delivery of legal services.227 Under one of the models proposed by the Special Committee, clients would have the option to work primarily with nonlawyers, thereby incurring lower legal fees. This model requires the lawyer/owner of the firm to maintain responsibility for all work product and be accountable for the actions of the paralegals working for the firm.228

Another model proposed by the Florida Committee permits secretarial or form preparation companies to request that a lawyer supervise their operations and/or provide legal advice and legal representation to their clients if necessary. The Florida Committee recommended that lawyers be allowed to own all or part of such companies and provide services to the companies by contract.229 According to this model, a lawyer could provide services to the customer of the company only if a separate lawyer-client relationship is established with the customer. Nonlawyer employees of the companies

225 See In re Opinion 24 of the Unauthorized Practice of Law Committee, supra note 173 (decision by the New Jersey Supreme Court that freelance paralegals are not engaged in the unauthorized practice of law.)

226 For a discussion of some of the subject areas in which paralegals currently provide professional services, see supra Part One, § C.1.

227 The report of The Florida Bar's Special Committee on Non-Lawyer Practice included the descriptions of three models for the involvement of lawyers and nonlawyers in innovative practice settings. The report stated that the Special Committee believed that there are "institutional barriers" which "inhibit lawyers from entry into the market for delivery of affordable legal services" and that the purpose of proposing that the Florida Board of Governors approve the models is to provide a safe harbor for lawyers to rely on in working with paralegals in the delivery of affordable legal services." The FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE, supra note 82, at 3. The Florida Bar's Board of Governors declined to adopt the recommendations of the Special Committee, however, and did not officially comment on the models. A summary of the Board's decision is set forth in FLORIDA BAR NEWS, supra note 225.

228 THE FLORIDA BAR REPORT OF THE SPECIAL COMMITTEE ON NON-LAWYER PRACTICE, supra note 82, at 237.

229 Id. at 246, 243.
would be governed by the Florida Supreme Court rules governing document preparers.359

The ABA recently promulgated Rule 5.7 of the Model Rules of Professional Conduct, which states that it is ethically permissible for law firms to employ many kinds of professionals in law-related businesses (sometimes referred to as "ancillary businesses") to help provide one-stop, lower cost services to their clients. Rule 5.7 expressly states that lawyers may ethically own or control law-related businesses as long as they comply with various disclosure and other requirements in the Rule.360

Nonlawyer professionals employed today in lawyers' subsidiary law-related businesses include accountants, financial advisors, land use specialists, international trade experts, engineers, education experts, nurses, social workers and others. Clients of law-related businesses owned by large law firms tend to be larger business organizations, governments and wealthy individuals. Subsidiary law-related businesses often owned by small firms include title companies and real estate brokerages.361

The Commission learned that a law firm in Florida has established a law-related business of document preparation. The Florida Bar Special Committee on Non-Lawyer Practice reported that this three person law firm located the subsidiary business in a separate neighborhood facility because it attracts self-represented persons who want help with filling out court or bar approved forms but who are reluctant to visit lawyers' offices.362 In this practice, document prepare disclose to customers that they are not lawyers and do not give legal advice. Such a statement appears to be what is required under the disclosure provisions of ABA Model Rule 5.7.363

If the customers of the Florida document preparation service ask for a referral to a lawyer, however, the service may refer customers to the parent firm for legal advice and assistance.364 Initially, the firm wanted to advertise that the

359 Id., at 343. The Florida Committee report noted that Florida Supreme Court Rule 10-2.1(a) of the Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law provides that nonlawyers may "engage in limited oral communication to assist a person in the completion of a legal form approved by the Supreme Court of Florida and that oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form and inform the customer how to file the form." Id. The Committee suggested that other requirements also be made of employees of document preparation businesses such as requiring them to place their name and address on all forms prepared by them. Id.

360 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1994).


362 The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82, at 164. See also James Podger, Rediscovering the Middle Class, supra note 82, at 62-63.

363 MODEL RULES OF PROFESSIONAL CONDUCT, supra note 331.

364 The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82, at 164.
document preparation business was lawyer owned and that the firm would be available to provide review of the clients' documents when the paralegals deemed it necessary. However, this was not done because the firm was advised that this arrangement would violate Florida's rules of professional conduct that prohibit a lawyer's assistance to nonlawyers who are engaged in "the practice of law."  

2. THE ROLE OF BAR ASSOCIATIONS

Bar associations have undertaken initiatives in recent years to help persons of modest means achieve solutions to their legal needs on an affordable basis. Some of these initiatives encourage or assist their members in activities described in the previous section. For example, a few bars have encouraged and even provided seed money to establish prepaid legal insurance plans. Bar associations are developing other kinds of creative initiatives, some of which have the potential to significantly improve access to justice for persons of modest means, and we turn now to a brief description of some of them.

a. Publication of Self-Help Materials

Some bars are beginning to publish their own self-help materials. The Florida Bar, for example, has prepared both standardized pleadings and self-help instructional materials in a wide variety of subject areas for use by self-represented persons. These materials are sold in stationery stores at a modest cost. The ABA Standing Committee on Delivery of Legal Services stresses that self-help materials should be made widely available—at libraries, bar associations, schools, retirement homes and at the courthouse.

b. Joint Projects with Not-for-Profit Agencies

Bar associations have an opportunity to work with not-for-profit organizations to develop projects that will benefit the organizations' constituencies. Joint projects may include information presentations, individual legal guidance or the creation of "package plans" for specific legal services. Various entities within the state or local bars may identify appropriate consumer groups and membership

536 Id.

537 Id. Florida's ethics rule is similar to ABA Model Rule 5.5, a version of which has been adopted by nearly every state's court of highest jurisdiction.

538 See supra note 296 regarding the Florida and Texas bars prepaid legal insurance plans.

539 The database maintained by the ABA Standing Committee on Delivery of Legal Services contains descriptions of bar association programs which are designed to provide legal assistance to persons of modest means. Information on such programs is also available from the ABA Division for Bar Services and the ABA Young Lawyers Division.

540 The development of the self-help forms in Florida can be attributed at least in part to the public reaction after The Florida Bar's successful prosecution of Rosemary Ferman for unauthorized practice under the state's UPL statute. See supra notes 99-101 and accompanying text.

organizations with whom to develop a cooperative alliance. Because many con-
sumers are uneasy about using lawyers, the Legal Counsel for the Elderly (LCE)
has recommended that bar associations [and lawyers] explore the potential of
working with consumer groups and membership organizations that people trust
as the prepaid legal services industry has done. In 1992, LCE's director wrote
that LCE planned to embark upon a cooperative venture with the Nashville Bar
Association in which the bar association would offer a special life planning
package for Tennessee members of the American Association of Retired Persons
(AARP) which would include the drafting or modification of a simple will, a
living will and durable powers of attorney, for fees ranging from $150 for an
individual to $250 for a couple. The AARP is promoting this joint program to
its 30,000 members living in the Nashville community.343

2. Lawyer Referral Services

There are over two hundred lawyer referral services in the country operated
by bar associations, and many of these services have adopted measures to bet-
ter serve persons of low and moderate income. Several, for example, maintain
reduced fee panels for persons of low and moderate income. The ABA Stand-
ing Committee on Lawyer Referral and Information Services (GRS) urges bars
to maintain such panels.348 In a statement to our Commission, a New York
State Bar committee examining nonlawyer practice wrote:

[It] is patently ironic that, at the same time many segments of our soci-
ety cannot afford legal services and, therefore, may be tempted to turn to
less skilled and less well trained vendors of quasi legal services, so many
law graduates find themselves unable to find employment.... The Com-
mittee has tentatively identified this as a "matching" problem which we
believe the organized Bar should attempt to alleviate.348

343 Moore, Improving the Delivery of Legal Services for the Elderly, supra note 322, at
849–50.
348 The ABA Standing Committee on Lawyer Referral and Information Services uses
the services of volunteer lawyers with expertise in establishing and operating lawyer refer-
ral services to visit and consult with state and local bar groups interested in creating,
funding and operating referral programs.
346 Statement of New York State Bar Committee on Nonlawyer Practice, supra note
246, at 3. The Committee also noted that housing courts are notorious for their lack of
tenant representation and that pro se litigants in matrimonial and other court proceed-
ings are on the rise, causing problems for the judiciary, the judicial system and litigants alike.
In 1992, Fred H. Dore, Chief Justice of the Washington State Supreme Court, con-
venced a Task Force to explore the feasibility of creating a legal clinic staffed by recently
admitted lawyers to provide legal services to persons of moderate means at affordable rates.
After extensive study, the Task Force reported that there was a need for services to persons of
moderate means and that a substantial number of new attorneys would be interested in
working in such a legal clinic. The Task Force recommended a pilot project. Subject areas
identified by the Task Force to be covered at the clinic included family law, landlord-ten-
ant disputes, foreclosure proceedings, consumer issues, questions regarding unemployment
compensation and preventive legal counseling including wills, prenuptial matters and real
estate contracts. See WASHINGTON STATE SUPREME COURT, ACCESS TO JUSTICE TASK
FORCE FINAL REPORT (June 17, 1992) (task force report available from Chief Justice Dore
or from ABA Standing Committee on the Delivery of Legal Services, Database No. 66.)
Citing the examples of tenants in housing courts and pro se litigants, the Association wrote:

The individuals involved often do not meet the income standards to qualify for free legal services or pro bono volunteer assistance, but, nevertheless, cannot find lawyers to represent them at affordable rates. Development of low-fee lawyer referral panels populated by lawyers whose practices are not yet established, coordinated by bar associations and assisted by paralegals, may well be worth exploring. 345

Many lawyer referral and information services not only make referrals to lawyers in private practice but also provide information about other appropriate sources of help to problems such as mediation, small claims courts, legal service programs, social welfare agencies and government offices. These programs require skilled and trained intake specialists who are knowledgeable about the sources of assistance within the community. 346

A former member of the ABA LRIS Committee suggests that other improvements can be made in bar referral programs to make them "client-friendly." He notes, for example, that individuals who are fearful of lawyers and the justice system want to know up front what they will be charged and information about the lawyer to whom they will be referred. He notes that they also prefer to be given a choice of lawyers. 347

d. Hotlines and Legal Information Telephone Services

Telephone advice services via 800 or 900 telephone lines are an affordable method of providing individualized legal advice to persons who cannot or will not visit lawyers' offices. These services have been provided by some consumer organizations and bar associations, and they may provide advice in many languages.

The nonprofit Legal Counsel for the Elderly program legal assistance program operates a "legal hotline" or telephone advice and assistance service, via 800 toll free telephone lines in nine states. In this program, lawyers offer free telephone help to older Americans regardless of income or the nature of their problems. 348 A sophisticated computer network allows callers to speak directly

345 Statement of New York State Bar Committee on Nonlawyer Practice, supra note 246, at 3.

346 The ABA's standards for lawyer referral services urge bars to offer information to callers about alternative sources of assistance. See ABA, MODEL SUPREME COURT RULES GOVERNING LAWYER REFERENCE AND INFORMATION SERVICES (August 1993). Rule II provides: A qualified service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems. Id.

347 See Moore, Improving the Delivery of Legal Services for the Elderly, supra note 322, at 823 and Accio to Legal Services Diner, supra note 240.

348 See Moore, Improving the Delivery of Legal Services for the Elderly, supra note 322, at 823. Moore reports that most callers have a low- or middle-income level. Id.
with lawyers experienced in their areas of need. Lawyers make referrals for callers whose legal needs they cannot meet by telephone. The referral lawyers agree to offer reduced fees of about $50 to $60 an hour.349 The program’s director notes that the experience of lawyer referral services, legal hotlines and prepaid legal service programs is that they resolve the majority of legal concerns over the telephone.350

Some bar associations are also providing advice by telephone. For example, the Jackson, Mississippi Young Lawyers’ Association answers telephone calls from the public once a week. Some bars are using the media to offer individualized advice. An example is the Denver Bar Association Weekly call-in television show which has combined with Denver’s Channel 9 to answer viewers’ questions about law-related problems. The calls are handled off the air while public information is broadcast.351 A Washington State task force, created by the Chief Justice of the Washington State Supreme Court, recommended that the Washington State Bar Association institute a telephone system with a 900 number service and also made detailed recommendations concerning billing, staffing, scope of service and liability insurance.352

Several bar associations, especially those for which operation of staffed lawyer referral services or 900 telephone lines is not feasible, provide toll free numbers that allow people across the state to access pre-recorded information about a wide variety of legal subjects. Callers may listen to recordings on substantive issues and on procedural issues such as accessing the courthouse and finding legal help. Often callers have the option of receiving brochures about the subjects of their inquiries.353 These “tel-law” programs provide tapes in English, Spanish and other languages in order to serve the local population. These programs do not offer the individualized assistance provided by legal hotlines and advice programs, nor do they offer the comprehensive services provided by lawyer referral and information services. However, they do provide

349 Id.

350 Id. Prepaid insurance plan statistics also reveal that between 60% and 80% of problems presented to a plan’s participating lawyer can be resolved by telephone. American Prepaid Legal Services Institute, Opening the door to Affordable Legal Services, supra note 291. One study for the Orange County Bar’s Lawyer Referral Service, ascertained that one-third of the problems of that service were resolved over the telephone. See Mestecker, supra note 242.

351 Similar radio and television call-in programs are operated by the Palm Beach County Bar Association and the Hawaii State Bar. A complete listing of telephone advice programs is maintained by the ABA’s Standing Committee on Delivery of Legal Services. Several of the programs have also received awards from the ABA Center for Partnership Programs which maintains a listing of its awardees.

352 WASHINGTON STATE SUPREME COURT, ACCESS TO JUSTICE TASK FORCE FINAL REPORT, supra note 344.

353 See, e.g., the Michigan Tele-Court system, District of Columbia Bar Legal InformationHELP Line, and the San Diego Municipal Court 900 Phone Number Services, Tel-Law Taped Legal Information system.
basic information on legal subjects that may be sufficient for callers who are seeking general information only. 334

2. Legal Clinics That Provide Assistance to Low and Moderate Income Persons

Some bar associations now offer free legal assistance to low- and moderate-income persons through clinics held at courthouses, libraries and other neighborhood locations. These clinics are staffed by volunteer lawyers, law students and paralegals. Some of the clinics are operated for the express purpose of providing advice and assistance to low- and moderate-income litigants who intend to represent themselves. 335 Others are intended to provide advice and at least preliminary assistance to both low- and moderate-income persons. 336 In some communities, low-income litigants who need additional assistance or representation are referred to volunteer bar members who agree to handle their matters on a pro bono basis.

f. Community Education Programs

Bar associations can make effective use of the media to present public service announcements. These radio, print and television spots may include information on how and when to consult a lawyer, discuss the role of lawyers, how to find and what to expect from a lawyer, how to negotiate a fee and settle fee disputes.

334 These "in-law" programs operate in Michigan, New Mexico, Oregon and the District of Columbia, among other states. The New Mexico service, for example, has information on over 50 legal topics such as "Can Bankruptcy Help Me?" and "What if I am Injured at Work?" and it received the 1992 "Best Projects" award from the National Conference of Bar Presidents.

335 With the cooperation of the Superior Court, the District of Columbia Bar has established a family law clinic to assist low- and moderate-income persons who are representing themselves. The District of Columbia Bar plans to expand its clinic to include landlord-tenant and bankruptcy matters. The D.C. Bar, 23 Bar REPORT (Oct/Nov 1994) (describing plans to provide help in bankruptcy matters.) The Commission also learned that in South Carolina, the South Carolina Bankruptcy Bar Association is recruiting attorneys to provide free assistance to persons proceeding pro se in personal bankruptcy matters.

336 The Middlesex County Massachusetts Bar Association operates a "Free Legal Clinic" every Wednesday evening by appointment to provide free legal advice to "people who cannot afford an attorney and who cannot be helped by the traditional legal aid services." Similar programs have been established in Hillsborough County, Florida and in Richmond, Virginia. The ABA Young Lawyers Division began a program in 1994 to encourage law firms and local bar groups to open offices for the "working poor" in which it is contemplated that a nominal flat fee of about $50 will be charged. See Filling the Gap: Access to Justice for Persons of Modest Means, ABA Young Lawyers Division Pamphlet (1994). According to an interview with Heidi McNeill, coordinator of the Young Lawyers project, the purpose of the program is to "provide legal services for the 'gap group'—people who make too much money to qualify for Legal Services Corporation assistance, but too little to afford a private attorney." Program Fills Gap in Legal Aid, THE Nat'l. L. J., July 4, 1994. The projects were modeled after the law office for persons of modest income established by the law firm of Hunton & Williams in the Church Hill section of Richmond, Virginia. See Hettrick, Doing Good, 79 A.B.A.J. 1993.
A University of Baltimore Law School professor, who serves on the Council of the ABA Section on General Practice and on the ABA Standing Committee on Professionalism, stresses that the organized bar must do more to educate the general public about what lawyers do and why they are important—both to individual clients and to society.357 The Oregon Bar, for example, produced and ran a series of radio and print ads designed to remind consumers that using a lawyer is often less expensive and more effective than using a nonlawyer for the same service. The four 60-second radio ads featured consumers who are faced with a seemingly simple legal problem but hesitate to consult a lawyer because of the perceived expense. A voice-over at the end of the ad encourages the listener to call the state bar's toll-free number for a free booklet on the legal subject of the ad. It was reported that "the bar got so many calls during the first week the radio ads ran that its switchboard jammed."358

Some bars are creating innovative ways to teach the public. The ABA's Family Law Section, for example, has devised a unique program for high school students which teaches them about the monetary costs of marriage and having children as well as about related legal topics.

3. THE ROLE OF THE COURTS IN PROMOTING ACCESS TO JUSTICE

Conferences at the ABA 1994 Just Solutions Conference concluded that service and courtesy to all persons involved in court processes are essential. Thus, courts should enhance access to information and assistance to users of the court system. Translators for non-English speaking court participants, extended court hours and neighborhood or community courts were among the conference recommendations.359 Of particular urgency, the Just Solutions conference noted, is the need for improved assistance to pro se litigants. The Commission notes that court sponsored assistance programs should maintain the neutral posture necessary to foster confidence in the judiciary while still providing a level of assistance that will avoid irreparable harm to the self-represented person. Court programs should also provide a level of service that will enable the self-represented persons to at least avoid procedural or technical errors.

A number of courts have already undertaken public service initiatives.360 We turn now to a review of some of them.

a. Informational Materials

In the past decade several courts have developed informational materials for public use. Pamphlets, slide shows, audio tapes, video programs and interactive video programs are among the new tools to assist litigants, witnesses and

357 See Weston, supra note 275.

358 As reported in Oregon Bar Promotes the Value of Lawyers, ABA BAR LEADER 36 (Jan–Feb. 1994).

359 ABA JUST SOLUTIONS REPORT, supra note 121, at 30–35 and 42–43.

360 For example, in 1991 the Domestic Relations Division of the Maricopa County Arizona Court began an Extended Hours Court to offer litigants, most of whom appear pro se, access to the court after normal working hours for resolution of uncontested domestic relations matters.
jurers. The materials explain court procedures, the rights offered and obligations imposed in particular courts, filing procedures for pro se applications for mediation or arbitration and how to obtain free or reduced fee legal assistance.

For example, in 1993 the Napa County Superior Court produced a "Pro Per Packets for Family Law Procedures." An informational video explaining tenant and landlord rights in housing court, prepared by the Association of the Bar of the City of New York, is now available in the Queens, Brooklyn and Staten Island Housing Courts. In 1994 the District of Columbia Bar received a grant from the State Justice Institute to produce two educational videos, manuals for pro se litigants and simplified form pleadings to be used in the District's family law courts. Copies of these materials will be circulated through community groups, law school clinics and local libraries. Maricopa County in Arizona places its informational packets for pro se litigants in law libraries.361

b. Telephone Assistance

Taking the lead from bar association and nonprofit agency telephone advice services, some courts now offer similar services to those who are seeking information about court procedures. For example, the San Diego Municipal Court maintains a 900 number telephone service that, for the cost of using the 900 line, provides motorists with personalized information on their traffic offenses and how to resolve them.362

c. Assistance to Pro Se Litigants

The growth in self-representation has caused an explosion in caseload volume for many courts across the country. While the Commission lacks national statistical data reflecting the volume of pro se litigants currently appearing in all federal and state courts, the Commission's record reveals that pro se caseloads are now growing dramatically in civil courts.363 This apparent trend is increasingly discussed in bar and judicial forums.364

In Maricopa County, Arizona, which the Commission visited, at least one party was unrepresented in 88% of the divorces in 1990 and both parties were

361 Information on these and other programs can be obtained from the ABA Standing Committee on Delivery of Legal Services.

362 This program is noted in ABA JUST SOLUTIONS REPORT, supra note 121, at 30.

363 See supra notes 116 and 117 and accompanying text. A similar increase has occurred in administrative agencies. See statement of Sally Kurtz, Acting Chairman of the Administrative Conference of the United States Statement, supra note 157. Chairman Kurtz stated that the Social Security Administration was projecting a caseload of 500,000 for 1994 for its 900 administrative law judges and rapidly growing caseloads in immigration and veterans benefits were "straining the system." Id.

364 See, e.g., Consumer Bankruptcy: A Roundtable Discussion, supra note 117, at 5 (a discussion by several federal bankruptcy judges concerning the explosion of pro se litigants in the personal bankruptcy area). At the ABA Annual Meeting in New Orleans in 1994, a program discussing the general explosion of pro se litigants in family and other civil courts, entitled Litigants Without Lawyers: The Bench and Bar Responded, was presented by the Judicial Administration Division of the ABA and the ABA Standing Committee on Delivery of Legal Services on August 8, 1994.

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unrepresented in 52% of the cases.\footnote{Sales, Beck and Haan, supra note 123.} The high rate of self-representation in divorce matters, particularly uncontested matters, does not appear to be unique to Maricopa County. The Commission received testimony that very high pro se caseloads are increasingly common in divorce courts all over the country.\footnote{Pro se representation is not limited to domestic relations cases. Bankruptcy courts have also faced an avalanche of self-represented persons in recent years. As prison populations have risen, so too has the number of pro se civil rights claims protesting alleged prison misconduct, seeking review of parole board decisions, claiming entitlement to medical care or public benefits, and raising a host of other civil claims.\footnote{To address the challenge of dramatically increased numbers of pro se litigants, the courts, frequently in collaboration with the bar, legislatures and individual practitioners, are devising innovative mechanisms to provide assistance. For example, the federal district court in Washington, D.C. has received so many pro se cases from prisoners, government and private sector employees alleging employment discrimination, and from others that the court established a pro bono panel of bar members to assist the pro se litigants and also helped it establish a privately funded pool of money to pay out-of-pocket expenses so that the volunteer lawyers would not have to pay them.\footnote{A Denver Law School Dean Emeritus states that to address the challenges presented by expanding self-representation caseloads, resources must be coordinated.\footnote{The bench, the general bar, the family practice bar, legal service}

\textit{Sales, Beck and Haan, supra note 123.}}}}
lawyers, academics and court administrators must be included in the development of new programs. The Dean further noted that any program of materials or assistance must include a warning to pro se litigants about the need for at least advice, if not representation, from a lawyer when certain circumstances are present. He cited research revealing that pro se litigants too often proceed without the benefit of critical information such as pretrial relief, allocation of insurance and pension benefits, and tax consequences. This is another way in which such programs, even when utilizing nonlawyer personnel, can seek to prevent the self-represented person from inadvertently suffering harm.

For many years most courts prohibited court personnel from providing information about the preparation of pleadings or court forms lest they inadvertently provide "legal advice" and engage in the unauthorized practice of law. Now, a growing number of courts are both using existing personnel and employing specially trained assistants who are usually nonlawyers to help pro se litigants and witnesses. Some courts have established teaching seminars in which judges or court personnel speak to groups of pro se litigants. Some have included in the seminars nonlawyer document preparers who are regularly helping pro se litigants complete the court-approved forms. This may have developed because, as several judges informed the Commission, they would prefer that nonlawyers who regularly assist pro se litigants be trained so that delays caused by poorly prepared documents can be avoided.

Under the auspices of its supreme court, the Washington State Courthouse Facilitator Project was launched in seven counties in 1993. The facilitator, who are paralegals, help pro se litigants in family court calculate child support, answer questions on court procedures, provide court-approved forms, make available brochures and other written or audio materials, and provide referral services to existing community programs as appropriate.

Courthouse facilitators are now emerging in other jurisdictions. Some employ full-time paid staff and others utilize volunteers who may be paralegals, law students, trained nonlawyer volunteers or lawyers.

Some courts have developed, in conjunction with local bar or law school clinical programs, comprehensive legal assistance programs for persons of low
and modest incomes. These courts typically provide offices or desk space with telephones and other materials for use by pro bono lawyers and paralegals. Others simply assign pro se litigants to volunteer lawyers on request.

d. Interactive Video Projects

Several courts have installed sophisticated interactive computer systems for use by pro se litigants. For example, the Maricopa County Superior Court developed a multimedia interactive computer system, known as "Quick-Court," which is housed in a kiosk similar to a bank ATM machine. The computer program poses questions that the user answers, then generates ready-to-file forms in no-fault divorces, landlord-tenant and small claims matters. The program prompts a user in the calculation of child support required under statutory or judicial guidelines. Because the software is interactive, the forms can be tailored to each person, offering an improvement over the generalized commercially available software. In 1995 the Court plans to expand the kiosk concept to include probate and guardianship matters.

In South Carolina, a Pro Se Modification of Child Support Awards Project opened in 1994 to help parents who cannot or choose not to hire a lawyer to alter court-ordered child support payments, to prepare for hearings, and to help ensure that child support payments are equitably set to meet the needs of parents and children. The South Carolina project offers a hotline for parents to seek information about child support guidelines; a computer equipped with child support guidelines software is available to complete worksheets and form pleadings with instructions. On-site assistance to parents is also provided by paralegals and law students.

4. THE ROLE OF LAW SCHOOLS IN PROVIDING IMPROVED ACCESS TO JUSTICE

While the role of law schools was not a principal focus of the Commission's study, a number of witnesses offered suggestions meriting further consideration. Others are set forth in the Report of the ABA 1994 Jur Solutions Conference. The Commission agrees with the statements made by several witnesses that law schools should educate students about today's marketplace and that students at all law schools should be encouraged to think in terms of provid-

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373 Some of these clinics are described above in the preceding section on bar association programs.

374 Other courts operating kiosks are discussed earlier in this report in Part One § B.2.b.ii.

375 William R. Byres, Jr., Chief Administrative Judge for the Fifth Judicial Circuit in Columbia, South Carolina stated that the project would help the courts be productive, explaining "oftentimes, when people are representing themselves they don't know what information to present to the judge in order for the judge to make the right decision. A judge's decision is only as good as the information he or she receives." Judge Byres added that he would advise everyone to retain an attorney but recognizing the trend to self-representation, he stated "it is necessary that the courts make self-representation easier and help people understand what information they need to present." As quoted in ABA Press Release issued by the ABA Center on Children and the Law (1994).
ing help to individuals at modest fees rather than assuming that they can all be employed in large law firms representing major corporations. Similarly, law schools should consider marketplace realities when determining tuition fees, loan forgiveness programs, clinical training, work-study plans, internships and their curricula because the high cost of the legal education requires law students to earn enough not only to live, but also to repay law school loans after graduation.

A University of Maryland law professor and chief of its clinical program reports, for example, that his law school, as well as the University of Baltimore, have made such an analysis and plan to develop a curriculum aimed specifically at training students to provide legal services to under-represented segments of the population on a fee generating basis.376

A law professor at George Washington University School of Law, and former president of the American Association of Law Schools, stresses that law schools must recognize the markets that their graduates will serve and identifies, for example, the need for multi-lingual lawyers—both to serve non-English speaking immigrants in this country and to work with overseas clients as the economy and the practice of law become globalized.377

The Dean of the University of South Dakota Law School, and former director of the ABA Division of Professional Education, urged the legal profession, including law schools, to envision the education of nonlawyers to handle legal matters and, specifically, the future role of law schools. He observed that because state law schools are increasingly relying on tuition and private fundraising, paralegal and other nonlawyer professional education has the potential to increase law school revenues. He forecast that in the next century, law school would be a division of allied legal sciences including paraprofessional education "just as we now have most medical schools being divisions of allied health sciences." He added:

We will teach both J.D. candidates and a variety of specialties in law practice, plus we may be teaching law enforcement personnel, legal assistants and technicians, mediators, arbitrators, investigators, legal administrators, and (others). I think we'll also have courses for the public to allow them to handle some of their own legal matters, and for other professions—financial advisors, accountants and (others)—to help them deal with the increasing regulation of their areas of practice.378

376 Professor Michael Millemann reports that the law school of the University of Maryland will be cooperating with the University of Baltimore and the Maryland State Bar to establish a general practice law firm in a clinical setting that will address the needs of the "Third Quartile," that is, those with incomes up to $45,000. One aim of the new program is to identify new legal markets to be served by the clinic as well as by students after they graduate. The partnership with the Maryland State Bar will allow the delivery models developed at the clinic to be adapted by the private bar. CLE programs will also be offered to members of the bar. See Podger, Chasing the Ideal, supra note 256 at 60.

377 Remarks by Professor Thomas D. Morgan, supra note 267.

The dean noted that an existing model for his vision of the future is the Master in Legal Studies program at the University of Nebraska Law School, a one-year program for other professions such as financial advisors and realtors. He also noted the blurring of lines between law school education and continuing legal education, suggesting law schools will play a more dominant role in continuing legal education in the future.379

A legal ethics professor at Hofstra University School of Law urges the greater employment of third-year law students to serve persons of modest means.380 This development would require a number of changes despite the fact that every state (including the District of Columbia and Puerto Rico) has adopted a student limited practice of law rule.381 For example, awarding academic credit for clinical practice as well as structured internships with private law firms and other entities, including paying internships, will require a revision of both law school policies and the ABA accreditation rule, Standard 302, which currently prohibits law students from receiving academic credit for paying work. Legislative authorization may be necessary to protect student participation in non-litigation matters such as landlord/tenant, wills or tax. Malpractice insurance might also need to be expanded to provide coverage beyond legal aid or defender services, he notes.

A proposal to establish a residency requirement for recent graduates to practice residencies in the medical profession was the subject of the winning essay in the ABA 1994 Ross Essay Contest.382 The author writes that the burden of law school loans, malpractice insurance and other costs make it very difficult for a lawyer in search of employment to simply open a practice. He argues that instituting a residency program placing recent graduates in law firms, government agencies, corporations and legal service programs will give young lawyers an opportunity to gain invaluable experience and at the same time provide help for the “group that will not qualify for pro bono or reduced fee representation, yet cannot afford the services of an attorney.”383

379 The Report of a 1992 ABA task force on law schools and the profession also stressed that legal education is a continuing one rather than one that ends with graduation from law school. See generally ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, supra note 237.

380 Professor Roy D. Simon, Hofstra University School of Law, written statement to the Commission on Nonlawyer Practice (1994).

381 Joan Wallman Kurucz and Rachel A. Brown, Student Practice Rules in the United States, 63 THE BAR EXAMINER 49 (August 1994). Appendix I summarizes the key provisions of student practice rules in the fifty states, the District of Columbia and Puerto Rico as of March 1994. In the era of permitted activities, almost every state authorizes students to represent clients in both civil and criminal matters. Seven jurisdictions (Delaware, District of Columbia, Michigan, Ohio, Oregon, Rhode Island, Vermont and Washington) expressly permit student practice in juvenile matters and allow students to appear in juvenile or family court while Vermont allows students to appear in probate court, thereby expanding the scope of student practice to important and new practice areas.

382 Alan Scott Nemeth, Taking Care of the Middle Class, 80 A.B.A.J. 72 (Sept. 1994). Nemeth is a staff attorney at the National Veterans Legal Services Project.

383 Podger, Rediscovering the Middle Class, supra note 281, at 72.
Conferences at the ABA Just Solutions Conference recommended that all law
students be required to participate in mandatory pro bono projects during their
law school career and opined that this would both help meet unmet legal needs
of low- and moderate-income persons while offering students hands-on expe-
rience.384 Many persons advocated also that law schools provide clinical train-
ing for all students.385 While such programs will expand the opportunities for
members of the public to receive legal assistance, the need to have in place
mechanisms promoting public protection should not be overlooked.

5. THE ROLE OF THE FEDERAL AND STATE GOVERNMENTS

A comprehensive discussion of the role that state and federal govern-
ments can play in improving access to justice is beyond the scope of this
report. Numerous suggestions are contained in the ABA Report on the
1994 Just Solutions Conference and in previous ABA reports.386 The ABA
has long advocated adequate funding for the justice system by federal and
state governments and has supported federal funding for the Legal Services
Corporation.387

As in the case of law schools, however, several suggestions were brought to
the attention of the Commission that seemed especially worth considering.
Of particular note was the recommendation of the Attorney General of the
United States that state and local jurisdictions establish two and four year
college programs in community advocacy that would graduate cadres of
trained advocates to provide assistance to the public with administrative
agency and other law-related problems not currently being met by the jus-
tice system.388

The federal and state governments can also enhance access to justice by
establishing multi-purpose information and referral systems that link together
courthouse intake systems (such as the ABA sponsored "multi-door" projects),
lawyer referral services, crisis hotlines, government agency intake systems and,

384 ABA JUST SOLUTIONS REPORT, supra note 121, at 60.
385 A recent ABA task force on law schools and the profession concluded that while
universal live-client clinical training for all law students may not be feasible from a bud-
getary perspective for some time, law schools should expand their clinical course offer-
ings. ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, supra
note 237, at 254, n. 36.
386 See, e.g., ABA JUST SOLUTIONS REPORT, supra note 121.
387 See ABA POLICY AND PROCEDURES HANDBOOK, Index: Legal Services Corporation
388 Speech by Attorney General Janet Reno at the 1993 ABA Conference, REACHING
COMMON GROUND: A SUMMIT ON CIVIL JUSTICE IMPROVEMENTS, Washington, D.C.,
Dec. 13, 1993, Tr. 16, and reprinted in Major Leader Special Supplement, FEDERAL NEWS
SERVICE, 7, Dec. 13, 1993. It was reported at the ABA Just Solutions Conference that the
city of Milwaukee already has a program using the services of nonlawyers to assist low-
income persons with homelessness, health, housing and public assistance issues. ABA
JUST SOLUTIONS REPORT, supra note 121, at 36.
nonprofit social service information and referral programs. The emergence of computer networks on which information can be easily accessed offers a practical tool for linking together varied referral systems. Nonlawyers can play a valuable role in these information and referral systems as they have for many years in other countries. For example, in Great Britain neighborhood offices called Citizens Advice Bureaus are staffed by trained nonlawyers who handle several million requests a year for information and advice. Referral and advice programs can also be established as components of neighborhood complaint and dispute resolution centers.

Simplification of laws, regulations and procedures by legislative and executive branches of governments have also been urged by many. Virtually all states have reduced complexity in the divorce field by changing their laws to include no-fault divorces. More recently, child support obligations have been standardized in many jurisdictions. A few legislatures have adopted model pleadings and standardized forms that reduce the complexity for certain kinds of other legal matters such as statutory wills. These simplification statutes enable increased numbers of persons of modest means to represent themselves with minimal advice or "discrete task representation" from the bar.

The Commission finds that nonlawyers who assist and represent individuals in agency proceedings expand access to justice for the American public participating in these forums, particularly for those lower and moderate-income persons whose needs are not now adequately met by the justice system. Consequently, the Commission recommends that states should consider allowing nonlawyer representation of individuals in state administrative agency proceedings, and that nonlawyer representatives should be subject to the agencies' standards of practice and procedure. In arriving at this recommendation, the Commission relied in significant part on the practices and experience of some state and many federal administrative agencies.

Recommendation 3
States should consider allowing nonlawyer representation of individuals in state administrative agency proceedings. Nonlawyer representatives should be subject to the agencies' standards of practice and procedure.

389 Several legal scholars have advocated combined information and referral systems that utilize the services of nonlawyers and combine lawyer referral services with other community access services. See Moore, Access to Legal Services Paper, supra note 240, at 5 and Improving the Delivery of Legal Services for the Elderly, supra note 322, at 869; Bellows, Legal Services in Comparative Perspective, supra note 253, at 374–75.

390 See Slovis, Let's Look at Citizens Advice Bureaus, 65 J A.B.A. 567 (1979); Jeremy Cooper, English Legal Services, 5 Mt. J. OF COmM. LEGAL ISSUES 247, 250 (1994); Bellows, Legal Services in Comparative Perspective, supra note 253, at 374–75. Professor Bellows notes that of the 1.4 million cases that legal service programs handle every year, close to 80% are handled by referral, limited service, or advice and information. He states "The problem in the United States is that we treat this phenomenon as something that we 'have to do' in order to get on with the more important represented cases, instead of focusing on it as important itself. Thus, 'make'—as we call it—is always done by the least experienced people, with the least monitoring, and subject to the least rigorous standards of quality." Id. at 375. See also Moore, Access to Legal Services paper, supra note 240 for similar comments.

391 See supra note 259 and accompanying text. See also discussion supra, Part Two, § A.

392 The history of nonlawyer practice before federal agencies is discussed earlier in the Report at Part One, § 3.
The Commission has learned that not all agency proceedings are so complex that they require the specially trained skills of a lawyer. This is particularly true in the early stages although the record reveals that even in later stages of many agency proceedings, experienced nonlawyers perform competently. Both Justices Rehnquist and Douglas have supported this proposition. In 1969, Justice Douglas stated the rationale for permitting nonlawyer assistance:

"It is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent."

Justice Rehnquist has expressed similar views in the Court's opinions upholding nonlawyer assistance to veterans making benefit claims. The Commission also concludes that there are many tasks undertaken by lawyers on behalf of their clients that are not the practice of law but only incidental client services which can be performed by both lawyers and nonlawyers. Similarly, federal administrative agencies report that nonlawyers provide valuable help in many kinds of proceedings. The acting chair of the Administrative Conference of the United States (ACUS) called the Commission's attention to the "staggeringly large" caseloads and resulting backlogs currently existing in so-called "mass justice" federal administrative agency proceedings such as the Social Security Administration. She stated that "pro se claimants cause great difficul-

393 1993 statistics from the Social Security Administration reveal that in 1992, claimants who were represented by attorneys obtained favorable decisions in 73.2% of their appeals while those who were represented by non-attorneys obtained favorable decisions in 71% of their appeals. Claimants represented by anyone prevailed in only 57% of their appeals. Similar results were obtained in 1993 with claimants succeeding in 72.6% of their appeals when represented by a lawyer, 69.8% when represented by a non-lawyer and 52.7% when unrepresented by anyone. See Social Security Administration, Office of Hearings and Appeals, Office of Policy Planning and Evaluation, "Highlights for Fiscal Year 1993 Tables 1 and 2 (Nov. 30, 1993)." See also Popkin, The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs, 92 CORNELL L.REV. 989 (1977) (finding that in Federal Employees' Compensation Act proceedings, represented claimants are more likely to prevail in nonadversarial proceedings than unrepresented ones.


395 Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding a $10 fee limitation against a challenge that it unconstitutionally precludes representation by lawyers and asserting that the record showed that veterans were not harmed by nonlawyer representation.) The effect of the fee cap is to limit all representation for fees from both lawyers and nonlawyers. Justice Stevens dissented and argued that whether or not lawyers would be more successful in veterans proceedings than nonlawyers, the fee limitation limits the fee choice of representative and that limitation is both harmful and an unconstitutional infringement of individual liberty. Id. at 368–72. The ABA is on record as opposing the fee cap and supporting legislation to repeal it. ABA POLICY AND PROCEDURES HANDBOOK, Index to ABA Policy 137.
ties and nonlawyer representation can help provide relief to the system as well as to the individual caught up in it.\textsuperscript{396} This observation finds support in the success rates achieved by nonlawyers in Social Security appeal hearings.\textsuperscript{397} ACUS includes the heads of all federal agencies as well as other federal public officials and public members appointed by the President. It is charged with reviewing and adopting formal recommendations regarding federal agency practice. It adopted formal recommendations concerning nonlawyer practice before federal agencies at its 33rd plenary session on June 19, 1986. Its first recommendation was:

The Social Security Administration, the Immigration and Naturalization Service, the Veterans Administration, the Internal Revenue Service, and other federal agencies that deal with a significant number of unassisted individuals who have personal, family or personal business claims or disputes before the agency, should review their regulations regarding assistance and representation. The review should be directed towards the goal of authorizing increased assistance by nonlawyers, and of maximizing the potential for free choice of representative to the fullest extent allowed by law.\textsuperscript{398}

ACUS also recommended that agencies tailor any eligibility criteria "so as not to exclude nonlawyers (including nonlawyers who charge fees, as a class, if there are nonlawyers who, by reason of their knowledge, experience, training or other qualification, can adequately provide assistance or representation."

Contrary to the federal experience, state administrative agencies do not have a uniform history of permitting nonlawyer representation. In some states there

\textsuperscript{396} Written statement to the Commission on Nonlawyer Practice by Sally Katten, Acting Chairman of the Administrative Conference of the United States, \textit{supra} note 157. Katten further stated:

I believe that it is crucial that the bar takes an affirmative stand in favor of increased availability of nonlawyer representation (albeit with appropriate safeguards) in programs such as those administered by the SSA, INS, VA and other mass justice agencies.

Katten also noted that "while supporting a maximization of free choice of representatives," ACUS recognized that agencies might need to establish "specific eligibility criteria at some or all stages of representation." \textit{Id.}

\textsuperscript{397} See Social Security Administration, Office of Hearings and Appeals, Office of Policy Planning and Evaluation, \textit{Highlights for Fiscal Year 1995}, \textit{supra} note 393.

\textsuperscript{398} Administrative Conference Recommendation No. 86-1, Nonlawyer Assistance and Representation, 1 C.F.R. § 305.86-1 (1987). The Conference reviewed a report on the subject of nonlawyer practice which was prepared under the direction of its Committee on Regulation. This report noted, among other things, the administrative efficiencies that resulted when individuals were represented as opposed to when they were proceeding pro se. See \textit{Report to Administrative Conference of the United States, Committee on Regulation}, 33rd Plenary Session, June 19, 1986. See generally Honorett, Nonlawyer Assistance to Individuals in Mass Justice Agencies: the Need for Improved Guidelines, 2 \textit{Admin. L. Rev.} 85 (1988).

\textsuperscript{399} See generally Remmer, \textit{supra} note 65.
is already extensive nonlawyer representation. In other states such representation has only recently been authorized. Case law reveals that some state courts have refused to permit nonlawyers to appear before administrative agencies. There is no clear pattern to these decisions. At one extreme, some state supreme courts have ruled that they have exclusive authority over the practice of law outside of the courtroom and that the legislature cannot authorize nonlawyers to provide representation in administrative agencies. At the other extreme, New York courts, in upholding nonlawyer practice before administrative agencies, have found that their power is subordinate to that of the legislature and can be exercised over issues concerning the practice of law only if the legislature has not acted.

A majority of state supreme courts, while asserting their inherent power to regulate the practice of law outside of the courtroom, have stood aside in the face of legislative action regulating practice before administrative agencies on the theory that such actions are "in aid of the judiciary." Florida and some other courts have determined explicitly that the legislature has concurrent power with the court to regulate and control the practice of law, including practice before administrative agencies. These differing theories on the inherent power of the courts to control law-related activities outside of courtrooms have resulted in disparate decisions concerning nonlawyer practice before state administrative agencies. The federal courts, on the other hand, have never asserted any inherent power over federal administrative agency practice. Administrative law scholar, Walter Geelhorn, has written:

Eradication of whatever defects there may be in prevailing controls over practice before federal agencies is peculiarly a matter within the compe-

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400 A 1993 survey by a committee of the New York County Lawyers' Association found that 70% of New York State agencies and 63% of New York City agencies permit some form of nonlawyer representation for at least some purposes. The committee's report on the results of the survey stated that the committee "found, generally, a positive view of nonlawyer advocacy and a fair consensus on the issues of the need for appropriate training and, possibly, agency regulation or licensing and examination." Committee Report, Committee on Legal Assistance, New York County Lawyers' Association, Oct. 14, 1993.

401 See In re Unauthorized Practice of Law Rules Proposed By the South Carolina Bar, 422 So.2d 123 (1992) and earlier discussion at note 51 and accompanying text.

402 See, e.g., Floret v. City of Glendale, 463 P.2d 67 Ariz. 1969 (en banc) (discussed supra note 198); ABA STATE LEGISLATIVE CLEARKHOUSE BRIEFING BOOK, supra note 70; Roe, supra note 71; Remmert, supra note 65.

403 See generally cases cited in Remmert, supra note 65 (discussing state court rulings on inherent judicial power to regulate practice before state administrative agencies).

404 See, e.g., Earley v. State Bar, supra note 64, at 436.

405 See generally Remmert, supra note 65.

406 Id.


408 See generally Remmert, supra note 65.
tence of the national legislature and of the administrative bodies themselves. The Supreme Court has never expressed the belief apparently held by some state courts that prescribing qualifications for administrative practice is an inherently judicial power. On the contrary, in Goldman v. United States Board of Tax Appeals 270 U.S. 117 (1926), the Court held that an administrative tribunal, even in the absence of explicit statutory authorization to do so, may properly establish standards of practice before it.

In any event, either by statute or agency rule, a growing number of the states permit nonlawyer representation before some administrative agencies, most typically those handling individual matters such as unemployment insurance, workers’ compensation, public health and public assistance benefits, employment discrimination and real estate assessments.410 State agencies, like federal ones, cover diverse subject areas and have procedures that range from informal to very formal and complex. No uniform rule of representation applies to all administrative agencies, either at the federal or state level.

Agencies permitting nonlawyer representation in hearings or other proceedings have frequently adopted standards of practice and ethics that are applicable to all who appear in a representative capacity, whether they are lawyers or nonlawyers. Some have also established disciplinary offices to enforce the standards of practice. ACUS recommended that in the federal arena, agencies should apply to nonlawyers, as appropriate, rules of conduct that they apply to lawyers. These rules address such matters as negligence, excessive fees, fraud, misrepresentation, and conflicts of interest and establish agency procedures for enforcing those rules of practice and for receiving complaints from the affected public.411 The Commission agrees with ACUS and urges both the federal and state governments to make applicable to nonlawyers, as appropriate, all standards of practice and disciplinary procedures.

The Commission heard compelling testimony that an area where such regulation is particularly needed is in the immigration field. The Commission received information and documentation from many sources that there is a significant problem of protecting the public in the immigration and naturalization area prior to the time any appearance is made before the Immigration and Naturalization Service (INS); that a number of nonlawyers who have little qualification are exploiting recent immigrants and refugees, and sometime illegal aliens; that they charge substantial fees and fraudulently or negligently


410 See, e.g., In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 So.2d 123 (1992) (ruling by the South Carolina Supreme Court that nonlawyers may represent others in proceedings before the state’s administrative agencies where the agencies’ rules permit nonlawyer appearances.)

411 Several federal agencies, including the U.S. Patent and Trademark Office and Internal Revenue Service, have rigorous admission and disciplinary procedures, and some agencies, such as the NLRB have no special admission or discipline procedures. See generally Remmert, supra note 65.
promise to secure visas or other benefits that they cannot or do not deliver; and that, in fact, they never sign and file papers with the INS or otherwise make themselves known to the INS. Since these activities do not involve representa-
tion before the INS, they are not regulated by the federal agency.

There is an extensive array of advice and assistance that can be given to aliens and refugees regarding visas and related matters even when there are no proceedings pending before a governmental agency. While some of these mat-
ters may be relatively straight-forward, with a relatively small risk of signifi-
cant harm if the advice is erroneous, for other matters incompetent services can result in serious harm such as denial of immigrant or refugee status and deportation. Moreover, an immigrant’s lack of familiarity with the English language, or with American culture and legal practices, can make it difficult for the immigrant to assess the qualifications of a person offering immigration assistance.412

Recently, a few states have taken action to curb such abuses by regulating those aspects of nonlawyer assistance in the immigration law area that are not already governed by federal regulation. For example, a California law allows nonlawyer immigration consultants to provide advice, draft documents and fill out forms but written contracts are required and they must include notice that the consultant is not a lawyer.413

The Commission concurs with the findings of the ABA Coordinating Committee on Immigration Law that there are many qualified nonlawyers who can provide valuable assistance to immigrants for many matters and that this should be encouraged. But also agrees with the Coordinating Commit-
tee that appropriate state laws and regulations should be adopted to curb abuses.

In the federal area, nonlawyers currently provide assistance in INS proceed-

ings in a representative capacity (although in this instance the agency has lim-

412 Some of those providing assistance for compensation to the public in the immi-
gration area are known as “immigration counselors,” “visa counselors” and, particular-
ly among Spanish speaking populations coming from “Central or South America, as
“consulados” or “notarios.” The “notario” title especially lends itself to deception because
many Central and South American countries are based on civil law and in those sys-
tems the notario is an important legal official while the office of “notary public” in this
country has a similar title but carries with it more modest authority and responsibili-
ty. See generally Pedro A. Malave Cruz, Counsel for the Situation, the Latin Notary: a
Historical and Comparative Model, paper prepared for publication on file with the
author, Georgetown Law School (Dec. 30, 1994 draft, at 73). (Paper notes the fact
that in civil law countries, documentary evidence is seen as more reliable than testi-
monial evidence, and consequently, the written word is paramount in judicial pro-
ceedings. The paper further notes that because the notarial document is prepared and
certified by a “qualified legal professional,” the notarial document is “singled out for
very special probative value.” (Id)

413 Cal. Gov’t Code § 23441 (West 1995) (en d. g. Ill.; St. Ch. 115 § 5052AA
(West 1994) (approved Aug. 12, 1994); Ariz. Rev. Stat. § 12-2701 to -2703 (West
statutes in 1987).
ited such representation to defined categories of nonlawyers).\textsuperscript{414} One of the most important categories of nonlawyer help in the immigration area is comprised of accredited representatives of recognized nonprofit organizations.\textsuperscript{415} Representatives of both the ABA Coordinating Committee on Immigration Law and the American Immigration Lawyers Association advised the Commission that the presence of the recognized organizations and their accredited representatives in the delivery system for immigration law service is well-established and should be continued. The Commission also received considerable information about the high quality of the services provided by these agencies and the fact that they enabled thousands of unrepresented immigrants and refugees to receive assistance that they would not otherwise receive. The Coordinating Committee recommended that to increase the availability of qualified services for parties with matters before the INS, the Department of Justice should amend agency regulations regarding representation to permit the accreditation of qualified nonlawyer employees of lawyers in the same manner as employees of nonprofit agencies are presently accredited, and to allow the sponsoring organization of all such accredited nonlawyer representatives to receive "reasonable" fees for services provided from those who are able to pay.\textsuperscript{416} The Commission agrees with these recommendations.

6. THE ROLE OF LAWS, RULES AND POLICIES

In the preceding subsections, the Commission encourages the practicing bar, bar associations, courts, law schools and governments to consider a variety of ways to improve access to affordable legal services and to justice. Each of these groups or institutions may also have a role in establishing the laws, rules and policies that govern the activities that can be lawfully performed in law-related situations by nonlawyers such as document preparers, legal technicians, law students, court personnel and traditional paralegals. The Commission urges, as part of this broad encouragement, and consistent with its previously expressed concern for appropriate public protection, that these groups and institutions also consider reviewing whether such laws, rules and policies should be modified.

\textsuperscript{414} The regulations governing practice before the INS define who may provide representation in various immigration matters. For the purposes of this report, the most relevant authorized representatives include lawyers, law students, law graduates not yet admitted to practice, family members or friends serving without pay, and accredited representatives. 8 C.F.R. § 292.1 (1992) The latter are nonlawyers who have undergone training and are affiliated with a not-for-profit organization formally recognized by the INS. Only a nominal fee can be charged and the organization must have access to assistance from a source knowledgeable in immigration law. Id.

\textsuperscript{415} There are presently 285 recognized agencies and 352 accredited representatives employed by them. Telephone Interview with Christine Donley, Paralegal Specialist, Office of Counsel, INS (Mar. 29, 1995).

\textsuperscript{416} ABA Coordinating Committee on Immigration Law, Recommendation on Nonlawyer Practice, Oct. 1993 (Statement submitted in conjunction with recommendation to ABA Commission on Nonlawyer Practice, Commission hearings, Phoenix, Arizona, Oct 1, 1993).
The most obvious restrictions on nonlawyer activity are outright prohibitions against nonlawyers "practicing law." Most states have criminal and civil statutes prohibiting the unauthorized practice of law (UPL), but enforcement of UPL is most frequently accomplished through court orders and informal policing actions, including advisory rulings of bar UPL committees. Statutes, court orders and bar UPL activities play an important role in establishing the limits of nonlawyer activity. Taking into account the findings and conclusions set forth in this Report, state entities may wish to reassess their current UPL laws, rules and enforcement activities. The growth of both written and computerized self-help materials may pose additional questions for review of legislative, judicial and bar association rules and policies regarding UPL. For example, state entities may wish to consider whether interactive software and CD-ROM assistance to self-represented persons are or should be covered by existing UPL statutes and rules.

Similarly, if courts and bar associations seek to provide model forms and in-person assistance to self-represented persons, state entities may wish to consider whether existing laws and rules governing court personnel, lawyer referral service staff, and law librarians need to be modified. Anticipating similar questions, the ABA Legal Technology Resource Center has already been examining the application of state UPL prohibitions to lawyers who use facsimile machines, modems, electronic mail or bulletin boards to provide advice to clients, potential clients or self-represented persons in states in which the lawyers are not admitted to practice.

If jurisdictions wish to permit law students and retired lawyers from other states to participate in rendering pro bono services, state supreme courts, federal courts and legislatures may need to consider modifying applicable laws and rules. With respect to law students who provide services through a law school's clinical practice program, through a legal services program, or as a part of an internship experience in the law office, special authorization for limited practice similar to that already existing in many jurisdictions may be needed. With respect to lawyers who have retired to jurisdictions in which they are not members of the bar, those jurisdictions may wish to create a special status for the limited purpose of permitting such lawyers to offer pro bono services.

417 See Part One, § A for a brief history of the enforcement of UPL by states. A discussion of the separation of powers doctrine as it applies to legislative and judicial enforcement of UPL by states is set forth in Remmers, supra note 65.

418 See Rhode, supra note 71 and accompanying text at 15–16 (summarizing survey findings that bar UPL committees are far more active in UPL enforcement than are other state entities).

419 A compilation of state UPL laws can be obtained from the ABA Center for Professional Responsibility. See also ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, ¶¶ 2-8D21 et seq (1984) (discussing state enforcement of UPL statutes).


421 The ABA Division for Legal Services reports that in several states, bar admission rules have been changed to permit retired lawyers to provide pro bono legal services even though they are members only of other state bars.
As a corollary to state laws barring UPL, state supreme courts, state bar associations, and occasionally, state legislatures, have adopted ethics rules, standards and policies governing the conduct of lawyers who participate in providing legal or law-related services in conjunction with nonlawyers. As the following discussion indicates, the issues raised in this Report necessarily implicate a number of these rules. In each state the appropriate entities may wish to consider reviewing their relevant ethics rules, standards, and policies to determine their impact on access to justice and the delivery of affordable services in law-related situations.423

Should any jurisdiction decide to permit some form of "practice of law" by nonlawyers, state supreme courts and bars may wish to consider the need to modify existing ethics provisions.424 Alternately, state supreme courts may simply conclude that certain authorized nonlawyer activities do not constitute the "practice of law."425

The Commission also urges the American Bar Association, through its appropriate entities, to examine its relevant rules, policies and standards relating to lawyers who deliver legal or law-related services in conjunction with nonlawyers.426 In particular, as the Association has borne the leadership responsibility in the formulation of model ethical standards through the Model Rules of Professional Conduct (and its predecessor Model Code of Professional Responsibility), the Commission recommends that the Association examine its ethics rules, policies and standards to ensure that they promote the delivery of affordable competent legal services and access to justice. Specifically, the Commission recommends review of the rules regarding supervision of nonlawyers, fee sharing with nonlawyers, assistance to nonlawyers providing law-

424 C.f. In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, supra note 51 (South Carolina Supreme Court 1994 ruling that nonlawyers may represent others before state administrative agencies) and In re Opinion 26 of the Committee on the Unauthorized Practice of Law, supra note 66 (New Jersey Supreme Court 1995 opinion permitting real estate closing by nonlawyers).

425 These entities include, among others, the Standing Committees on the Delivery of Legal Services, on Legal Assistance, on Lawyers' Responsibility for Client Protection, on Lawyers' Professional Liability, on Lawyer Referral and Information Services, on Lawyer Competence, on Group and Prepaid Legal Services, on Legal Aid and Indigent Defendants and on Ethics and Professional Responsibility, the Special Committee on Solo and Small Firm Practitioners, the Commission on Advertising, the Consortium on Legal Services and the Public, the Judicial Administration Division, the Coordinating Committee on Immigration Law and the Sections of Law Practice Management, Administrative Law and Regulation, General Practice, and Urban, State and Local Government Law.
related services, delivery of routine law-related services through related businesses, and the rendering of unbundled legal services.

c. Rules and Policy Relating to Limited Forms of Assistance by Lawyers

This Report notes that some lawyers are rendering "limited" services (sometimes called "unbundled" services) to a client rather than handling all aspects of a particular legal problem. Others are providing advice exclusively via the telephone. If these methods of delivery were to be recommended or encouraged in a state as a matter of policy, both ethics rules and the terms of malpractice insurance policies might need to be examined to determine their applicability, if any, to such practice, and whether any modifications are desirable to ensure that there are appropriate protections for both clients and lawyers. For example, written retainer agreements expressly authorizing the limited representation might be deemed desirable or even essential, and the applicability of other principles of lawyer/client relationships, such as confidentiality, the attorney-client privilege and conflict restrictions, should be specifically considered for the benefit of the client.

d. Rules Regarding Fees and Partnerships

Jurisdictions may want to review as well those policies and rules that govern lawyers' sharing fees with nonlawyers and to evaluate and balance their concerns about protecting lawyers' independence of professional judgment with any objectives that they might establish for improving legal services delivery through development of new or expanded relationships between lawyers and nonlawyers.

For example, states have adopted rules of professional conduct that require lawyers to maintain independent professional judgment. As a corollary to such rules, jurisdictions restrict fee sharing between lawyers and nonlawyers, although exceptions to the general rule have also been adopted.60 Similarly, ethical restrictions in fifty states prohibit lawyers forming partnerships with nonlawyers "if any of the activities of the partnership consist of the practice of law." The District of Columbia Bar permits such partnerships and fee sharing by deleting the traditional prohibition from its rules of professional conduct. The District's rules still require the exercise of independent judgment by a lawyer, avoidance of conflicts, and assurance that all ethics rules will be complied with by the law firm entity and all of its partners.607

e. Rules Regarding Rendering of Law-Related Services Through Lawyer Owned or Controlled Businesses

Lawyers' ownership interests in (and authority to control) businesses that deliver law-related services to the public directly through nonlawyers are well

60 Most states have adopted a version of ABA Model Rule 5.4, which generally provides that a lawyer shall not share legal fees with a nonlawyer but which makes several exceptions. The exceptions include, among others, allowing lawyers to include nonlawyer employees in compensation plans even though the plans are based on a profit sharing arrangement and allowing third parties to pay the fees of clients so long as the third parties do not control the lawyers' exercise of independent judgment.

607 See DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT, Rule 5.5.
established in most states. Businesses recently established by large law firms offer sophisticated professional services such as financial consulting or environmental engineering. States might wish to permit or encourage lawyers to deliver simple or routine services such as document preparation to low- and moderate-income persons through similar lawyer-owned businesses as a method of providing affordable help to the public. Bars might determine that these businesses also have the potential to improve lawyers' incomes.

Potential problems stemming from the operation of separate (or sometimes law firms' integrated) subsidiary or ancillary businesses were scrutinized during the recent development of ABA Model Rule of Professional Conduct 5.7 ("Responsibilities Regarding Law-related Services"). The concerns expressed during the development of the rule parallel those identified by the Commission in its consideration of the desirability of lawyers expanding their utilization of nonlawyer services and the desirability of expanding the delivery of nonlawyer services generally.

The ABA resolved the potential problems stemming from the operation of ancillary businesses by adopting a new Model Rule 5.7 that would apply the full panoply of ethics rules to lawyer-owned businesses in circumstances where the businesses "are not distinct from the lawyer's provision of legal services to clients" or in circumstances where "the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services [in a separate entity controlled by the lawyer] knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship [such as the protections of confidentiality and avoidance of conflicts] do not exist." Examples of such businesses include title companies, notary public offices, real estate brokerages, tax preparation services and financial planning companies.

One of the models suggested by the report of The Florida Bar Special Committee on Non-Lawyer Practice consisted of law firm ownership of a document preparation service operated by nonlawyers. See supra note 224 and accompanying text. The report discussed one Florida law firm that has already established such a business. Id. at 164. This business was also described in Hodges, Rediscovering the Middle Class, supra note 281, at 62–63.

Model Rule 5.7 states:

a. A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related service is provided:
   1. by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients, or
   2. by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

b. The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Two of the models suggested in the Report of The Florida Bar Special Committee on Non-Lawyer Practice were also grounded upon the concept of reasonable expectations of the consumer and required disclosures to the consumer. See The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82.
The Comment to Model Rule 5.7 noted, as does the Commission, that even when the full protections of all the Rules of Professional Conduct do not apply to the provision of law-related services, "principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services."431 Consumer-redress mechanisms may also be available to the user of law-related businesses owned or controlled by lawyers.

1. Rules Regarding Assisting Unauthorized Practice and Supervising Work of Legal Assistants

The great majority of states have adopted a version of ABA Model Rule 5.5. That Rule states: A lawyer shall not:

a. practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

b. assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Although Model Rule 5.5 prohibits lawyers from assisting others in the unauthorized practice of law, the Comment to the Rule explicitly approves of lawyers employing supervised paralegals and other paraprofessionals, thereby recognizing and accepting the established custom of lawyers being assisted by nonlawyers. That Comment states, in relevant part:

i. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

Model Rule 5.3 provides: With respect to a nonlawyer employed or retained by or associated with a lawyer:

a. A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

431 The Comment to Rule 5.7 notes further that those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients.
c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional conduct if engaged in by a lawyer if:

i. the lawyer orders or, with the knowledge of the specific conduct, rat-
ifies the conduct involved; or

ii. the lawyer is a partner in the law firm in which the person is
employed, or has the direct supervisory authority over the person
and knows of the conduct at a time when its consequences can be
avoided or mitigated but fails to take reasonable remedial action.

The Comment to Rule 5.3 states:

Lawyers generally employ assistants in their practice, including secre-
taries, investigators, law student interns, and paraprofessionals. Such
assistants, whether employees or independent contractors, act for the
lawyer in rendition of the lawyer’s professional services. A lawyer should
give such assistants appropriate instruction and supervision concerning
the ethical aspects of their employment, particularly regarding the
obligation not to disclose information relating to representation of the
client, and should be responsible for their work product. The measures
employed in supervising nonlawyers should take account of the fact
that they do not have legal training and are not subject to professional
discipline.

For these states that have not adopted the Model Rules, the prior provi-
sions of the ABA Model Code of Professional Responsibility may be in
effect. However, the Code had no direct counterpart to this Model Rule.
DR-4-101(D) of the Code provided that a lawyer “shall exercise reasonable
care to prevent his employees, associates, and others whose services are uti-
li zed by him from disclosing or using confidences or secrets of a client....”
DR-7-107(J) also provided that “[a] lawyer shall exercise reasonable care to
prevent his employees and associates from making an extrajudicial statement
that he would be prohibited from making under DR-7-107.”

Model Rule 5.3 is frequently interpreted to impose a vicarious disciplinary
liability for, and an explicit duty of supervision over, the work performed by
nonlawyers “employed or retained by or associated with” a lawyer, the viola-
tion of which rule may result in lawyer discipline.

While the Model Rules permit appropriate delegation, they do not speci-
fy the extent to which lawyers must supervise the work which is delegated to
the varied kinds of nonlawyers employed by them. Adequate supervision
may vary depending upon the qualifications of the nonlawyer, the prior
training or experience obtained by the nonlawyer, or the complexity of the
tasks involved. Notwithstanding this lack of clarity regarding supervision,
effective utilization of nonlawyer assistants requires that many tasks normal-
ly performed by lawyers be delegated to them.

Jurisdictions interested in considering expanded roles for paralegals (or
other nonlawyer assistants such as investigators, photographers, medical per-
sonnel, social workers, engineers, and accountants) must examine the lan-
geage of any ethics rules similar to ABA Model Rules 5.3 and 5.5, as well as
their state court decisions, ethics opinions and disciplinary cases, to identify the interpretation their state has given to the ethical duty of supervision.

Lawyers may also be liable or ultimately accountable for the actions of paralegals or other nonlawyer assistants they employ or retain as a master of malpractice law, whether or not they provide supervision of those nonlawyer assistants. State court decisions would have to be examined to identify the extent to which a state's law requires supervision under traditional agency principles and for malpractice liability purposes.432

The Commission learned that tasks currently performed by traditional paralegals in many states cover a wide range of activities that include interviewing clients, drafting simple wills, conducting title searches, handling real estate closings, probating estates and preparing bankruptcy petitions and tax forms. They also render litigation support services such as drafting pleadings, preparing summaries of depositions, collating documentary evidence and preparing responses to discovery requests.

The Commission recommends that both the ABA and the states consider whether their rules of professional conduct should be amended to specify that the range of activities of traditional paralegals be expanded and that lawyer accountability for paralegal services, rather than lawyer supervision of such services, be the controlling standard. This change in rule emphasis may enable paralegals to provide expanded support to lawyers by increasing their direct services to clients.

Accountability ordinarily mandates that lawyers exercise care in employing paralegals and other nonlawyer assistants and in delegating specific work to them to ensure that they have the requisite education, knowledge and ability to perform the delegated tasks competently. Certainly, a failure to do so would substantially increase the lawyer's risk of incurring professional liability under general principles of malpractice law.

C. The Protection of the Public from Harms Arising from Incompetent and Unethical Conduct by Persons Providing Legal or Law-Related Services is an Urgent Goal of both the Legal Profession and the States. When Adequate Protections for the Public are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public With Access to Justice.

If the bar enhances the delivery of services at affordable prices (and on a "client-friendly" basis) it is likely that an increased demand for lawyers' services

432 See supra notes 186—187.

433 One commentator has concluded that the availability of legal services for people of mediocre means is "essentially a marketing problem" reflecting the fact that the more legally savvy clients become, the more likely they are to utilize the legal services available to them—before signing a contract to buy a house, or becoming mired in debt, or trusting to dumb luck that the interstate laws will provide for their families and estate what they would provide themselves. ABA REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, supra note 378 at 57, quoting BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 39 (1970).
will result, especially if lawyers educate the public about the law and the need for lawyers.493 Even if all steps are taken to make lawyers' services more accessible to larger numbers of people, however, it is unlikely that nonlawyer services will disappear, or even significantly decline, in view of the country's long history of reliance on both self-representation and nonlawyer assistance, coupled with increased marketing by nonlawyer providers. Thus, the issue of expanded services by nonlawyers should not be defined as an economic issue for lawyers since increased information about the need for, and the availability of, legal and law-related services of all types is likely to increase the caseloads of all classes of providers.

1. PROTECTION OF THE PUBLIC

Testimony revealed instances in which services by document preparers and legal technicians appeared to be incompetent or sometimes even fraudulent. According to individuals appearing before the Commission, some document preparers exceed their role by offering advice about which forms to use and what answers to provide. Erroneous information puts consumers at risk and wastes judicial time in making corrections. Similarly, legal technicians assisting self-represented persons sometimes lack the training or understanding to correctly interpret even simple legal issues, and consumers may be misled into foregoing rights or misstating facts. Moreover, as in every service industry, nonlawyers offering legal or law-related services sometimes engage in deceptive or fraudulent practices in order to improperly obtain funds from consumers.

The Commission believes that the expanded delivery of law-related services by legal technicians carries with it a risk of incompetent and fraudulent behavior. This risk will necessarily have to be taken into account by states as they consider the roles now performed, or to be performed in the future, by nonlawyers who provide law-related assistance to consumers. Concern about increasing the public's access to the justice system and to affordable assistance with legal and law-related needs should always be weighed against the need to protect the public from unreasonable or excessive risks of harm by those who offer help. The risk of creating a tiered competency system looms large if procedures or recommendations for change are made without consideration of the complexities existing in our legal system and the legal profession's duty to protect client interests. The Commission reaffirms the continuing validity of both of these concerns.

Any effort to make the legal system more affordable and accessible must be accompanied by thoughtfully constructed safeguards that assure that those persons who receive legal services are protected from incompetence, negligence or fraud. The complex web of lawyers' ethical rules, enforced by disciplinary agencies in every state and the District of Columbia, are designed to protect the public at every stage of a representation, and even after the representation has terminated, by requiring lawyers to maintain client confidences and secrets inviolate. Lawyers have a mandatory duty to keep their clients' funds in separate accounts to insure that these funds will not be misappropriated. These protections are absolutely essential for the protection of lawyers' clients. It is a fundamental tenet of the legal profession that lawyers provide representation...
that is competent and that it should not vary according to ability to pay. States should consider such mechanisms and their applicability to the nonlawyer delivery of law-related services.

Taking appropriate steps to assure public protection against harm has long been a major concern of the legal profession. One of the co-sponsors of the Working Group on Nonlawyer Practice which preceded this Commission was the ABA Standing Committee on Lawyers' Responsibility for Client Protection. Throughout this Report, examples of that concern have been noted in the discussion of the history of UPI, enforcement (Part One, Section A), in the description of recent efforts by the states to establish limited licensing of legal technicians (Part One, Section E), in the discussion of laws and rules designed to provide public protection (Part Two, Section B.6), and in the formulation of an analytical framework for considering whether to regulate particular types of nonlawyer activity (Part Two, Section D). It is because of the overriding need to protect the public that the legal profession has, in recent years, adopted for itself many improved rules and procedures discussed in this Report, including adoption of new rules of professional conduct and improved professional disciplinary systems.

While the Commission recognizes that public protection against incompetent and unscrupulous providers of legal or law-related services can never be perfect, the Commission believes that it is well worth the effort to assure as much as practicable, under all the circumstances, that all types of assistance in legal and law-related situations, whether rendered by a lawyer or a nonlawyer, are provided with competence and the highest level of quality. At the same time, serious problems in access to the justice system create both consumer and professional pressures to modify rules of public protection in the interests of greater access. The final section of the Commission's Report suggests that these competing interests are an appropriate subject for careful analysis within each state, during which balances can be struck that best address the need for improved access without undue risk of harm to members of the public.

Testimony before the Commission frequently reported on the current balance between public protection and access to the justice system. For example, in most circumstances, the relatively newer legal technician businesses, like other nonlawyer owned businesses, may advertise their services subject only to regulatory restrictions imposed by unfair advertising and similar consumer protection laws. State task forces examining the work of document preparers and legal technicians have reached different conclusions about whether additional regulation is needed, and if so, the regulation required. The Commission's witnesses have also reached differing conclusions.

Some nonlawyer witnesses contended that existing consumer protection laws and common law tort and contract laws sufficiently protect the public against harm from newer nonlawyer activities. Others concluded, however, that because the newer services are unlicensed, unlike older nonlawyer services provided by realtors, bankers and accountants, the state can better protect the public by acknowledging their existence and licensing them.434

434 See reports of state task forces investigating nonlawyer activities in their states, supra Part One, §E.
Judges responding to the Commission's questionnaire and submitting statements also offered divergent views.435 Many judges decried the poor quality of pleadings prepared by unassisted self-represented persons and legal technicians. One trial court law clerk wrote:

Many of these people come in seeking a divorce, having no idea what their pleadings say, what to do, or what to say to prove their case. The judge then either has to be hardened, telling them it is their responsibility to do all things necessary to present their case, or else take them by the hand and lead them through it, taking up considerable judicial time and effort that shouldn't be necessary. Additionally, this puts the court in the position of acting as counsel for the litigant; particularly when the court ends up drafting the judgment and preparing all the documentation necessary. With the current overburdened judicial system we're working under, this just places an added burden on our courts that should not be there.436

Some judges observed there was a greater difference between trained and untrained nonlawyers than between trained nonlawyers and lawyers. Many judges questioned on the subject agreed that trained nonlawyers were better than totally unassisted self-represented persons.437 A California bar survey

435 Because relatively few judges appeared at the Commission’s hearings, the Commission members drafted an informal questionnaire to elicit responses from state and federal judges concerning their experiences with pro se litigants. See Appendix B for a summary of the responses. In 1993 the New York County Lawyers’ Association conducted a similar informal inquiry and reported that “The recognition among those who testified that non-lawyer advocates could provide valuable service in the specialized practice of particular agencies' regulatory work. Opinions, pro se and non, were expressed as to whether the conduct of adversarial proceedings, before any type of tribunal, would be appropriate for nonlawyers.” See New York County Lawyers’ Association report supra note 460, at 3. A statistically valid survey was conducted for the State Bar of California in 1990 by a social science research organization, and it found that opinion among judges about the usefulness of nonlawyer assistance in judicial proceedings was about equally divided. See CHARLTON RESEARCH COMPANY, STATE BAR OF CALIFORNIA JUDGES’ MAIL SURVEY: SUMMARY OF FINDINGS; report presented to the State Bar of California, July 1990.


437 Judge Roderic Duncan of the Superior Court of Alameda County, California stated it this way:

1. The numbers of people who appear in my family law court in pro per are multiplying monthly. Lawyers are just not able to serve these people within their present price structure. We do have a handy bunch who do pro bono work, but they cannot begin to touch the need. Alluring campaigns to attract more lawyers to this effort are largely ineffective.

2. Most of the pro per do a poor job of representing themselves. Major issues are missed, important evidence is not brought to court, enforceable orders are not presented for signature and enforcement.

3. Regulated paralegals who have some formal training and experience would be a whole lot better than the existing chaos. I know the people who run the "divorce bureaus" in my area and I feel sure that if they were allowed to come to court with litigants, a whole lot more justice would be accomplished.
resulted in similar findings with the judges evenly split on whether nonlawyer assistance is helpful to pro se litigants. 438 Some lawyers expressed concerns that regulating additional nonlawyer legal technicians would take clients away from them. 439 Other lawyers disagreed that this will be the result. 440

On the one hand, we can anticipate that if the costs for handling a particular matter are equal, some members of the public will prefer the additional knowledge and expertise that a lawyer can provide. Clients are assured of greater protection when they retain a lawyer because of the existence of client protection funds, malpractice insurance and disciplinary systems to enforce ethical standards 441 These protections are virtually nonexistent when a person obtains assistance in law-related matters from an unregulated legal technician.

On the other hand, the Commission has identified several reasons for expecting that members of the public may continue their employment of nonlawyers for some of their legal and law-related needs. One reason is that lawyers' services for particular matters are either unaffordable, or there is a perceived lack of value in paying for those services. As Part One of this Report describes more fully, other reasons are: more people are representing themselves both in and out of court with the limited assistance of nonlawyer providers, and prefer to do so; new technology and simplification of court and administrative agency processes have made self representation easier; there is increased use of alternative dispute resolution mechanisms that do

438 Charleston Research Company, STATE BAR OF CALIFORNIA JUDGES MAIL SURVEY: SUMMARY OF FINDINGS, supra note 434. See also supra note 366 for recent articles containing divergent views of bankruptcy judges on nonlawyer assistance to self-represented persons in personal bankruptcy proceedings. The responses from judges to the Commission's own questionnaire also revealed divided opinion as to whether nonlawyers should be licensed to assist pro se parties in court. See Appendix B.

439 See, e.g., THE FLORIDA BAR NEWS, June 15, 1994, supra note 225 (quoting statements of governors of The Florida Bar opposed to licensing legal technicians.)

440 See, e.g., statement of Van O'Steen who reports that his personal injury firm must compete with a growing number of "public adjusters" who handle personal injury claims for contingencies as low as 18%. He states that "Our business is as good as it's ever been. If you do good work for your clients, you'll not only survive, you'll thrive. I favor more open competition in the delivery of legal services, including non lawyer delivery systems." As quoted in Podgers, Legal Profession Faces Crumbling Fortress: Rising Tide of Non-lawyer Practice, supra note 70 at 54.

441 Not all of these safeguards are provided by every lawyer in every state, however. Legal malpractice insurance, for example, is mandatory only in Oregon. Client protection funds exist in all but one state. Disciplinary systems to enforce lawyers' rules of professional conduct also exist in every state, and these systems are increasingly well-staffed, professional agencies. See supra note 236. Several state bars are also implementing fee arbitration mechanisms under which lawyers can or must submit fee disputes with clients to arbitration.
not always require lawyers; and nonlawyer providers have promoted their services in both traditional and new arenas.\textsuperscript{442}

Many who appeared before the Commission agreed that lawyers are ordinarily essential for competent representation before tribunals that have formal evidentiary rules and involve complex matters. In any forum, the representation of group rights, the prosecution of test cases, and law reform advocacy almost always require the special skills of lawyers. At the other extreme, while lawyers can assist retired persons in applying for social security benefits, these applications do not ordinarily require a lawyer's skill.\textsuperscript{440} Of course there may be circumstances where it would be important to have a lawyer for any matter, even for a social security application. The seemingly routine social security application may be denied or there may be a dispute over what the benefits should be, and appeals may be required all the way through federal court. Notwithstanding this possibility, most Americans do not hire lawyers when they apply for social security. In between are numerous circumstances when a lawyer's services may or may not be essential to the competent handling of the matters.

3. NONLAWYERS HAVE IMPORTANT ROLES TO PERFORM

The Commission has concluded that nonlawyers who provide services already authorized by law perform important roles. It recommends, therefore, that the activities of nonlawyers who provide assistance, advice and representation authorized by statute, court rule or agency regulation should be continued, subject to review by the entity under whose authority the services are performed.

The Commission's record shows that many people are unaware of the extensive role nonlawyers already occupy in our legal system.\textsuperscript{444} The extent and type of nonlawyer activity varies widely among the states because each state has developed its own, locally focused, methods to meet citizens' needs, deploying nonlawyers in many different ways.

Part One of our Report describes many types of important and authorized nonlawyer activities. For example, as previously discussed, the traditional paralegal has ever increasing importance and may be able to play an even larger role in the future. Similarly, we have also noted that nonlawyers have an important role to play in helping people with many kinds of administrative agency problems. In particular, the Commission received extensive information about the high quality of services provided by nonlawyers employed by religious and sec-

\textsuperscript{442} The Florida Bar Special Committee on Non-Lawyer Practice noted:

In addition to the economic principles discussed above (affordability of lawyers' services) it also appears that many people simply prefer to use non-lawyers for routine legal services even if comparable services (are) available by lawyers at a competitive price. The Florida Bar Report of the Special Committee on Non-Lawyer Practice, supra note 82, at 6.

\textsuperscript{444} See opinions of Justices Douglas and Rehnquist, supra notes 394 and 395.

\textsuperscript{444} Many of these roles are discussed earlier in Part One, §§ B2-5. Performance of these roles often involves giving advice on legal matters.
ular nonprofit agencies. One important example is in the immigration area where nonlawyers assist immigrants and refugees, many of whom would otherwise be unrepresented.

Compelling testimony disclosed that in some instances even grassroots mutual support assistance has been effective and has met needs not served by the practicing bar.465 Some state bar task forces examining nonlawyer activities in their states also concluded that some document preparers and legal technicians are competently and adequately assisting self-represented persons who are not served by the bar.466

Although there are many circumstances in which a lawyer's services are essential, or at least advisable, the Commission's record establishes that nonlawyers also have important roles to play and that their assistance enhances the justice system. Further, performance of these roles necessarily entails the giving of some legal advice. It is exceedingly difficult to draw a bright line to determine circumstances when a lawyer's skills are essential.467 Many business people and other professionals handle matters that inevitably involve the law, and they give advice about that law. As former Harvard Law School Dean Erwin Griswold noted in 1955, "obviously there are many things involving the law and its application which can and must be done by nonlawyers."468 In 1969, the ABA and the American Institute of Certified Public Accountants jointly acknowledged this fact in a statement of principle which was in effect at the time, stating:

In our complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.469

465 See discussion of nonlawyer assistance to handicapped children and battered women, supra Part One, § B4b.

466 See Part One, § E for a discussion of some recent task force reports reviewed by the Commission during its deliberations.

467 See generally Rhode, supra note 71.

468 Griswold, supra note 67, at 1114. See also Minton, supra note 103. See also ABA, "...IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REINVIGORATION OF LAWYER PROFESSIONALISM, supra note 1, at 301, which concluded:

[It] can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law.

469 The statement was contained in a 1969 American Bar Association Statement of Principal issued jointly with the Council of Certified Public Accountants. Statements of Principles between the ABA and other professions are no longer in effect. See supra notes 68–69 and accompanying text.
The U.S. Supreme Court observed that drafting the specifications and claims of a patent application constitutes "one of the most difficult legal instruments to draw with accuracy.... And upon rejection of the application, the practitioner may also assist in the preparation of amendments... which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art." 450

Notwithstanding the legal difficulties alluded to, the Supreme Court concluded unanimously that nonlawyers, who are subject to admission and discipline requirements of the Patent Office, can perform the activities of patent law practice as well as lawyers. The Court barred states from interfering with nonlawyer patent practice through application of unauthorized practice of law rules. 451 The Court reached this conclusion even though it recognized that the nonlawyer activity would necessarily involve the giving of legal advice, stating that patent work "inherently requires the practitioner to consider and advise his clients as to the patentability of inventions under the statutory criteria... as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law." 452

The history of practice before the U.S. Patent and Trademark Office is instructive. The problem of unscrupulous nonlawyer patent agents at one time had become a national scandal and led to several Patent Office reforms. The Supreme Court noted that nonlawyer agents were "particularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office." 453 Rather than outlawing all nonlawyer patent agents, the Patent Office tailored reform toward good moral conduct requirements and required patent examinations of both lawyers and nonlawyers. The Supreme Court noted that this reform effort successfully rooted out incompetent and unscrupulous persons without disqualifying a whole class of persons:

So successful have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct. 454

The Patent and Trademark Office, like other agencies with highly developed regulatory systems, offers a model which is both protective of the potential client and also not unduly exclusionary as to choice of representative.

451 Id. at 404. The U.S. Patent and Trademark Office issued regulations under a 1952 federal statute allowing patent applicants to be represented by nonlawyer "agents," as well as by lawyers, at their choice. The regulations established a register for nonlawyer patent agents. The U.S. Supreme Court held that the State of Florida was preempted by federal law from interfering with the work of patent agents living in Florida, including the part of the practice in Florida that was incidental to the preparation and prosecution of patent applications before the Patent Office.
452 Id. at 383 (emphasis added).
453 Id. at 396.
454 Id. at 402.
The Commission cannot anticipate the details of debate within each state about precisely where the state should draw a line between permissible and nonpermissible nonlawyer activities. Rather, the Commission's purpose is to report on the wide array of nonlawyer practices it has found, to comment generally on their potential or risk in the search for solutions to people's legal and law-related problems, and to flag situations that may require prophylactic measures to prevent harm. With these purposes in mind, the concluding sections of the Commission's recommendations will discuss how a state might decide to permit, regulate or prohibit specific nonlawyer activities.

In sum, the Commission finds that the legal profession has always shared, and will continue to share, the provision of at least some of its services with nonlawyer providers, notwithstanding that most states have laws forbidding the unauthorized practice of law. Thus, in the future, some citizens will continue to employ lawyers for all of their legal needs, while others will not. Most people are likely to prefer lawyers for many, although not all, matters. Some citizens are likely to continue to prefer to proceed on their own without the assistance of anyone, at least in some circumstances.

Americans are independent-minded and historically value choice in purchasing services of any kind. Governmental efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere.

The current array of approaches to federal tax preparation and advice, a law-related area that affects almost everyone, shows the range of choices that can be available:

- Many citizens study the applicable tax laws and prepare their own tax returns with nothing more than the IRS Instructions.
- Many others use self-help books, and some use sophisticated software that does the math, answers questions, produces filled-in forms and electronically files them.
- IRS employs large numbers of nonlawyers to provide tax advice which taxpayers rely upon even though IRS is not bound to honor the advice.
- Nonlawyer providers also regularly assist taxpayers for fees, providing advice about tax law and preparing tax forms. Some of these providers receive intense though relatively brief training, and work in high-volume clinics that are typically located in shopping malls, store fronts and other neighborhood locations, and often employ multilingual staffs. Others operate as sole proprietorships and are not required to demonstrate any accounting or legal qualifications.
- Still other nonlawyer providers are highly trained, skilled and regulated, such as Certified Public Accountants.
- Nonlawyers who become "Enrolled Agents" by passing an IRS examination may both prepare returns and represent taxpayers at all levels of agency proceedings, including appeals from matters handled by others. (Taxpayers can, of course, represent themselves in all such proceedings, CPAs can appear in such proceedings without becoming Enrolled
Recommendation 6
States Should Adopt an Analytical Approach in Assessing Whether and How to Regulate Varied Forms of Nonlawyer Activity That Exist or Are Emerging in Their Respective Jurisdictions. Criteria for The Analysis Should Include the Risk of Harm These Activities Present, Whether Consumers Can Evaluate Providers’ Qualifications, and Whether the Net Effect of Regulating the Activities Will Be a Benefit to the Public. The Highest Courts in the Jurisdictions Should Take the Lead in Examining Specific Nonlawyer Activities Within Their Jurisdictions, with the Active Support and Participation of the Bar and the Public.

Agents, and other nonlawyer tax preparers can come with taxpayers during proceedings related to returns the nonlawyers have prepared.)

• Highly skilled lawyers who specialize in tax law offer tax preparation and appeal services in both simple and complex matters, as well as in proceedings before the U.S. Tax Court.453

This array of choices responds to a broad range of public demand for assistance. It may be a useful model of how the legal profession, together with nonlawyers, can offer the public the kinds of affordable, appropriate and reasonably safe help for law-related matters that the public seeks in many areas.

D. Both To Protect the Public and Promote Access to Justice, States Should Assess Whether and How to Regulate the Varied Forms of Nonlawyer Activity in Law-Related Matters That Exist or are Emerging in Their Respective Jurisdictions

In Part Two, Section B, the Commission recommended that the range of activities of traditional paralegals should be expanded, with lawyers remaining accountable for their actions, and that states should consider allowing nonlawyer representation of individuals in state administrative agency proceedings, under agency standards of practice and discipline. In Part Two, Section C, we recommended continuation of the activities of nonlawyers who provide assistance, advice and representation under the current authority of statutes, court rules or agency regulations, subject to continued review by the entity granting the authority.

The Commission recommends with regard to the activities of all other nonlawyers, states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities present, whether consumers can evaluate providers’ qualifications, and whether the net effect of regulating the activities will be a benefit to the public. The Commission further recommends that the highest courts within the jurisdictions should take the lead in examining specific nonlawyer activities within their jurisdictions, with the active support and participation of the bar and the public.

Throughout America, we found that bar associations, law firms, courts and state governments are attempting to ensure affordable access to justice for individuals and organizations. We also found many unmet legal needs. Based on the record before it, and after reviewing many legal needs studies, the Commission concludes that even with full implementation of all current efforts, a significant gap in access to justice, especially for low- and moderate-income individuals, will probably remain. Many of these individuals will still seek less expensive or more accessible methods for obtaining help.

453 Alan Morrison of Public Citizen, a nonprofit consumer organization, observes that nonlawyers also give tax advice outside of the tax preparation area. “Accountants give a wide range of tax advice, so do life insurance agents and bankers. Stock brokers advise on the tax ramifications of transactions. Pension advisers give lots of tax advice.” Morrison, supra note 105, at 372–3.
This gap might be partially closed by allowing nonlawyers to engage in the range of activities described in our findings. But many of the gaps involve legal issues of importance to the individual that seem simple but turn out to have more complex and far-reaching ramifications. In these situations, consumers can be hurt by inadequately informed advice.

The Commission finds that this complex interplay of factors does not lend itself to simple solutions. Instead, a careful balancing of interests among concerns for public protection and consumer safety, access to equal justice, preserving individual choices, judicial economy, maintenance of professional standards, efficient operation of the marketplace, implementation of public policy and respect for state sovereignty is required.

This balancing is best done at the state level. Each state has a unique culture, a specific legal and social history, a record of experience with nonlawyer activity and an economic, political and social environment that will affect its judgment about the types and amounts of nonlawyer activity likely to enhance access to justice and protect the public. Therefore, the Commission believes there should be no national prescription of the appropriate mix of lawyer and nonlawyer activity.

Although self-helpers, publication and software writers, document preparers, other business groups and professions, traditional paralegals and legal technicians engaged in approved agency representation are probably legal in all states, their level of activity varies from state to state. Beyond those categories, the Commission believes that no general proposal for approval of specific nonlawyer roles will fit all jurisdictions.

Consequently, the Commission's most important conclusion is that each state should develop its own examination of how it can most effectively and appropriately protect the public while considering improvements in access to justice for low-, moderate- and middle-income individuals through nonlawyer activity in law-related situations.

In the course of this examination, representatives of consumers, the bench, the legislature, the bar and nonlawyers should consider ways that each element of the system for dealing with legal issues can be improved. In particular, a state should consider the range of nonlawyer roles already permitted in some or all states, and in state and federal agencies, and other nonlawyer roles proposed to this Commission. Each state should then develop, if appropriate, recommendations for changes and for new initiatives by the bench, bar and legislature, and possibly for changes in the law, or in acceptable activities within the law.

If a state inquiry finds that access can be improved by expanded nonlawyer activity, then recommendations for expansions should be accompanied by consideration of appropriate consumer protection and regulation.


Within each state, the highest courts have traditionally regulated the practice of law. The separation of powers doctrine protects the judicial branch of government from legislative or executive interference when exercising its regulatory function. We find, however, that many aspects of nonlawyer activity that happen outside court settings involve negotiations and other non-judicial
transactions. In addition, state legislatures usually enact statutes that govern the unauthorized practice of law; the executive branch is usually responsible for enforcing them. Thus, the legislative and executive branches have a distinct role in the assessment process to the degree that the discussion of nonlawyer activity involves revised definitions of the "practice of law."

Also, the executive or legislative branch may have already preempted the process by regulating certain nonlawyer activities. For example, an executive or legislative branch may regulate real estate closings, financial planning and investment, and administrative agency appearances.\footnote{See, e.g., supra notes 91–98 and accompanying text (discussing licensing by Washington State Supreme Court of nonlawyer real estate conveyancers) and Part One, § B 3 (discussing legislative and judicial rules in regulating nonlawyer representation before administrative agencies.)} Of course, a state judiciary would be unlikely to undertake directly the licensing and enforcement of all types of nonlawyer activity, including the responsibility for budget and administration.

Nevertheless, the Commission recommends that a jurisdiction's highest court should appoint a body of lawyers and nonlawyers\footnote{See, e.g., task force compositions in California, Florida and Minnesota. The reports of these task forces are described in Part One, § E.} to make an initial assessment of whether or not certain nonlawyer activity should be regulated. This is particularly desirable when the nonlawyer activity is closely related to the judicial process. The most difficult and controversial aspects of the assessment will likely concern whether to regulate legal technicians who provide legal advice to self-represented persons or who appear on behalf of clients in judicial proceedings.

2. STATES SHOULD ADOPT AN ANALYTICAL APPROACH IN ASSESSING WHAT LEVEL OF REGULATION, IF ANY, IS APPROPRIATE FOR PARTICULAR NONLAWYER ACTIVITIES

The decision whether and how to regulate any particular type of law-related nonlawyer activity, whether to prohibit the activity entirely, or whether the activity should be unregulated, should be based on a careful weighing of the potential benefits and costs of regulation. Obviously, this weighing is not a scientific process that can be conducted pursuant to a precise formula. As in most judicial and legislative decisions, solutions require an exercise of discretion and judgment based on the best available evidence.

The Commission's record contains many suggestions for assigning weight to factors. Many suggestions received passionate support and were then opposed with equal vehemence. Experienced lawyers and nonlawyers often testify to diametrically opposed perceptions of consumer needs, risks of harm, nonlawyer capabilities and deficiencies, and the potential economies or effectiveness of any chosen regulatory approach.

The Commission sorted through these conflicting opinions and developed an approach that may help states to decide when and how to regulate nonlawyer activity in law-related situations. The Commission found three broad criteria that define the most important elements that a state should consider

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when assessing whether and how a specific kind of nonlawyer activity should be regulated. They are:

a. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?

b. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?

c. Do the actual benefits of regulation likely accrue to the public outweigh any likely negative consequences of regulation?

A regulatory approach for nonlawyer activity may be needed if the activity presents a serious risk of harm, if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness (of different regulatory options) in reducing the predicted harm while avoiding counterbalancing negative consequences. The activity should be prohibited if no regulatory approach will effectively accomplish an appropriate level of public protection.

Of course, nonlawyer activity in law-related situations is already subject to at least some forms of regulation. An important part of the suggested state inquiry will be an examination of the current regulatory schemes, whether they consist of basic consumer protections or a ban on the activity considered. In each instance, the state should decide whether the current regulatory approach best serves the public interest or whether a change is needed.

A chart that illustrates the analytical process appears on the following page. It shows that regulation is only one of the available choices. For example, if there is no serious risk to the consumer even when the nonlawyer service is poor, then a state may conclude that the activity should be unregulated. Similarly, a state may find it overly protective to regulate nonlawyers if reasonably informed consumers can make an effective evaluation of the qualifications of the nonlawyers.

The first two criteria—risk of harm from the activity and the consumer's level of knowledge—are designed to identify situations that probably do not require a careful balancing of competing interests. Here a state may or may not wish to consider regulation of nonlawyer activity. In the latter case there would be reliance on basic consumer protection laws, remedies or forum regulations.

458 An easily accessible consideration of general criteria that are useful in deciding whether to regulate in any area can be found in Benjamin Stilberg and Doug Reeder, QUESTIONS A LEGISLATOR SHOULD ASK, issued by the Council on Licensure, Enforcement and Regulation (CLEAR), an affiliate organization of the Council of State Governments. For a discussion of specific regulatory criteria that may be used in regulating nonlawyer activities that are law-related, see Rhode, supra note 71, at 85–97.

459 The possibility of increasing consumer information about nonlawyers may offer avenues by which states can avoid more extensive regulatory schemes while providing enhanced consumer safety.
Criteria: Assessment of Need to Regulate

Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?

NO → Regulation may not be needed.

YES →

Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?

YES → Regulation may not be needed.

NO →

Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

NO → The activity may need to be prohibited.

YES → Regulation may be appropriate.
Application of the third criterion, which balances benefits and costs, will often lead to a decision to regulate an activity if the public benefits outweigh the costs. However, a more complicated situation results if, under the third criterion, the benefits of regulation do not outweigh the costs. In that circumstance, two options remain. On one hand, because of the potential serious harm to the public, a state might prohibit the activity altogether or limit it to prevent harm to the consumer. State statutes banning the unlicensed practice of law seem to typify this type of decision.460

Alternatively, a state may permit the activity without specific regulation or enact regulations that offer inadequate consumer protection. States which do not currently regulate legal technicians engaging in potentially harmful living trust and notario operations may have tacitly concluded that the economic and political costs of regulation would be too great to justify the creation and implementation of a regulatory system for these activities. Instead, they rely upon criminal statutes and other consumer remedies as adequate to provide protection for the public without unduly restricting access to affordable assistance. The following sections consider in detail each of the Commission's three criteria for assessing the desirability of nonlawyer regulation.

a. Does the Nonlawyer Activity Pose a Serious Risk to the Consumer's Life, Health, Safety or Economic Well-Being?

This criterion involves judgments about measures of injury. Since any activity—lawyer or nonlawyer—can cause injury, risk evaluation concerns issues of degree. How often might a nonlawyer engage in an inaccurate, improper, uninformed or poorly executed activity? How often will that improper activity cause injury? (Many potential injuries never arise because they depend upon other events that never occur.) How substantial will the injury be if it does occur? Will it affect consumer interests for which after-the-fact consumer remedies are available and effective or interests for which no remedy is possible (such as irreparable injuries to life, health or safety), realistically available or sufficient?461 Is there any actual experience with the nonlawyer activity that can be considered in determining the answers to these questions?

These questions will lead a state, guided by its existing matrix of law and regulation that reflects a balance of state oversight and individual liberty, to analyze the risk level it considers "serious." Although this interplay of values may create uncertainty in many specific situations, the Commission believes a state already knows how to weigh these values. There will always be some risk of harm.

Based on the record before it, the Commission suggests several guidelines for consideration. If the nonlawyer activity is highly individualized, not susceptible of rate learning or mass production, then the frequency of error will

460 However, the absence of enforcement of unauthorized practice of law statutes in most states suggests that the prosecutorial authorities have reached a different conclusion about relative benefits and burdens than the legislature. See earlier discussion in this Report, supra Part One, § A, The Last Third of the Twentieth Century: The General Decline of Unauthorized Practice of Law Enforcement.

461 For example, some economic loss is so substantial that later compensation through return of fees or recoverable damages does not make the injured party whole.
b. Do Potential Consumers of Law-Related Nonlawyer Services Have the Knowledge Needed to Properly Evaluate the Qualifications of Nonlawyers Offering the Services?

The second criterion asks whether potential consumers can protect themselves. While the common law expressed a strong preference for the principle of caveat emptor, many federal and state laws limit that principle in the interest of avoiding harm. Most decisions in daily life, however, are still governed by the belief that individuals are responsible for themselves.

The second criterion evaluates whether consumers can assess provider qualifications (not provider service quality). Thus, an important question is whether a consumer needs specialized information beyond the general knowledge of a reasonable person to assess whether a nonlawyer is qualified. Will most people or only the most vulnerable people make incorrect or blind assessments of qualifications? Is the nonlawyer service likely to be used by the most vulnerable or by the general public who are presumed to have an ordinary ability to protect themselves?

Consumers often have trouble measuring the quality of professional work because so much special expertise is involved. In such circumstances, consumers must rely upon the credentials, stated prior experience, demeanor and other apparent qualifications of service providers when making purchasing decisions. These indirect measures of quality are the best available. The practical question posed by the second criterion is whether enough relevant provider qualifications for the activity will be known to the consumer. If not, then the state should consider whether some regulation might supply enough information to allow the consumer to protect himself or herself or whether, instead, to move to broader regulatory questions under the third criterion.

Consumers are probably better able to assess service provider qualifications if the activities involved are relatively familiar ones that occur outside of the legal context, or if the transactions are ones that occur commonly in ordinary life. Similarly, if a consumer can learn about the underlying transaction by reading printed or electronic materials, then the consumer is more likely to be able to evaluate nonlawyer qualifications effectively. In addition, a reasonable consumer can be expected to ask whether a service provider has experience relevant to the task. Of course, the more complex the activity or the underlying law, the less able the consumer is to evaluate provider qualifications.

Simple regulatory actions might be considered to strengthen the consumer’s ability to evaluate nonlawyer provider qualifications. For example, a state might require nonlawyers to post and/or provide prospective customers with written information about their credentials and experience and might make false or deceptive information a specific basis for sanctions against the nonlawyer and cause for liability to the consumer.

462 The logic of this guideline rests on two observations. First, consumers will probably pay more if the stakes are high. Second, large sums of money attract criminals interested in preying on consumers. Of course, a low price does not demonstrate that the risk is low.
The third criterion for regulation is balancing the benefit of public protection with any negative consequences of regulation. A state may lessen the serious risk of injury to consumers, particularly the most vulnerable, by protecting against unqualified nonlawyer services. In addition, that state may protect qualified providers, including lawyers, against threats to their livelihoods from unqualified or unscrupulous service providers.

A state should weigh the benefits and negative consequences of regulation candidly under this criterion.

Will regulation of qualifications or mandated continuing education actually diminish the risk to such an extent as to avoid significant harm in the first instance? Will ethical standards or increased provider accountability actually enhance the quality of the product to such an extent as to avoid harm in most instances?

When nonlawyer activity will contribute to an effort to improve access to equal justice, how much will a regulatory approach reduce access? Will there be substantially fewer providers of the needed services following regulation? If all the innovations and improvements suggested earlier in this Report are implemented, will lawyers actually provide the needed services at prices consumers will choose to pay or will the lawyer's economic choices coupled with regulatory limitations on nonlawyer services continue to leave consumers without assistance?

Will the regulatory system under consideration, if enacted, cause nonlawyers to raise their prices so much that increases in access will be lost? For example, nonlawyer costs would undoubtedly rise if there were requirements of education and training, insurance, registration fees or dues for professional societies. Would such a regulatory approach be designed so that it would impose the same additional costs on nonprofit charitable organizations such as Court Appointed Special Advocate (CASA) programs for children, programs that represent battered women, or accredited representatives who assist immigrants?

Will the regulatory system under consideration actually be enforced? If it is not adequately funded and enforced, a new regulatory system may both lessen consumer protection and restrict access. For example, legal technicians who advise self-represented persons seeking a consensual divorce following a marriage without children or significant assets might fall under a state-created licensure system. If the regulatory agency were unlikely to prosecute legal technicians who did not obtain a requisite license, however, then a licensing system would be an ineffective method of protecting consumers. In that situation, the state should consider whether lax prosecution of UPL, together with effective enforcement of consumer protection statutes and specific consumer remedies, might better serve the public.

Will the proposed level of regulation result in too few providers? The intention of regulation is to limit authorized providers to those who meet regulatory standards. But too high a level of regulation imposes additional costs on the

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403 Despite many assertions in its record that regulation will lead to increased prices, the Commission has not discovered any useful method for actually estimating the economic impact of regulatory systems on prices.
state and its citizens. First, a high degree of regulatory activity such as licensing and testing demand staffing. This might not be possible because many state budgets are already strained.

Second, to the degree that potential access benefits available from competent nonlawyers are regulated out of existence, the courts and administrative tribunals will continue to have to deal with larger numbers of uninformed and unassisted self-represented persons.

Third, some public policies rely in part upon citizen assertion of rights for their enforcement. An obvious example is housing code compliance by landlords. If tenants lack help when they face eviction from substandard dwellings, housing codes and the public policy they express will probably be unenforced and often ignored.464

At the root of this balancing of interests lies a difficult question, which a state will have to answer based on its particular culture and values. In many situations, a lawyer's breadth of training and competence will offer a consumer the probability of a better result than that available from an appropriately trained and skilled nonlawyer.465 What should be the level of trade-off, if any, between a consumer's interest in having at least some assistance from a nonlawyer and the increased risk of harm to that consumer from the possibly less qualified assistance of a nonlawyer? The Commission can offer no direct answer for this question. During our hearings, many lawyers denied that there was a value to nonlawyer assistance; many nonlawyer service providers and consumer witnesses disagreed.

A state that applies the preceding three criteria to specific nonlawyer activities may well decide that nonlawyer activities with or without some form of regulation will serve the public well. Such a state will then determine the number, if any, of specifically regulated activities necessary to provide better access to legal services or whether to permit a range of nonlawyer activities within the scope of a more general scheme of regulation.

3. REGULATORY OPTIONS FOR CONSIDERATION BY EACH JURISDICTION

A jurisdiction has many options to consider when deciding whether a particular type of nonlawyer activity should be regulated. These options are briefly listed and described.

464 See Philip B. Heymann, A Law Enforcement Model for Legal Services, 23 CLEARMINGHOUSE REVIEW 254 (July 1989).

465 This general conclusion is supported despite numerous exceptions. Our record demonstrates that there are specialist nonlawyers providing services that are better than those available from lawyers who are not specialists. For example, few lawyers seem to have any knowledge of the complex rules and factual issues involved in determining what sort of special educational plan is appropriate for special needs children; the nonlawyer advocates involved in the Parent Information Centers probably offer higher quality assistance than most lawyers.
A state may determine that some forms of nonlawyer activities should be regulated through existing statutes, regulatory schemes or common-law remedies that otherwise apply to commercial activities, perhaps with modifications that regulate elements of the nonlawyer activity. Private citizens can sue in common law tort for fraud or negligent infliction of harm or pursue a consumer protection statutory remedy for unfair, false or deceptive trade practices or enforce statutory warranties on services. Consumer protection and law enforcement agencies can enforce statutory provisions. Public prosecutors at both the state and local levels can bring criminal actions for fraud and theft and civil actions to enjoin unfair, deceptive or false trade practices.

Consequently, a state should consider whether and to what extent its existing arsenal of measures already adequately protect the public against potential nonlawyer harm. These existing measures are available without the creation of a new regulatory scheme, although some modifications of existing provisions may be needed.46 For example, it may be found desirable to extend existing consumer protection statutes to include services as well as goods or to address specific types of nonlawyer services.

The Commission believes it is important to separate the specific concern about preventing fraud from the general concern about activity by honest nonlawyers. Of course, it is as important to prevent fraud by nonlawyers offering legal services as it is to prevent fraud in any other transaction.

The Commission heard testimony about a number of situations where nonlawyer activities seemed to be in violation of various state consumer protection laws. For example, some individuals, including disbarred lawyers, falsely tell potential clients, and even opposing parties and courts, that they are lawyers. A special example of this kind of fraud may occur when "notarios" deceive Spanish-speaking immigrants, unfamiliar with the American legal system, into believing that they are lawyers.

Witnesses also described circumstances in which document preparers failed to type in the information provided by their customers; books and software for the preparation of wills inaccurately stated that their forms were adequate to accomplish stated results; legal technicians in family law matters gave incorrect or misleading advice or even encouraged a customer to commit a fraud on a court or another individual; and legal technicians in bankruptcies designed complicated schemes to defraud clients out of initial fees and leave lawyers holding the bag.

As is the case with all such consumer protection measures, these laws only establish standards for behavior, allocate responsibility for injury, and provide the basis for possible criminal and civil litigation. They lack affirmative protection for consumers or standards that govern the individuals who can engage in the activity. Moreover, their effectiveness can be diminished if the prosecu-

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46 Uniform state law provisions, such as the Uniform Consumer Sales Act (1972) or the Revised Uniform Deceptive Trade Practices Act (1966), may provide some guidance in drafting appropriate statutes where current law is inadequate.
torial and enforcement officials charged with their implementation are not able
to give violations by nonlawyers much attention. Nevertheless, many states
currently rely on precisely these consumer protection and criminal laws to pro-
tect citizens against unscrupulous or careless conduct by sellers of services.

b. Consumer Remedies Specifically Designed for Nonlawyer Activities that Cause Harm:
Insurance, Bonding, Arbitration and Mediation, and Client Protection Funds

A state may consider a different group of consumer remedies or protections
for nonlawyer errors or wrongdoing if it wishes to affect the behavior of non-
lawyers and protect consumers more extensively than through consumer pro-
tection laws and regulations. These additional remedies include insurance,
bonding, arbitration and mediation, and client protection funds. Any of these
remedies can be incorporated into a voluntary or mandatory system of regis-
tration, certification or licensure, without the necessity of a regulatory
agency's involvement, although enabling legislation might be required in
some circumstances.

In their voluntary form, any nonlawyer may choose to purchase or enroll in
a program or system that will provide these consumer remedies. A purchaser
of nonlawyer services who is harmed can then receive full or partial recom-
pense for the injury. At the same time, the nonlawyer's decision to provide one
or more of these remedies to purchasers will provide choices to consumers who
are attempting to distinguish among various nonlawyer service providers.

Insurance. Malpractice insurance or errors and omissions insurance might
be available for negligent acts by nonlawyers providing compensation for
injuries suffered as a result of a failure of due care or a failure to perform ser-
tices in a reasonable fashion.467

Bonding. Nonlawyers who hold money, securities or other valuable proper-
ty of another could purchase a fidelity bond.

Arbitration and Mediation. Nonlawyers can offer clients the option to arbi-
trate or mediate any disputes about fees or about the quality of services
provided.

Client Protection Fund Requirement. Nonlawyers could form a voluntary
organization and contribute to a consumer protection fund. Every state, except
Maine, currently has a client protection fund to compensate clients for certain
types of lawyer misuse of funds.

c. Regulation by Control of the Forum: Prescribing Forms, Limiting Tribunal Access, and Disclosure
of Nonlawyer Role

The Commission's findings set forth an extensive array of federal and state
administrative agencies and processes in which nonlawyers are, and have for
some time been, permitted to provide legal advice, file legal documents and
even make appearances in adjudicative proceedings. In all of these instances,
from federal Social Security Administration hearings to workers' compensation

467 Witnesses were in conflict about the availability of this insurance for nonlawyer
activities: some reported underwriters were available, and others reported no coverage
could be obtained.
hearings, the presence and role of the nonlawyers involved is disclosed and the tribunal or agency is empowered to bar from further activity any nonlawyer whose conduct is inappropriate, improper or of poor quality. Establishing similar controls over nonlawyer activity in additional agencies and in tribunals is an option for states to consider.468

In some circumstances, it is possible to exercise regulatory authority over the forum in which nonlawyer activity may occur rather than having to put in place direct controls over nonlawyer behavior. For example, a California judge developed and adopted specific forms for use by pro se litigants. The approved forms require explicit disclosure of any nonlawyer who assisted a party. The judge offers training classes for legal technicians and document preparers who have been assisting self-represented persons. If forms are incorrectly prepared, the judge will prohibit the nonlawyer involved from rendering further assistance on such forms to be filed in the court.

Similarly, the Florida Supreme Court prescribed forms that may be used for self-representation in several types of cases. Nonlawyer assistance to a party must be disclosed. The courts in which the forms are filed bar further assistance by nonlawyers whose customers’ forms are repeatedly in error.

Even in the absence of approved forms, a state can require that all forms filed by self-represented persons disclose whether a nonlawyer assisted in preparing the forms. If a document preparer or legal technician makes repeated errors, a court can require the nonlawyer to take a training course or simply bar the nonlawyer from offering assistance. Court rules that regulate nonlawyer assistance might include civil sanctions or criminal penalties for violations.

The Bankruptcy Code amendments of 1994 place controls upon bankruptcy petition preparers who were previously unregulated. They must sign the documents they prepare and include their social security numbers. Provisions are made for the disclosure of fee arrangements and the avoidance of fraud.469

d. Registration, Certification and Licensing

There are three common types of more extensive regulatory control that states may consider:470

Registration—a record containing a list of names. An individual would file her or his name, address and, possibly, qualifications with a government agency, and perhaps agree to be bound by certain standards, before providing services.

Certification—registration and permission from an identified authority to use a specific occupational title based on meeting certain qualifications. The law could limit the use of the title to only those meeting the qualifications.

468 States may find it particularly attractive to consider regulation over nonlawyer activity through the forum when other states have already used that regulatory approach for the same kinds of matters or activities.


470 These definitions have been derived from the general regulatory structure used by the Council on Licensure, Enforcement and Regulation (CLEARN), an affiliate organisation of The Council of State Governments. See Shimberg and Roederer, supra note 463.
such as "Certified Legal Assistant," "Certified Paralegal" or, potentially, "Certified Legal Technician." Non-certified individuals may still offer services if they do not use the occupational title.

Licensing—registration and a requirement that the nonlawyer meet formal state standards, perhaps through testing or education, to offer services. Licensing could include certification and the use of a restricted occupational title.\textsuperscript{471}

All of these regulatory approaches share the following characteristics:

- identification of a state or local governmental agency with administrative responsibility;
- specification of qualifications required to meet minimum standards (a list of possible qualifications appears in the following subsection of the Commission's Report);
- the opportunity to enumerate standards for activity;
- the possibility of exclusion from further activity; and
- the need to identify sanctions for impermissible activity under the regulatory scheme and to delegate responsibility for enforcement.

Registration is the least restrictive regulatory tool. Minimally, registration produces a roster of service providers. Recently, the California legislature considered a bill requiring registration of all document preparers and legal technicians so that they could be observed by the judiciary and a consumer affairs agency.\textsuperscript{472}

Perhaps most important, a registration requirement precludes unregistered persons from engaging in the regulated activity. Registration also gives the public a list of service providers.

Registration can establish minimum service standards and can require proof that the nonlawyer meets basic qualifications. For example, minimum age and education requirements might be required for registration or the form could require the registrant to disclose that he or she was not a lawyer.

\textsuperscript{471} Of course, these terms are often used with far less precision in practice than they are in their definitions here. For example, "Registered" Nurses and "Certified" Public Accountants are actually engaged in licensed professions, and certification by professional associations (such as bar or legal assistant associations) may have no connection to governmental regulation by "certification." Further, a learner's permit to drive an automobile and a lawyer's privilege to practice law each involve licensure, even though the prerequisites for each are dramatically different. Jurisdictions may encourage the voluntary registration of bicyclists for the purpose of facilitating the return of lost or stolen property, but the Commission is using the term "registration" in its mandatory sense as a prerequisite for offering a service.

\textsuperscript{472} See California Assembly Bill 1287, introduced March 3, 1995. An amended version of the bill called for the State Judicial Council and the State Department of Consumer Affairs to establish a joint task force to conduct a comprehensive study to identify all nonlawyer providers, required the participation of all nonlawyer providers and prohibited any nonparticipant from providing nonlawyer services. Assembly Bill 1287, as amended August 27, 1994 in the California Senate. The amended version of the bill did not require participation by document preparers, authors or publishers of self-help materials or by legal technicians who are authorized by federal or state law to provide legal assistance or appear before any tribunal. \textit{Id.} at § 202. On the last day of the legislative session, the bill was withdrawn by its sponsor, Gwen Moore.
Certification identifies a group of registrants as specifically qualified to provide services. Those certified can use a unique occupational title so that they can easily be distinguished from those who have not been certified.

Certification may be a valuable tool to inform the public of those qualifications or credentials considered to be appropriate for nonlawyer activities while still providing the public with a free choice of providers. Certified nonlawyers may publish their superior qualifications and even charge a higher fee. The public would be free to place its own value on certification and choose to pay or not pay any higher fee that may result.

While certification may normally imply a complete set of standards that define a high level of competency related to relevant tasks, this is not always the case. Certification standards may be simple and easily satisfied. Certification standards should reflect the required skills so the public is reasonably assured the nonlawyer can provide competent services.

Certification systems are generally more expensive than registration because they require development of competency tests. Creation of a two-tiered system of service providers naturally leads to friction at the boundary, with certified providers having a substantial stake in ensuring that uncertified individuals do not claim the restricted occupational title or undercut its marketability.

Licensure is the most complex and restrictive form of regulation. It is a process by which a government agency grants individuals formal authorization to do a specified thing upon finding that they have met certain educational and professional standards required to ensure that the public’s personal and economic well-being will be reasonably well protected.

It is illegal for anyone who does not hold a valid license to hold himself or herself out as licensed to provide services for which a license is required. Nevertheless, the requirements for licensure may be easily satisfied or they may be extraordinarily difficult to fulfill. The requirements for licensure can be carefully tuned to eliminate or mitigate the harm to the public arising from a nonlawyer by demanding a demonstration of the minimal competency considered necessary by the jurisdiction to provide that service. The minimal competency may be low or high, but only those who demonstrate that they have minimal competency will be permitted to serve the public.

Licensure is generally the most expensive form of regulation to implement, since it requires competency testing, standard setting and policing of unauthorized service provision by those not licensed.

e. Requirements that might be included in Registration, Certification or Licensure Systems

When a state considers the more extensive regulatory systems it will also appraise what conduct, admission and retention requirements will be part of the system. The following eight requirements may be useful to consider as states assess whether to develop new regulatory systems for nonlawyer activities. States will undoubtedly find other possibilities.

i. Disclosure Requirements

Disclosure requirements may be a useful part of a regulatory scheme to avoid consumer confusion and make misrepresentation more difficult. Disclosure by nonlawyers that they are not lawyers is a simple and effective means to assist consumers in assessing service provider qualifications and the reason-
aleness of the fee. Consequently, the Commission recommends that docu-
ment preparers and other nonlawyer providers of services in law-related situa-
tions should be required to openly disclose that they are not lawyers and to
indicate that without the client-lawyer relationship there is no evidentiary priv-
ilege and no obligation to preserve confidentiality.

While there are innumerable possible disclosure statements, some of the
more likely are the following:

• I am not a lawyer.
• I do not provide legal advice (or) I am not permitted to give legal advice.
• I am not an "abogado" nor a "notario publico" (lawyer). I am an "epigna-
da publica" (notary/scrivenet). This and all other notices should be in both
Spanish and English in any location that has Spanish-speaking clients.
Similar notices in other languages can also be required.
• No clients-lawyer privilege exists regarding my professional relationship
with you. [This should be explained to the consumer.]673
• I have no obligation to keep confidential any information you tell me, and
the law places no obligation on me to keep your secrets.
• My educational background, or degrees are as follows: ...

These and similar disclosure statements might be required to be displayed
prominently in a public area in the nonlawyer's offices, stated and explained in a
document presented to a customer before services are provided and acknowledged
in writing by the client. Also, a state might require that nonlawyer-prepared doc-
uments bear the nonlawyer's name and address and registration number.

6. General Education and Age Requirements

Both minimum age and education requirements address the general matur-
ity and sophistication of a nonlawyer, but neither is directly related to non-
lawyer competency. The Commission heard a variety of testimony regarding
age and education requirements, with minimum educational levels proposed
that ranged from none to four years of college with some postgraduate work.

iii. Work Experience Requirements

Many who testified before the Commission recommended a work require-
ment related directly to the skills necessary to perform specific activities. Of
course, any requirement should be reasonably related to the work to be done,
and it would be inappropriate to assume that one kind of nonlawyer experi-
ence necessarily created qualifications for another kind.

In some regulatory systems, satisfaction of a work experience requirement
can substitute for a minimum education requirement. Witnesses testified that
many paralegals and legal technicians have years of valuable experience but
may have only a high school education or less. Paralegals in legal services pro-
grams, for example, often come from the communities they serve and have lit-
tle formal education before working as advocates. Yet, they are often reported
to be among the best advocates before administrative tribunals. Because on-

673 States may wish to consider whether to create a nonlawyer version of the client-
lawyer privilege or the duty of confidentiality.
the job skills training may be the most important indication of a nonlawyer's competency, a general education requirement without a work experience alternative is probably inappropriate.

iv. Specialized Training or Education Requirement

Like work experience, qualification to perform nonlawyer activities through specialized training or education should be directly related to the skills necessary to perform the activity. Different programs can be required for different types of activities. Someone qualified by the state to assist self-represented persons in small estate probate matters would not be presumed competent to represent battered spouses in proceedings to obtain a protective order against further abuse. Similarly, a tax preparer's specialized training would have little to do with appearing in a visa matter as an accredited representative.

There is likely to be great variation in training requirements for specific services. To assist self-represented persons seeking name changes, the training period might be less than a day. To represent special needs children, based on one training program that is already in use, training may extend for a year and include clinical as well as classroom preparation. If regulatory systems are established, the training requirements for specific activities can be developed by working groups consisting of both legal and paralegal educators and practitioners.

Witnesses reported that most existing nonlawyer training programs are designed primarily to train traditional paralegals. The curricula in these programs, like the curricula in most law schools, is designed to provide the student with a broad background in the law, research skills, an understanding of the legal system, substantive law, and other areas, but generally do not provide skill-specific training or hands-on clinical experience of the kind discussed in this section. These curricula can, however, be revised or new training programs can be designed by these educational institutions.

As already noted, there are relationships between specialized training requirements and work experience requirements; in some circumstances, regulators may conclude that satisfaction of either one of the requirements is sufficient.

v. Maintenance of Client Records Requirement

A record of the names, addresses and telephone numbers of all clients may be required. If a record is necessary it should be maintained to the fullest extent possible. Additionally, a record of the dates of services provided and a short description of the type of services provided may be required.

vi. Continuing Education Requirement

A minimum number of hours of practice-area specific continuing legal education may be required annually. This can include in-house training, and some of the hours of the requirement may be satisfied by self-study using appropriate materials, including law school texts, audio and video taped legal training lessons, and interactive legal training software.

A regulatory system may include adoption of a set of rules of professional conduct and a method for enforcing those rules that includes a disciplinary procedure and sanctions such as private and public censure and expulsion from the occupational group. Many regulated professions other than the legal profession already adopt such regulatory systems.

Training in ethics and professional standards of practice might be required as part of a work experience requirement, a training requirement or a continuing education requirement.

vii. Examination Requirement

A skills-specific, practical examination may be required before a nonlawyer is qualified to use an occupational title or provide law-related services. Skills examinations are designed to provide assurance of minimum qualifications. Ideally, examinations will be prepared, safeguarded, administered and revised to test all of the skills needed in the practice area.

Although not required in many other professions, periodic reexamination might be included in a regulatory system for nonlawyers. Reexamination can help to avoid the competency problems that are sometimes associated with part-time workers and to encourage the selection of relevant continuing education training of high quality.

4. SOME EXAMPLES OF HOW A STATE MIGHT APPLY ANALYTICAL CRITERIA TO NONLAWYER ACTIVITY AND SELECT WHAT, IF ANY, REGULATION IS APPROPRIATE

In this section, we explain how a state inquiry can apply the previous section’s analytical criteria to situations in which witnesses before the Commission reported nonlawyer activity is occurring. The results will guide states to appropriate decisions about whether or what regulation of nonlawyer activity is necessary and effective.

In undertaking an inquiry, two considerations should be kept in mind. First, no reasonable system of regulation can avoid the risk of harm entirely; if the consideration of nonlawyer activity in law-related situations is held to a standard of perfect safety, then there is no point in making the inquiry. Second, the analysis will be useful only if the nonlawyer activity is narrowly and carefully defined.

The recommended analysis will be ineffective if states begin their inquiry using wide varieties of nonlawyer activity in broadly defined legal areas. It will take little time to conclude, for example, that a self-represented person in a family law case seeking advice about “what to say in a legal paper” faces a serious risk of harm; moreover, the consumer is unlikely to be able to evaluate the nonlawyer’s qualifications to give such broad advice. Similarly, the benefits and negative consequences of regulating such nonlawyer activity will be impossible to assess if the inquiry is framed in such vague terms.

A state might consider, however, the effectiveness of the analytic approach where the situation is narrowly defined. The analysis could be effectively performed, for example, in the discrete and relatively uncomplicated circumstance of a self-represented individual asking a nonlawyer to explain unfamiliar terms contained in instructions accompanying a court-approved form for use in a
divorce in which division of property, payment of debts and alimony (if any) is agreed to by the parties. Here a state might conclude that there was no serious risk of harm or, if there were a possibility of harm, that the individual could form a reasonably accurate evaluation of the nonlawyer's qualifications to explain the terms. If the state concluded that the consumer's evaluation were likely to be inadequate, the narrowness of the circumstances would permit the shaping of a specific and narrow form of regulation that would protect the consumer from harm without making the advice so expensive that the consumer would forego the advice and take her or his chances.

A state will find the process useful in more complex situations as well. For example, if a nonlawyer advises a self-represented individual about how to fill in a form in a contested custody matter, it is unlikely that the consumer can effectively evaluate a nonlawyer's qualifications to provide such advice. Here a state might choose a regulatory approach calling for the licensing of certified social workers and other nonlawyers, who had worked at least three years as paralegals handling custody cases under the supervision of a lawyer, to provide advice and perhaps require that such licensees carry malpractice insurance, take 20 hours of continuing legal education annually, and provide only advice, not representation.

That no system can prevent all risk of harm is inescapable. Just as with the delivery of services by lawyer, the potential for serious harm from nonlawyer activity increases as the stakes, whether personal or financial, increase. Even in what initially appear to be straightforward matters, there will occasionally be individuals at risk of serious harm. It does not make a difference whether it is a lawyer or a nonlawyer who gives bad advice: harm occurs in either case. The legal profession, of course, has at present a much better-developed panoply of remedies in place than most nonlawyers can currently offer and a more extensive regulatory system than any thus far proposed for nonlawyer activity. The question for a state to consider is whether, in at least some limited circumstances, some balance of consumer remedies and controlled risk will lead to approval of additional nonlawyer activity in order to improve consumer access to justice.

We offer below in more detail several demonstrations of how a state might analyze whether new regulations are needed for law-related nonlawyer activity and, if so, what regulation might be appropriate. We recognize that these examples may be useful in some states and not in others. Each jurisdiction must scrutinize its laws, policies and practices to determine whether or how it can provide better public access to legal services by an increased use of nonlawyer providers while providing an appropriate level of public protection.473

a. The Document Preparer with Court-Approved Forms

Is there a serious risk to the consumer's life, health, safety or economic well-being? There is little risk if a document preparer gives no legal advice, even as

473 This assessment should take place in the context of the broader efforts of the bar, bar associations, courts, law schools and state governments to help assure affordable assistance for the legal and law-related needs of the public, as described supra in Part Two, § B.
to which forms to use, and uses only court-approved forms. This is true even if the forms can be used for substantial personal interests, such as custody, or assets in a divorce or a will. Although the seriousness of the potential harm would increase, the likelihood of an error by the document preparer would remain constant. In this scenario, the state might conclude that the risk was not serious enough to require regulation, even though the unadvised may incur self-inflicted harm by the use of the wrong form, taking an ill-advised action, or mistakenly completing a form.

If a state remained concerned about the substantial interests involved in document preparation, it might then assess whether a consumer can evaluate the ability of a document preparer to fill in forms correctly. On the whole, the nonlawyer's qualification to merely type written information onto a form, thereby only transcribing the client's words, would seem almost always to lie within the consumer's ability to evaluate except, perhaps, where the consumer lacks the necessary language ability. A state might review the possibility of requiring qualifications to be available in the consumer's language as a limited form of regulation to address this problem, or it might examine additional ways to regulate the business of document preparation.

If a state review of the first two criteria leads to the conclusion that some regulatory protections are in order, application of the third criterion occurs: will the effects of developing appropriate regulation discourage or prevent effective access to the service? Each of the many alternatives available in the wide range of regulatory options will have some price. At present the price of document preparer's services is low, owing in part to the simplicity of the service and the large number of people who are available and willing to do it at modest cost. Some of the regulatory options may not drive up costs. For example, the existence of court-approved forms in some jurisdictions imposes one form of regulation through the tribunal with little likely effect on price. Similarly, a state could require disclosure of the nonlawyer role on every form without a significant cost increase.

If a state decides to implement specialized consumer remedies, such as malpractice insurance or client protection funds, the cost of obtaining the insurance or contributing to a fund may significantly increase the price. Registration fees or licensing, including examinations and training requirements, would also cause additional costs and inevitably reduce the number of people who sell and type forms. If a state requires licensure, in-office disclosure forms listing relevant qualifications might become the most common element of the regulatory system.

b. The Document Preparer Without Court-Approved Form

It may at first seem that there is a greater risk of serious harm if the document preparer is using forms prepared by private publishers without screening or approval by a tribunal. However, a state may conclude that any increased risk arises from the absence of court review of the forms, not from a document preparer's activity. Also, the consumer's ability to evaluate the preparer's qualifications seems unaltered. However, if the absence of court-approved forms persuades a state of the need for more regulatory protection, the balancing of likely regulatory benefits and costs might suggest requiring disclosure on all forms and, perhaps, registration.

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Is there a serious risk to the consumer’s life, health, safety or economic well-being? States may find this a close question, particularly in light of the practice in California, New York City and several other jurisdictions that allow this type of uncontested divorce without judicial review. The procedures for divorces of this kind tend to be simple, and forms for them are among the most common self-help materials. Life, health and safety are unlikely to be involved in the facts as stated. By definition, the economic consequences are modest.

Applying the first criteria, a state might decide not to regulate technicians offering these services. Even if a state decides there is a risk of serious harm, it may leave the activity unregulated because a consumer has the ability to evaluate the nonlawyer provider’s qualifications. The nonlawyer service leads to a court-approved divorce in most cases. When it does not, the reason for not receiving a divorce will usually be clear. If the nonlawyer has provided incompetent services, it will usually be apparent.

If a state decides to regulate the activity, it might find that existing consumer protection laws and special consumer remedies are adequate, or it might decide to have the local divorce forum regulate the nonlawyer activity through disclosure on forms and oversight of parties whose papers reveal the presence of a nonlawyer providing assistance. On the other hand, the state might decide on registration or on a licensure system that requires an examination as a prerequisite to providing advice in these limited circumstances.

A state considering licensure would want to balance the likely benefits of preventing harm to consumers against the cost of creating and enforcing licensure. It seems likely that, with the plethora of self-help materials available on divorces, the costs associated with providing the limited and inexpensive nonlawyer services involved here can be quickly driven up so high as to result in fewer legal technicians under a full licensure scheme.

d. The Legal Technician assisting in the Execution of a Real Estate Purchase and Sale Contract for a Single-Family Home and Representing the Purchaser or the Seller Through the Closing.

Does the activity pose a serious threat to the consumer’s life, health, safety or economic well-being? The purchase of a home is the single largest financial transaction that most consumers will undertake. While a good home buying decision can pay handsome economic dividends for a family, a bad decision may well leave the family unable to financially recover during its working life.

476 This determination might quickly change as the assets of the couple increased, or if a child became a factor.

477 The term “Legal Technician,” as is used in this discussion, does not include real estate brokers operating within the authority of a state regulatory system or real estate conveyancers licensed by the judicial branch in the State of Washington to assist in real estate transactions. See supra note 95 and accompanying text.
Most families will not recover from a serious mistake in the purchase of a home. While the evidence suggests that the frequency of mistakes and harm to be slight, the consequences of serious or material mistakes are devastating to the parties involved.

Most of the difficulties a home buyer faces concern finances and are not of a purely legal nature. Negative market conditions have nothing to do with whether a home was purchased with proper legal advice and counsel. However, a lawyer’s role may not be limited to technical legal issues, especially for the financially unsophisticated. A lawyer is likely to be the only independent advisor available to a home buyer. Other participants in the process depend upon commissions or other compensation contingent upon completion of the transaction.

There are many aspects of a home purchase in which buyer and seller may suffer serious economic harm from bad legal and economic advice. The independent advice of counsel helps the purchaser determine the value of the home to buy in light of the purchaser’s economic circumstances, identify the type of mortgage best suited to the buyer’s needs, avoid onerous mortgage terms, evaluate the risks inherent in purchasing a new home, and handle other issues as well.

The seller has different, but equally important, issues. For example, if the seller is purchasing a replacement home, the sale proceeds should be properly allocated to defer otherwise taxable gains. The transaction must be coordinated with the seller’s estate plan. If the seller has been divorced recently, or is in the process of a divorce, the seller must account properly for the sales proceeds.

There is another factor that complicates a “simple” real estate transaction. Today, the notion of “buyer beware” has given way to a seller’s requirements to disclose. The seller must make required disclosures to the buyer so that the buyer can evaluate the risks involved. Many states now require written disclosure because most people buy homes so infrequently that they are unlikely to know the risks without fair warning. Some of these risks go beyond economic concerns and may involve a risk to the physical safety of a purchaser’s family such as the presence of asbestos, lead paint or radon. It is not always easy for a seller to know precisely what the law requires; failure to make all required disclosures puts him or her at risk of liability to the buyer long after title passes.

Despite these serious risks of injury to both buyers and sellers, many states allow people who are not lawyers to advise buyers and sellers about the terms of prospective real estate contracts and to assist at or conduct closings. In addition, a substantial number of people involved in these transactions represent themselves, relying on prior experiences, written materials and various types of nonlawyer assistance. In the face of these widely differing approaches, some states may decide that the myriad of factual settings and the complexity of real estate transactions present a risk of serious harm to buyers and sellers; others may reach the opposite conclusion.

See supra notes 66 and 83 and accompanying text.
In states that conclude that a serious risk is present, the second criteria in the analytical framework asks whether a buyer or seller will generally be able to evaluate the qualifications of legal technicians offering assistance. Most purchasers lack the experience to assess provider qualifications. Purchasers may choose a title company based upon reputations and internal standards, but a purchaser hires a title company only after the parties have entered into a purchase and sale agreement. Moreover, title companies and escrow companies merely act to close the transaction and insure the resulting title. They do not purport to represent directly the interests of the parties or offer advice on the many, often competing, interests relating to the transaction.

Consumers may, of course, evaluate real estate brokers based on their reputations, although making judgments about professional qualifications regarding complex matters is always difficult without a detailed understanding of the profession. A state may conclude that it needs to reach the third criteria in its examination of whether and how to regulate legal technicians involved in residential real estate transactions because of the potential serious risks and the difficulty of consumers evaluating provider qualifications.

The third criteria asks what level of regulation will provide essential consumer protection while not imposing excessive costs or other burdens on the public, or whether there is no regulatory system capable of providing adequate protection against injury by legal technicians.

A licensing system for legal technicians with entrance examinations and administrative oversight is likely to add sufficient expense to the rendering of their services that they no longer offer substantial cost savings. This might discourage a state from enacting a regulatory system for legal technicians.

On the other hand, states that currently prohibit nonlawyer representation in contracting and closing real estate transactions may look to other states with different practices and experience and conclude that allowing one or another regulated profession to provide advice to parties would improve access to high quality yet more affordable services without significantly increasing consumer risks. Real estate brokers and sales personnel, mortgage bankers or brokers, and title and escrow companies are already licensed to provide a variety of closely related services. States may consider, in light of the experience of other states, whether adding contract advice and closing services to this list of licensed or otherwise regulated activities would reduce total buyer or seller costs in real estate transactions without unacceptable risks of economic injury.

By definition, there is serious risk in this contemplated situation; there can be little doubt that poor advice and assistance in this circumstance can quickly lead to substantial bodily harm as well as severe economic loss. However,
unique to this situation is the substantial risk of harm that comes from no
advice being available, although that is often the case. Even today police in
some communities are reluctant to act decisively on the basis of a woman's
complaint; courts lack the personnel to provide a prompt hearing; and some
judges are reluctant even to recognize the seriousness of physical abuse in inti-
mate relationships. Historically women experiencing abuse in marriage were
often ignored or disbelieved in our courts. Only through the intervention of
women's shelters and their volunteer cadres of lawyers and nonlawyers did the
widespread occurrence of violence in marriages and other relationships come
to light.

Can a battered woman assess whether the nonlawyer working in a battered
woman's program is qualified to offer assistance? The program's reputation in
the community, either through publicity or word-of-mouth, may provide
some basis for an assessment of qualifications. That the program is operated as
a nonprofit organization may help because the program's staff have no direct
financial stake and they do the work without charging the client. Similarly, the
program may offer the services of qualified social workers, therapists or lawyers
as part of the program's design or operation. On the other hand, there are
unlikely to be directly relevant credentials or certifications to show to a poten-
tial client. And the client's state of mind when deciding whether to ask for
assistance is likely to be preoccupied with other matters.

Witnesses who worked with battered women's programs informed the
Commission that the primary issue when a battered woman comes to a pro-
gram is actually true: that the program keep the secrets it is given; that the
client be protected by the program against further violence; that it be possible
to rely on the program and get help; and that the helper be someone whom
the client can feel safe talking to openly. In this context "qualifications" bear
little relationship to formal credentialling; moreover, they are best assessed by
a potential consumer of the services, rather than by the state.

In some states, battered women's programs now provide the kinds of advice
and assistance described here, including speaking in court on behalf of their
clients, without any regulation outside of court.488 Under the third criterion,
which balances the likely benefits of regulation against the likely negative con-
sequences, this outcome might be reached in several ways. In court, the judge
regulates nonlawyer presentations. Outside court, many factors may tip the
balance of a state's consideration away from regulation beyond state con-
sumer remedies. Among these factors are the inability of many of the battered
women to pay for assistance, the nonprofit nature of the services, the possibil-
ity that regulation would increase the cost to the organization beyond the abil-
ity of charitable funds to respond, the pressing need for someone to provide
immediate help, the public consciousness that the helpers are performing a
public service, the long record of lack of access to the justice system for these
problems, and the unlikelihood that any helper would ever be prosecuted for

488 The Commission heard testimony regarding the District of Columbia, Massachu-
setts and California, among others, but our record is incomplete and there are almost cer-
tainly states in which nonlawyer helpers are not allowed to speak in court and may also
be barred from some of the other activities described here.
providing this kind of help. If a state concludes that additional regulation is needed, *pro bono* projects of the kind already in place in many bar associations may provide a lawyer's advice and assistance to the nonlawyer volunteers and provide lawyers to handle court proceedings.
Closing Statement

With the issuance of this Report and recommendations, the Commission's work has come to a close. At the same time, this marks the commencement of the next phase of debate, and, hopefully, implementation. Now consumers of legal services, courts, bar associations, lawyers, nonlawyers providing law-related services and law schools must begin their factual review and analyses of the recommendations to determine which of them may be implemented practically and expeditiously to insure that consumers are protected while simultaneously afforded greater access to our legal system.

Commission members were genuinely surprised to learn of the extent of nonlawyer practice, both in terms of that which is already lawful and also with regard to new and expanding forms of activity by nonlawyers. Local bar associations and others may be similarly surprised to learn the extent of nonlawyer activity going on outside of their substantive and geographical practice area.

The Commission looks forward to the debate that will be conducted through national forums, such as the American Bar Association, and at the state level, on the important and complex issues that have been raised during its inquiry. As with all such reports, the recommendations suggested here may generate other, equally valuable, solutions to the problems the Commission has highlighted.

The Commission is hopeful that the many long hours of public hearings, of Commission debate and of research that have gone into this Report will serve to assist the states in their review of local circumstances as they attempt to address the tension presented by movements toward the provision of legal services by nonlawyers in light of demands for access to legal services. If this review ensues, and is facilitated by this Report and its recommendations, then the Commission will have made a contribution to this important process.
Summary of Recommendations

Whereas, increasing the public's access to the justice system and to affordable assistance with its legal and law-related needs is an urgent goal of the legal profession and the states; and

Whereas, the protection of the public from harm arising from incompetent and unethical conduct by persons providing legal or law-related services is an urgent goal of both the legal profession and the states; and

Whereas, when adequate protections for the public are in place, nonlawyers have important roles to perform in providing the public with access to justice;

Therefore, the American Bar Association Commission on Nonlawyer Practice recommends:

1. The American Bar Association, state, local and specialty bar associations, the practicing bar, courts, law schools, and the federal and state governments should continue to develop and finance new and improved ways to provide access to justice to help the public meet its legal and law-related needs.

2. The range of activities of traditional paralegals should be expanded, with lawyers remaining accountable for the paralegals' activities.

3. States should consider allowing nonlawyer representation of individuals in state administrative agency proceedings. Nonlawyer representatives should be subject to the agencies' standards of practice and discipline.

4. The American Bar Association should examine its ethics rules, policies and standards to ensure that they promote the delivery of affordable competent services and access to justice.

5. The activities of nonlawyers who provide assistance, advice and representation authorized by statute, court rule or agency regulation should be continued, subject to review by the entity under whose authority the services are performed.

6. With regard to the activities of all other nonlawyers, states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities
present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. The highest court in a jurisdiction should take the lead in examining specific nonlawyer activities within the jurisdiction, with the active support and participation of the bar and the public.
We have served with dedicated colleagues on the Commission on Nonlawyer Practice, which conducted a comprehensive examination of the impact of nonlawyer practice and formulated policy recommendations for the American Bar Association. Our decision to offer this Minority Report reflects our belief that protection of the public is a paramount goal of the legal profession and of the justice system it serves. For attorneys, a license to practice law is more than a mere authorization to do lawyering; it is an assurance to the public that a lawyer places the interests of the client above all else and is qualified to competently serve those interests. Client protection should be no less when the providers of services are nonlawyers. This Minority Report does not concern itself with protection of lawyers and their economic interests, but rather is a reaffirmation of the obligation of public protection at all levels of the legal service system and by all service providers. One of the subscribers to this Report was appointed to the Commission in his role as Chair of the ABA Standing Committee on Lawyers' Responsibility for Client Protection and as a representative of the Center for Professional Responsibility. Others of us also bring to our roles as commissioners deep concern over the protection of the public. Our commitment to client protection is an abiding one.

While we agree with most of the recommendations of this Report and with the thrust of the Report to increase access to justice, we believe that the Report does not sufficiently emphasize that the protection of the public should be an essential factor in any proposal to increase access. We disavow any inference that may be taken to the effect that access to justice is the paramount goal to be served, or that in doubtful cases, the access goal should be given greater weight than the goal of the protection of the public from the harm that may befall them at the hands of unskilled or unethical providers. In our judgment, the prospect of incompetent representation casts a long shadow over the doorway of access.

The failings of this Report to provide procedures to assure client protection are in stark contrast to the prominence given within the legal profession to self-regulation and public protection. This system did not emerge overnight, but is the product of years of experience and refinement. Public protection has become a goal essential to the integrity of the American legal system. This was reflected most recently by the ABA adoption of The Report of the Commission on Evaluation of Disciplinary Enforcement (known as the McKay Commission) which proposed numerous measures to strengthen disciplinary enforcement and expand public protection. It, therefore, seems incongruous that while efforts are made to further expand already stringent elements of lawyer accountability to clients, the Commission's Report makes no truly parallel effort to ensure protections when nonlawyers provide services directly to the public.
The disparity in public protection between lawyer and, as envisioned by this Report, nonlawyer providers, is evident. Those who retain a lawyer will be represented by a person who has met fitness standards and satisfied educational standards that include testing and licensure, and is also accountable for monetary damages for legal malpractice, insured to cover malpractice losses, and is subject to disciplinary sanction for misconduct. In addition, client protection funds exist today in all but one state to compensate clients for the defalcation of their lawyers.

Consumers who rely on a nonlawyer functioning outside the scope of lawyer accountability and forum regulation are assisted by a person who is not licensed or regulated, has not met any mandated educational or competency standards, and has not been subject to fitness review. The law surrounding these independent nonlawyers' activities to date reveals few meaningful remedies for client redress. Malpractice insurance is virtually nonexistent; existing lawyer funds for protection do not compensate for harm caused by the defalcation of these nonlawyers; and consumer protection statutes do not reach negligent conduct. Injunctive action is the sole remedy available to remove negligent or incompetent nonlawyer providers from the legal service arena.

The standard of "buyer beware," no longer controlling in much of the commercial arena, will be the watchword, a situation ill-advised as society approaches the 21st century.

The Commission's Report also fails to advance the results of its survey of judges who, by two to one margin, evidenced strong concerns about the level of competency demonstrated by nonlawyers. The problems identified included nonlawyers providing misinformation, charging large fees for matters that individuals could easily pursue pro se or unduly complicating the proceedings. In sum, these judges did not support an expanded role for nonlawyers without the attendant requirements of training and competency. While the Commission's Report touches on this issue of nonlawyer competence and accountablity, the references as previously noted, are unfortunately overshadowed by the emphasis accorded access to the legal process. A right lost to the incompetency of a lawyer or a nonlawyer remains a right relinquished needlessly and possibly irretrievably. The client should have comparable opportunity to seek redress regardless of the source of the harm. More importantly, the client should not have been exposed to the loss of its valued rights, rights the client sought to have protected.

In our view, the less able clients are to assess the risk of harm, the greater the need for some regulatory mechanism to ensure competent performance. While the analytical framework set forth in the Report is an acceptable starting point, it does not offer specific competency and accountability standards which should attach when independent nonlawyers provide law-related functions. This is a logical and necessary step in evaluating the complex question of expanding nonlawyer activities: specifically, the means by which clients should be protected from harm.

In conclusion, the public at large must have improved access to our justice system. There can be no drift to a two-tier system of justice where poor and middle class Americans cannot redress wrongs or pursue valid legal claims. To help assure maximum access, nonlawyer provision of certain legal services should be encouraged and nurtured. But once the door of access is opened
wider, we must anticipate the dangers to the public that could lurk in the darkness behind that door.

There must be clear rules and restraints established at the outset to cultivate a responsible and competent profession of nonlawyer providers. There must, as well, be assurances that the public is protected in the process and able to seek redress should harm occur. While encouraging access, the American Bar Association should not countenance a vague process of trial and error evolution. Safeguards must be put in place to light the way and protect the public before the ABA adopts the salutary recommendations included in the Commission's Report.

Respectfully Submitted,
Ernest Y. Sevier
Raymond J. Werner
The undersigned Commissioners, Walter J. Russell and C. Terrence Kapp, agree with the findings of fact and most of the conclusions of the majority Report. However, there are certain areas of the Report which need either increased emphasis or a change of emphasis. We also concur with the Minority Report filed by Commissioners Ernest Y. Sevier and Raymond J. Werner and we will not revisit the areas covered in their Minority Report. The lawyer is regarded by the public as preeminent in his or her ability to guide and counsel people in legal and other matters. Traditional paralegals and actual providers of legal services have time and time again recognized this preeminent position in matters involving the application of law to the affairs of clients. However, we recognize as stated and cited in the majority Report many legal transactions are or have become so routine as not to require the intervention of a lawyer.

We think that it is important for the American Bar Association before taking any action on the Report to adequately define the role of the lawyer and to distinguish fundamentally the differences between the lawyer, the paralegal, the legal assistant, the legal technician and the document preparer. Just as the medical profession has been able to define the differences between physicians, registered nurses, practical nurses, physicians assistants and paramedics, so should the legal profession. The ABA should take the lead in this.

While there may appear to be some overlapping and similarities between the various levels of service providers, the differences are substantial and fundamental. It is the duty of the ABA to begin to publicize the differences between the limitations of each service provided. It is absolutely imperative that the ABA take the lead in this role. The public has the right and the need to know these distinctions and to know when they should be consulting a lawyer. The ABA should articulate the reasons why consumers should consult the lawyer first. The lawyer should act as the intake person who will review and analyze the consumer’s problem and who will advise the consumer as to the level of service needed and the proper service provider. Lawyers should be encouraged to inform the public of the same and not hesitate to recommend a lower level of service provider when that will properly serve the consumer.

Lawyers everywhere will benefit when the public can trust that the lawyers they consult will steer them in the right direction. The recommendation of the majority that “Increasing the public’s access to the justice system and to affordable assistance with its legal and law-related needs is an urgent goal of the legal profession and the state” while laudable is a recommendation without substance. No reasonable person could possibly disagree with such a rally cry, just as no reasonable person could disagree with the same statement about the health care system.

In reaching this recommendation the majority relies heavily on such studies as the Report on the Legal Needs of the Low- and Moderate-Income Public,
referred to in the Report, which was prepared by the Institute for Survey Research at Temple University for the Consortium on Legal Services and the Public. The Commission majority accepted the findings of this report without analyzing the report in any detail. The report does not render a quantitative definition of what is "affordable." The questions asked assume that legal services are not affordable to many, particularly moderate-income people. The Commission should not have accepted this finding on its face, without some analysis of what "affordable" is. This is particularly true with respect to middle-income persons. For instance, if the report had been a survey of motel and travel needs of people, the same questions related to motel and other travel needs would obviously come to the conclusion that people would travel more and use more travel-related services if they were more "affordable."

Before leaping to accept these studies an analysis needs to be done of what the consumer can buy in goods or services for a comparable price and why the consumer considers one affordable while the other not. For example, our Commission heard that a will involving assets which included a house, savings, small investments and no tax issues for a married person with minor children in most cases did not exceed $100.00 to $125.00 when drafted by a lawyer. The fee for the will included not only the consultation on estate and probate matters but also the proper execution of the same. How does this compare with the cost to a family of four attending a sporting event with the attendant charges for parking, souvenirs, tickets and food? Or how does the cost compare for the same family to spend the day at an amusement park?

The question that should have been addressed by the Commission is the relationship of the worth of these services performed by the bar to that of other services and goods that the public buys and why a consumer is willing to pay for the sporting event as opposed to providing for the peace of mind of his or her family. In addition, any analysis of whether legal services need to be more affordable should be based on a relative study of general wage patterns and of what is being charged for other goods and services. These were issues and questions that were not addressed, and for any conclusion on affordable services to be meaningful, such questions should have been addressed by the Commission. We think that the fundamental question of the relative worth of a lawyer's services as opposed to other goods and services in the economy should be addressed by the ABA and promoted to the general public. In the same vein, the increase in costs of court fees and the fees of others who provide services to the legal profession should have been considered in the Report.

A concomitant theme running through our hearings has been access to lawyers. This lack of access to some meant lack of availability of lawyers; to others, it meant access was denied by the inability to afford a lawyer. To others it meant both. At the same time we heard testimony from representatives of the bar that many lawyers were underemployed or unemployed. We also heard that many lawyers were not trained to handle many legal matters, and the public was looking elsewhere for specialized services in such areas as battered spouse representation or educational rights of children. Yet, the consumers of legal services overwhelmingly looked first to lawyers for service. It was only when lawyers were not available for any of the reasons listed above that they looked to others. The majority fails to recognize or recommend what the bar can do to help the consumer have a lawyer or even how the bar can rec-
ommend ways in which a legal service provider may not be necessary. Instead the majority looks for ways by which nonlawyers can be the first contact with the consumer and the primary deliverer of such services.

The majority misses an essential point by not examining the ways in which other states have taken legislative action to preclude the need for a legal services provider or the ways in which the states and federal government have found to make lawyers affordable (thus increasing access to justice). Although encouraged by this minority, the Commission did not study the ways in which the legislatures and federal government have enacted legislation which provides the means for and encourages lawyers to get involved in these matters because compensation of lawyers is insured under this legislation. These enactments provide the means by which the services of a professional become affordable to the public at large and at the same time encourage the lawyer to take on a case that will properly compensate him or her.

While all of the Commission members rightfully praised "the parents who have fought for legally required special educational facilities for their own disabled children (without lawyer assistance) and for assisting other parents of disabled children with comparable objectives," the majority failed to comprehend that the legislation which provided for these rights for special education facilities for disabled children did not at the same time provide the means for these parents to afford lawyers who could fight the well-funded school boards who pay prestigious law firms to deny these disabled children their rights. Ironically, if these school boards knew they might have to pay the child's lawyer the same as their lawyers if they lost, most of these cases would be settled quickly. The majority leaves these parents with praise and encouragement and no recommendations for how they can get affordable professional help and access to justice.

The Commission should have made a recommendation that legislative bodies, both state and federal, review their laws and find means to increase access to justice whereby lawyers become affordable. There are ways to make it a win-win situation for both the public and the bar. The majority should recognize that any right without a remedy is a right denied and any right that does not provide the means to pursue the remedy is also a right denied. The majority position, after taking into account the analytical approach mentioned in this Report, could be an encouragement to all nonlawyers to provide basic services to the public because the majority Report perceives that any service is better than none. Nowhere does it consider unique methods by which there may be no cost to the consumer and therefore no need to create a lower tier of service. If a lawyer charges a $75.00 fee for a will, while an independent paralegal charges only $35.00 for the same, the quick reaction of the majority is to say that it is better to allow the nonlawyer to function than to have that consumer be without a will. However, although encouraged to do so, the Commission did not look at the system in Ohio where legislative action was taken which precluded the need for a will in almost 75% of all estates. The Ohio legislature found that if a will were drafted about 75% were drafted in the same manner. It then passed legislation which provided for the same outcome without a will. Thus, for most people a will was no longer a necessity in most estates. This minority wonders how many independent legal technicians would inform the consumer that they may not even need a will.
There are other ways to increase access to justice and provide affordable lawyers which the majority ignored. In the area of housing, most tenants do not have the means to fight eviction. While all reasonable persons would agree that a place to live is essential, the majority would not look into the cost of having court-appointed and paid lawyers to help the tenant at a reasonable fee such as $35.00 to $50.00. Given the glut of lawyers, this minority thinks one would be surprised as to how many lawyers would step forward to take these assigned cases just as they do for the criminally indigent. The majority suspects that a proper study would demonstrate how in the long run the public would save money when people are not improperly evicted.

Lawyers have traditionally and still do rise to the occasion and provide pro bono services. Yet the majority makes no such recommendation that other professions rise to the occasion and thus increase access to justice and provide affordable lawyers. How many psychologists and social workers provide pro bono services in the contested custody or visitation case? How many accountants provide pro bono service to the divorcing couple in working out their budgets? This minority recommends that the ABA work with, encourage and demonstrate how other professions can contribute to provide affordable lawyers and access to justice. The majority Report fails to take into consideration several other things, including the extensive advertising in the yellow pages of the phone book that shows lawyers are readily available for free conferences on legal problems and the myriad activities by lawyers to provide services to the public. Large law firms such as the Hunton and Williams firm in Richmond, Virginia opened a successful office in a low-income area.

All who are knowledgeable in the area recognize that a contradiction exists between two apparent truths: the lack of "affordable" lawyers and the glut of lawyers (both underemployed and unemployed). How did this happen? Before setting up nonlawyers to "bridge the gap," the ABA must investigate the reasons that have led to this iniquity and find the solutions to correct it. Both the public and the bar will benefit greatly.

This minority believes, as did the report of the New York State Bar Association Ad Hoc Committee on Non-Lawyer Practice, that our Report should make positive recommendations with respect to what the American Bar Association can do to insure adequate legal services. First of all, one of the constant comments we heard was that lawyers do not listen to people and that they argue too much among themselves. There is a public perception that this in fact is true. We should strive to emphasize that we must be more collegial in our dealings with each other. Each lawyer must recognize the limitations of his or her own experience in an area of expertise, and should be willing to refer clients to another lawyer when the lawyer does not have the expertise required. We have noticed, for instance, that larger law firms talk about being "full service law firms." Firms that a few years ago would have referred either domestic relations matters, patent matters, criminal matters or personal injury now have people competent and able to handle all of these areas. Other than the area of conflicts of interest, very little is referred out. Solo and small firm practitioners need to develop a network ability wherein they can have the confidence that the lawyers within the network will refer clients among themselves. We also encourage recognition of the specialization of individual lawyers in the area of litigation, divorce, probate, etc. The
courts need to establish criteria for practice before the courts, rather than simply admission to the bar.

The impact of nonlawyer practice does not fall evenly across the bar. Solo
and small firm practitioners are bound to be more heavily impacted. The result
of solo and small firm practitioners being forced out of providing legal services
means that the public will have less affordable legal services, rather than more.
The testimony before the Commission clearly indicated that the nonlawyer
practitioner, in such areas as divorce, are pricing their services just below what
lawyers charge, not necessarily on the value of the services. In short, the pub-
lic will have been done a disservice and will not have received improved legal
services.

Prepaid legal services, we believe, are one of the keys to access to legal ser-
VICES. Unfortunately, we had virtually no testimony in this area. Yet it is a grow-
ing area of practice, and some recommendation should be made whether we
are going to use a Kaiser Permanente or a Blue Cross/Blue Shield model. Per-
haps the ABA should take the lead in providing the prototype by which bar
associations become the primary pre-paid legal service providers.

We think the ABA must consider a substantial investment in institution-
al advertising. Recently we have seen excellent television spots by the Michi-
gan Dental Association which emphasize the training and skill of dentists
and impart the message that the best dentists belong to the MDA. Certain-
ly television spots directed to the general public emphasizing the training
and the duty of lawyers and how they may employ others for whom they are
accountable is a good starting point. The role of the paralegal in lawyers’
offices could be portrayed, as well as how technology is used by the lawyer
to give better service for less money. The ABA should be proud to encourage
the public to inquire of their lawyers if they are members of the ABA, since
the best lawyers are.

This minority recommends that law schools should become more sensitive
to their responsibility as professional schools to turn out graduates who are
trained to be lawyers and who are able to perform lawyer's skills in advocacy
by representing the average consumer, and not emphasizing glorified philo-
osophical think tanks on legal theory and social problems. Leave that for the
Brookings Institute and the graduate schools.

Lawyers should emphasize not only advocacy and representation of the
client, but also their duties and responsibilities as officers of the court. Lawyers
in a sense perform the function of intake persons for those having legal prob-
lems. It is the lawyer's responsibility to determine what the client's legal prob-
lems are and then to prescribe a remedy. Oftentimes clients have preconceived
notions of what their problems are and that all they need is someone to pre-
pare documents for them. In this case the majority's remedy might exacerbate
the problem. The other side of that coin is that we should put a stop to the dis-
service done to the consumer who has come to believe that a prototype docu-
ment that looks like a legal document is what is in the consumer's best inter-
est. Further, we must articulate why the seller of such a document is not
qualified to determine that this document is what the consumer needs. In
short, we must go forward on a positive vein and use this Report to improve
the quality of legal services delivered by the legal profession and zealously pro-
tect the public from unscrupulous people.
One other question that was never addressed in the Report is “What is the practice of law?” The practice of law has been defined by the courts on many occasions, and the definitions have not necessarily agreed. This should not discourage the attempt to arrive at a general consensus of what the practice of law encompasses and what it does not. This minority recommends that the ABA tackle this problem head on. At one time it was the norm that a lawyer’s card said he or she was also a counselor. Lawyers have counseled clients in many non-legal matters and should continue to do so. However, in those areas where legal learning, experience and judgment are to be applied to a problem, the exclusive right of the bar to practice in this area should be vigorously enforced.

It is interesting to note that the recent report of the New York State Bar Association Ad Hoc Committee on Non-Lawyer Practice published in May, 1995, provides some specific recommendations that the Report of the Commission did not. The New York Committee, in a letter of May 26, 1995 to the ABA Commission on Nonlawyer Practice, indicates that it relied heavily on the factual material contained in the preliminary report of this Commission. Several of the conclusions which are in the New York report, however, were not found in the Report of this Commission. These include recommendations with respect to 1) active enforcement of unauthorized practice of law statutes; 2) recommendation for the implementation of alternate delivery systems for lawyer’s services, including matching of under-utilized lawyers and clients with unmet legal needs; and 3) the utilization of prepaid legal service plans.

The Report fails to discuss the actual role of a lawyer in our legal system. That is, a lawyer is something more than simply the preparer of forms and other “papers.” The lawyer’s first and foremost responsibility is to the court and to the general public. Secondly, the lawyer does not simply draft papers. Inherent in those papers are the lawyer’s judgment as to the proper course of action, and the papers are merely a manifestation of that judgment and advice to the client. Certainly the public will not be protected if this judgment factor is not part of our legal system.

Regarding the appearance by nonlawyers before courts and the preparation of documents by nonlawyers which will be submitted to courts, a close analysis should be given to Appendix B in the Report-Summary of the 1993 Survey of Judges. As can be seen, the bar can do much to assist the public in this area and should. This minority recommends that the ABA encourage the Judicial Administration Division to investigate this and provide positive solid recommendations.

Finally, we encourage the Board of Governors to thoroughly examine with an open mind to the twenty-first century the majority Report and the Minority Reports. We then request that it fund further study by the appropriate group or groups of the areas recommended before submitting any requests to the House of Delegates. It is the ABA which should maintain the lead on the future of the legal profession, and it must proceed not only with due caution but also with proper deliberation. Delay or dismissing these Reports would only be a manifestation of disservice to the profession the ABA has so honorably served in the twentieth century.

On a personal note, it has been an honor and a privilege to serve on this Commission. The ABA is fortunate to have had the service of such highly qualified and dedicated Commissioners. Regardless of anyone’s personal
thoughts on the controversial issues addressed or on the position of any one Commissioner, the ABA owes a debt of gratitude to all of these Commissioners who donated not only superior talents and private resources but also countless weeks of their time to the mission assigned. To our fellow Commissioners, we thank them for their professionalism and for the example of civility they have set for the bar when analyzing and debating the issues. Regardless of our differences, we have gone beyond being Commissioners and colleagues to becoming truly life-long friends.

Respectfully submitted,

Walter J. Russell, Esq.
C. Terrence Kapp, J.D.
MEMBERS OF THE COMMISSION

HERBERT M. ROSENTHAL, Chair and at-large member. Mr. Rosenthal has been Executive Director of the State Bar of California since 1987. He is the former General Counsel of the State Bar of California and is a former president of the National Organization of Bar Counsel. He is a former chair of the ABA Standing Committee on Lawyers' Responsibility for Client Protection and the Working Group on Nonlawyer Practice. He is a past member of the ABA Standing Committees on Professional Discipline, Client Security Funds, Lawyers' Responsibility for Client Protection and of the Consortium on Legal Services and the Public.

ELLEN FEINGOLD, public member. Ms. Feingold is President of Jewish Community Housing for the Elderly, a non-profit organization that develops, owns and manages 1,000 housing units for elderly persons of low income in Boston and Newton, Massachusetts. Among her previous positions, she has been director of Civil Rights for the U.S. Department of Transportation and on the faculty of the University of Massachusetts at Boston, in the College of Public and Community Service, where she taught classes on civil liberties and constitutional rights and on values, law and public decision. She is on the National Board of the American Civil Liberties Union.

ZONA HOSTELEER, American Bar Association at-large representative. Ms. Hosteeler has been an elected delegate from the District of Columbia Bar to the ABA House of Delegates for the past five years and serves on the governing council of the ABA Sections of Individual Rights and Responsibilities. She is Chair of the ABA Coordinating Committee on Immigration Law, a Fellow of the American Bar Foundation, and Chair of the District of Columbia Chapter of the Fellows. Ms. Hosteeler is a past Chair of the ABA Committee on Professionalism and served for six years on the ABA Committee on Ethics and Professional Responsibility. A law firm partner in the District of Columbia, she has a general practice with special emphasis on individual rights, legal ethics and federal court and administrative agency litigation. Ms. Hosteeler is also an adjunct professor who teaches legal ethics and professionalism at the Washington College of Law at American University. She is a member of the American Law Institute (and of its consultative group on the Restatement of the Law Governing Lawyers) and is the author of numerous articles on the legal profession and the justice system.

MERLE L. ISGETT represents the National Federation of Paralegal Associations, Inc. (NFPA). Ms. Isgett is a member of the Advisory Council of NFPA and was president of NFPA from 1990 to 1993. She is a former policy vice president and regional director of NFPA. She also served two terms as president of the Cincinnati Paralegal Association. During most of her tenure as a member of the Commission, she was a litigation paralegal with Vorys, Sater, Seymour & Pease, a law firm in Cincinnati, Ohio, and an adjunct professor in the Paralegal Studies Program at the College of Mount St. Joseph, an ABA-approved program. She is currently the Managing Director of Litigation Support Services for Interim Legal Professionals in Ft. Lauderdale, Florida. She is a member of the Advisory Council for the Paralegal Program at the University of Cincinnati. She was a participant at the Just Solutions Conference and was the only nonlawyer participant at the Institute on the Future of the Legal Profession. In addition, Ms. Isgett has been a speaker at functions of numerous paralegal associations throughout the United States, at the American Bar Association, at sever-
al state and local bar associations, and at the Practicing Law Institute. She has been published in numerous paralegal publications and is the author of The Ethical Wall and Fees for Paralegal Services: Are They Recoverable? An Update. In 1989, Ms. Isgett was a nominee for Cincinnati Woman of the Year.

C. TERRENCE KAPP, J.D. represents the American Bar Association Section of Family Law. Mr. Kapp who has been in the practice of law for over twenty years is nationally recognized as an expert in Divorce Law. He has served the Family Law Section as past National Chair of the Divorce Laws and Procedures Committee, Chair of the Task Force on Clients Education and Chair of the National Symposium of Family Law Leaders throughout the United States on "The Image of the family Lawyer: Fact vs. Myth." He has also served as Vice-Chair of the Step-Families Committee, Chair of the by-Laws and Procedures Committee, chair of the Alternative Funding Committee, and as Executive member of the Taxation Committee. He is also an executive member of the tax section's Committee on Domestic Relations Tax Problems. He has served the ABA as a judge for the finals of the National Appellate Advocacy Competition. Mr. Kapp is an executive member of the Ohio CLE Institute of the Ohio Bar Association. A past Chair of the Family Law Section of the Cuyahoga county Bar Association, he also served on its Certified Grievance Committee, Judicial Selection Committee, and Bar Admissions Committee. Mr. Kapp who is widely published on divorce law and procedure also lectures nationally and throughout the State of Ohio on divorce law and procedure.

ESTHER F. LARDENT represents the American Bar Association Consortium on Legal Services and the Public. In her capacity as a legal and policy consultant, Ms. Lardent is Chief Consultant to the American Bar Association's Postconviction Death Penalty Representation Project and serves as the Project Director for the ABA Ford Foundation--Funded Law Firm Pro Bono Project. She also serves as a consultant to the Ford Foundation, state and local bar associations, and legal services programs. An active member of the Consortium on Legal Services and the Public and the ABA Comprehensive Legal Needs Study Policy Development Committee, Ms. Lardent also serves as a member of the ABA House of Delegates. Ms. Lardent is a member of the Board of Directors of the National Legal Aid and Defenders Association and serves as Special Advisor to the Public Service Activities Review Committee of the District of Columbia Bar. The author of The Resource: A Pro Bono Manual published by the ABA Standing Committee on Lawyers' Public Service Responsibility, Ms. Lardent has aided in the formation of pro bono publico programs for numerous organizations.

MICHAEL J. ROONEY represents the American Bar Association Section of General Practice. Mr. Rooney is currently Vice President and Dallas Area Manager for the Chicago Title Insurance Company in Dallas, Texas. He has served as the General Practice Section Budget Officer and a member of the Section Council. He is a former member of the Illinois State Bar Association's Public Protection from the Unauthorized Practice of Law Committee. Mr. Rooney is also a member of the American College of Real Estate Lawyers.

WALTER J. RUSSELL represents the ABA Special Committee on Solo and Small Firm Practitioners. Mr. Russell has over forty years experience practicing law in Michigan and is active in the ABA Section of Taxation. As a past member of the Formation of Tax Policy Committee, he participated in the tax area reorganization of the Treasury, and is currently active in the Value Added Tax Committee, having served as past vice chairman. Mr. Russell served as a liaison of the ABA Regional Liaison Committee to the Central Region Internal Revenue Service, IRS Central Region Counsel Advisory Committee and past chairman of the Committee on Attorneys in Small Law Firms of the ABA. He designed the Mentor Program of the Section of Taxation which provides counseling for small firms and solo practitioners by nationally recognized tax lawyers. Mr. Russell is a Fellow of the American College of Tax Counsel and is current Regent for the Sixth Judicial Circuit. In this regard he was a member of the Special Committee that wrote the testimony and position of the American College with respect to the Tax Committee of the National Tax Association—Tax Institute of America. He is also a member of the Grand Rapids Bar Association and past chairman of the Grand Rapids Association Tax Committee. Mr. Russell is a member of the panel of arbitrators for the American Arbitration Association.
JOHN E. SANDbower, III represents the ABA Section of Litigation. Mr. Sandbower has served on the Consor-
tium on Legal Services and the Public and as Section Liaison to the Working Group on Nonlawyer Practice
(predecessor to this Commission). Mr. Sandbower is a partner of Sandbower & Galbre, B&A, in Baltimore,
Maryland, specializing in the trial of civil cases involving premises liability, products liability/toxic torts,
commercial litigation, professional liability and personal injury. He has been active in the leadership of the
ABA Section of Litigation for more than 14 years. He has also served as a member of the ABA Commission
To Improve the Tort Liability Insurance System. Mr. Sandbower is a Fellow of the American College of Trial
Lawyers.

ERNEST Y. SEEVR represents the ABA Standing Committee on Lawyers' Responsibility for Clients Protection.
Mr. Sevier is a member of the San Francisco law firm of Severson & Werson. He is the former chair of the
ABA Tort and Insurance Practice Section, the former chair of the ABA Standing Committee on Lawyers' 
Responsibility for Client Protection, the former chair of the ABA Standing Committee on Associations Com-
munications and the former chair of the Coordinating Committee on Outreach to the Public (now the
Commission on Partnership Programs.)

L. DAVID SHEAR represents and serves as chair of the ABA Standing Committee on Legal Assistants. A
founding shareholder in the Tampa law firm of Shear, Newman, Hahn & Rosenkranz, Mr. Shear has a
special interest in the Interest on Lawyer Trust Account Program, which he helped start in Florida and
nationally. He also has an interest in prepaid legal services and legal insurance, and was a co-author of
the Florida Legal Insurance Act. He is a past member of the ABA House of Delegates, a past president
of The Florida Bar, and also a past member of the Executive Council of the National Conference of Bar
Presidents.

GERRY SINGSEN represents the ABA Standing Committee on Delivery of Legal Services and is Assistant to the
President at the Legal Services Corporation (LSC) in Washington, D.C. A legal services attorney from 1968
to 1978, Mr. Singsen was Vice President at LSC from 1979-1982. From 1983 to 1993, he was at Harvard
Law School where he was a lecturer on law and Director and Program Coordinator of the Program on
the Legal Profession. He is the founder and coordinator of the Interuniversity Consortium on Poverty Law

B. HARRIETT TAYLOR, at-large member. Ms. Taylor has been the Deputy Director of the Legal Aid Bureau,
Inc., which provides legal services to low-income persons in Maryland, since 1984. She serves on the Mary-
land State Bar Association Special Committee on Paralegals. She was formerly a Staff Attorney for the Legal
Services of Eastern Michigan and the Legal Aid Bureau. She also was an Assistant to the Director, Region
III, for the Legal Services Corporation.

KAREN L. TROUT represents the National Association of Legal Assistants, Inc. A certified legal assistant, Ms.
Trout has served the legal profession with technical and administrative support in estate, trust, guardian-
ship administration, and related tax matters since 1980. She previously served as Clerk of the Probate
Court in Palm Beach County, Florida for ten and a half years and has published articles for The Florida
Bar: Economics and Law Practice Section, the National Association of Legal Assistants (NALA), Florida
Legal Assistants, Inc. (FLA), and has lectured for the Florida Legal Education Association, the National
Association of Legal Assistants’ education programs and the National Certification Examination Review
Course, as well as CLE programs for the Palm Beach County Bar Association. She has held several elect-
ed and appointed offices with both NALA and FLA. Ms. Trout currently serves on the Palm Beach Coun-
ty Court Advisory Board of Palm Beach Community College. Ms. Trout was appointed by the president
of The Florida Bar to the Legal Technicians Study Committee and then to the Special Committee on
Non-lawyer Practice.
RAYMOND J. WEBNER represents the ABA Section of Real Property, Probate and Trust Law. Mr. Werner has written numerous articles and books on subjects related to real estate law and real estate financing. He has served on Committees of the American Land Title Association, and has chaired or served on committees of the Chicago and American Bar Associations related to real estate transactions, financing and development. He is a member of the American College of Real Estate Lawyers. Mr. Werner is a senior partner in the Chicago law firm of Aronstein & Lehr concentrating his practice on real estate law and on lenders’ rights and remedies.
SUMMARY OF THE 1993 SURVEY OF JUDGES

SURVEY METHODOLOGY

In the course of conducting its nine public hearings in various cities throughout the country, the Commission on Nonlawyer Practice received testimony from fewer than a dozen judges out of a total of 337 witnesses. In order to develop additional information on the attitudes of judges towards pro se litigants and assistance to pro se litigants in court by nonlawyers, the Commission conducted a survey of randomly selected judges throughout the country.

With the assistance of the ABA Judicial Administration Division, the Commission identified four target groups of judges. These were state trial judges, special state court judges (i.e., judges in courts of limited jurisdiction and state administrative law judges), federal bankruptcy judges and federal administrative law judges. The questionnaire included identifying information, short answer questions concerning pro se parties and in-court assistance to pro se parties by nonlawyers, and open-ended questions about both that allowed the respondents to reply in narrative form.

In August 1990, 800 surveys with an accompanying cover letter signed by then-ABA President J. Michael McWilliams and Herbert Rosenthal, Chair of the ABA Commission on Nonlawyer Practice, were mailed. The distribution of these survey instruments by category is as follows:

1. 525 surveys were sent to the special court judges. This sample is the largest because testimony before the Commission indicated that it is in the courts of limited jurisdiction, as well as before the state administrative agencies, that the presiding officers would have the most direct experience in dealing with a volume of nonlawyer representatives and pro se parties. Special court judges primarily preside in housing, family, probate, municipal and small claims courts and as justices of the peace. State administrative law judges are also included in this group.

2. 175 surveys were distributed to federal administrative law judges, including those hearing social security disability and immigration matters.

3. 63 surveys were sent to federal bankruptcy judges.

4. 37 surveys were distributed to the presiding judges in randomly selected state courts of general jurisdiction in major metropolitan areas. The Commission asked that the presiding judge copy the survey and distribute it to the judges they supervised.

In addition, a Commission member from Ohio made a special outreach effort to judges in Ohio by sending surveys to 100 randomly selected judges in that state.

In all, a total of 900 surveys were distributed and 180 responses were received.

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1 The word "survey" is used in its colloquial or common sense rather than as a technical description of a statistically valid analysis of judicial opinion. Nevertheless, the responses to the questions drafted by the Commission members provided the Commission with information similar in nature to the testimony we heard.
PRO SE PARTIES

The first two substantive questions on the survey examined the judge’s opinions about the needs of pro se parties for assistance in their court or hearing room and how those needs are currently met. An analysis of the responses made to these questions follows.

Perceived Need

The judges surveyed listed several areas of practice in which substantive and procedural assistance to parties appearing “pro per” or “pro se” would be beneficial. Those practice areas most often chosen by the respondents included landlord/tenant matters, family law (divorce, child custody, domestic violence), probate, and bankruptcy matters. Areas selected less frequently included workers’ compensation, welfare hearings, administrative proceedings and consumer matters.2

Judges were asked to state in their own words their perception of the specific needs of pro se parties. The area of concern most frequently noted by respondents was the general lack of understanding among pro se parties about procedural issues. This was identified as the area where the judicial process would especially benefit from special assistance given to the pro se litigant. Pro se parties may also require assistance in determining which court forms are most appropriate to achieve the purpose for which the person is coming to the tribunal. Finally, pro se parties often do not understand how to identify the relevant facts in their case and how the law applies to those facts. Accommodating the difficulties raised by the presence of pro se parties results in the inefficient use of the tribunal’s time and other resources. And, in the end, the lack of knowledge and understanding sometimes causes pro se parties to lose legal rights to which they are entitled.

Meeting the Needs of Pro Se Parties

Almost half (49.8%) of the respondents listed bar sponsored or other presumably lawyer-driven pro bono programs as the most common means of meeting the needs of pro se parties. Almost one-third (30.3%) believed that court provided assistance programs currently aid individuals representing themselves pro se. Nearly twenty percent (19.9%) responded that a family member or friend provided the assistance that was required. Other methods by which needs were met included legal aid, law school legal services programs, paralegal and document preparation services and community agencies such as battered women’s shelters. It should be noted, however, that the judges were not asked what percentage of the total needs for assistance were being met through any or all of these methods of assisting pro se parties in court and that some judges volunteered the information that a substantial share of the needs were not met. Some judges also identified the local legal services program as a source of assistance to pro se parties.

Effectiveness of Pro Se Assistance

Nearly nine out of ten (87.5%) respondents believed these services assist both the court and the client in the judicial process. The survey asked judges to comment on ways in which these services helped the process. The most common response was that these services provide pro se parties with an understanding of court procedures. Less court time is used because: (1) forms are accurately and fully completed; and (2) unnecessary court appearances are eliminated. Some judges noted that this reduced frustration for both the court and the client.

Most judges did not respond when asked whether court assisted programs, bar sponsored or other pro bono programs, social service programs, or family members or friends hindered the court process. Of those that did respond, some said that pro se parties who receive inaccurate advice regarding how to complete certain court forms can prolong the court process. Others said that some paralegals and nonlawyers who advise pro se parties are not properly trained. One judge stated “[n]on-lawyers, although well motivated, frequent-

2 Many of the judges responding are in tribunals whose jurisdiction or assignments are limited to just one or a few substantive areas.

B-2
ly show poor judgment and confuse the situation." Another comment was that nonlawyer representation generates negative public relations for the bar in that it promotes the belief that lawyers are not needed in certain court matters.

**ASSISTANCE FROM NONLAWYERS**

The final two questions on the survey asked the judges whether "a nonlawyer/legal technician/independent paralegal who is UNAFFILIATED WITH A LAWYER should be allowed to assist pro se parties in such courts as family, bankruptcy, landlord/tenant, and probate court and other courts" and whether a licensing process for such nonlawyers should be established. Responses to these questions are summarized below.

**Services Provided by Unregulated Nonlawyers**

Two-thirds of the judges responding to the Commission's questionnaire opposed allowing a nonlawyer/legal technician/independent paralegal unaffiliated with a lawyer to assist pro se parties in court. In the event that such nonlawyers were to be given a role in the courts, the prevalent view is that their assistance be limited to the preparation of documents. A major objection to nonlawyers is that they currently are not held to any professional standard and do not have liability insurance. Some respondents believed there was a great danger to the public if nonlawyers are allowed to offer legal advice to litigants in addition to assisting with documents.

**Regulating the Nonlawyer**

When asked if a regulatory system for nonlawyers/legal technicians/independent paralegals who might be allowed to assist pro se parties in court should be established, 55.2% responded affirmatively. These respondents were asked whether or not to include five elements in a potential licensing system. The most frequently selected elements of a regulatory system were the setting of educational requirements (96%) and the establishment of ethical standards (96%), while the provision of consumer redress (83.2%) and a testing program (83.5%) received the lowest, although still strong, rate of support. The fifth element, on-the-job experience, received the support of 93.7% of those responding to this portion of the survey.

**CONCLUSION**

The judges responding to this survey believe that pro se parties need assistance in many types of court proceedings and that court assistance, bar sponsored and other pro bono programs as well as family members and friends who provide such services to pro se parties are usually helpful. However, two-thirds of these respondents would not allow nonlawyers to assist pro se parties in court proceedings beyond providing scrivener services to persons who intend to pursue their cases pro se. In the event that nonlawyers are to be given a greater role in the provision of assistance to pro se parties in court, a majority of the respondents do believe that a licensing process should be established. The minority who responded negatively to the question about a licensing process had previously responded that they do not favor having nonlawyers be given authorization to assist pro se parties in courts under any circumstances.
<table>
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<th>State</th>
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<th>Session</th>
<th>Date Introduced</th>
<th>Status</th>
<th>Summary</th>
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<tr>
<td>CA</td>
<td>SB 536</td>
<td>93/94 RS</td>
<td>09/11/93</td>
<td>Signed by Governor 10/06/93; Effective 10/06/93</td>
<td>Nonlawyer Practice: Establishes California Legal Corps &quot;to conduct preventive law and pro per legal clinics, community legal education activities, school legal education programs, promote the use of alternative dispute resolution, and otherwise promote access to the legal system.&quot;</td>
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<tr>
<td>CA</td>
<td>AB 1090</td>
<td>93/94 RS</td>
<td>03/02/93</td>
<td>Signed by Governor 10/10/93; Effective 10/10/93</td>
<td>Nonlawyer Practice: Nonlawyer notaries public who advertise in a foreign language must include a statement that he/she may not give legal advice on immigration or other matters. Also relates to fees and commissions.</td>
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<tr>
<td>CA</td>
<td>AB 1287</td>
<td>93/94 RS</td>
<td>03/03/93</td>
<td>Passed Senate 08/30/94, returned to Assembly 11/30/94; Died in Committee with concurrence in Senate; amdms pending</td>
<td>Nonlawyer Practice: Calls for a &quot;comprehensive statewide study to identify all nonlawyer providers...and to assess their pro per services.&quot; Also provides for registration and regulation of &quot;nonlawyer providers.&quot;</td>
</tr>
<tr>
<td>CA</td>
<td>AB 1573</td>
<td>93/94 RS</td>
<td>03/04/93</td>
<td>Signed by Governor 10/09/93; Effective 10/09/93</td>
<td>Nonlawyer Practice: Requires Unlawful Detainer Assistants to register with the county clerk and to post a bond. Also specifies prohibited conduct.</td>
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<td>CA</td>
<td>AB 3137</td>
<td>93/94 RS</td>
<td>02/23/94</td>
<td>Signed by Governor 09/15/94; Effective 09/15/94</td>
<td>Nonlawyer Practice: Requires Immigration Consultants to post a bond and spells out duties of such persons to their clients.</td>
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Legend: AB = Assembly Bill, GA = General Assembly, GC = General Court, HB = House Bill, HF = House File, LG = Legislature, RS = Regular Legislative Session, SB = Senate Bill, SF = Senate File, SS = Statewide Session.
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<td>CA</td>
<td>AB 3283</td>
<td>02/24/94</td>
<td>Pending in Assembly Judiciary Committee 11/30/94; Taken from Committee without further action</td>
<td>Paralegal Practice/Attorney Fees: Defines the term &quot;paralegal&quot; for purposes of attorney's fee awards (which include paralegal costs) in guardianship, conservatorship, and estate administration matters.</td>
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<td>GA</td>
<td>HB 190</td>
<td>01/13/93</td>
<td>Signed by Governor 03/25/94; Effective 03/25/94</td>
<td>Nonlawyer Practice: Authorizes the use of third-year law students as legal assistants in criminal proceedings.</td>
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<tr>
<td>ID</td>
<td>SB 1508</td>
<td>01/25/94</td>
<td>To Senate Judiciary and Rules Committee 01/26/94; 4/1/94 Died in Committee</td>
<td>Unauthorized Practice: Makes unauthorized practice of law a violation of the state consumer protection act.</td>
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<td>IL</td>
<td>SB 1534</td>
<td>03/04/94</td>
<td>To Senate Rules Committee 03/04/94; 1/10/95 Died in Senate Rules Committee</td>
<td>Nonlawyer Practice: Prohibits the unauthorized practice of immigration and nationality law by nonlawyers.</td>
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<tr>
<td>IL</td>
<td>SB 1558</td>
<td>03/04/94</td>
<td>Enacted 09/09/94; Effective 09/09/94</td>
<td>Nonlawyer Practice: Establishes rules and fees for immigration consultants and specifies prohibited acts. Bars nonlawyers from rendering legal advice and mandates posting of a sign stating such at that person's place of business and in any advertisements.</td>
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<tr>
<td>IL</td>
<td>SB 1603</td>
<td>03/04/94</td>
<td>To Senate Rules Committee 03/04/94; 1/16/95 Died in Senate Rules Committee</td>
<td>Nonlawyer Practice/Unauthorized Practice: Bars public insurance adjusters from providing legal advice or representing an insured and prohibits the unauthorized practice of law.</td>
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<td>IL</td>
<td>HB 2163</td>
<td>03/10/93</td>
<td>Enacted 08/11/93; Effective 08/11/93</td>
<td>Unauthorized Practice: Prohibits the &quot;assembly, drafting, execution, and funding of a living will&quot; by nonlawyers.</td>
</tr>
</tbody>
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Legend: AB = Assembly Bill, GA = General Assembly, GC = General Court, HB = House Bill, HF = House File, Leg. = Legislature, RS = Regular Legislative Session, SB = Senate Bill, SF = Senate File, SS = Special Session.
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<td>IL</td>
<td>HB 3261 88th GA</td>
<td>03/11/94</td>
<td>Enacted 04/01/94; Effective 04/01/94</td>
<td>Nonlawyer Practice: Allows &quot;domestic abuse advocates&quot; to attend court proceedings, sit at counsel table and confer with the victim in domestic violence proceedings.</td>
</tr>
<tr>
<td>KS</td>
<td>SB 338 75th Leg.</td>
<td>02/16/93</td>
<td>To House Judiciary Committee 02/04/93; 5/23/94 Cited in House Judiciary Committee</td>
<td>Nonlawyer Practice: Provides for Court-Appointed Special Advocates to represent juvenile offenders.</td>
</tr>
<tr>
<td>KS</td>
<td>SB 339 75th Leg.</td>
<td>02/16/93</td>
<td>To House Judiciary Committee 03/04/93; 5/23/94 Died in House Judiciary Committee</td>
<td>Nonlawyer Practice: Provides for Court-Appointed Special Advocates to represent children in custody proceedings.</td>
</tr>
<tr>
<td>MA</td>
<td>HB 499 179th GC</td>
<td>01/05/94</td>
<td>Approved by Joint Committee on Education, Arts &amp; Humanities 05/05/94</td>
<td>Paralegal: Allows paraprofessionals to attend courses at institutions of higher education with no charge for tuition.</td>
</tr>
<tr>
<td>MI</td>
<td>HB 4066 87th Leg.</td>
<td>02/02/93</td>
<td>To House Judiciary Committee 02/02/93; 12/31/94 Died in House Judiciary Committee</td>
<td>Nonlawyer Practice: Allows nonlawyer corporate employee to represent the corporation in traffic court proceedings.</td>
</tr>
<tr>
<td>MI</td>
<td>HB 5100 87th Leg.</td>
<td>16/12/93</td>
<td>Enacted 12/29/94; Effective 12/29/94</td>
<td>Attorney Fees: Allows award of attorney’s fees to affected individuals who obtain injunctive relief against a person for unlawful practice of a licensed occupation of the Department.</td>
</tr>
<tr>
<td>MN</td>
<td>SF 1766 HF 2979 78th Leg.</td>
<td>02/24/94</td>
<td>Signed by Governor 05/05/94; Effective 08/01/94</td>
<td>Unauthorized Practice: Provides Attorney General additional penalties and remedies in unauthorized practice actions.</td>
</tr>
</tbody>
</table>

Legend: AB = Assembly Bill; GA = General Assembly; GC = General Court; HB = House Bill; HF = House File; Leg. = Legislature; RS = Regular Legislative Session; SB = Senate Bill; SF = Senate File; SS = Special Session.
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<tbody>
<tr>
<td>MN</td>
<td>SF 2419</td>
<td>HF 2640</td>
<td>03/14/94</td>
<td>To Senate Judiciary Committee 03/14/94; 5/6/94 Died in Senate Judiciary Committee</td>
<td>Nonlawyer Practice: Allows parent or child of a party to act on behalf of person in any action in court (w/o fee).</td>
</tr>
<tr>
<td>MT</td>
<td>SB 9</td>
<td>53d Leg.</td>
<td>01/04/93</td>
<td>To House Judiciary Committee 02/23/93; 3/26/93 Tabled in Committee</td>
<td>Nonlawyer Practice: Allows nonlawyers to assist civil litigants in small claims and justice courts.</td>
</tr>
<tr>
<td>NJ</td>
<td>AB 331</td>
<td>SB 679</td>
<td>01/11/94</td>
<td>AB 331 - To Assembly Committee on Judiciary, Law &amp; Public Safety 01/11/94, pending SB 679 - To Senate Judiciary Committee 02/24/94, pending</td>
<td>Nonlawyer Practice: Codifies the &quot;South Jersey Practice,&quot; which allows real estate closings and settlements without the presence of an attorney. Also would allow nonlawyers consistent with the &quot;South Jersey Practice,&quot; to search titles and abstracts, prepare conveyance documents and remove exceptions from title policies.</td>
</tr>
<tr>
<td>NJ</td>
<td>AB 559</td>
<td>206th Leg.</td>
<td>01/11/94</td>
<td>Enacted 06/23/94; Effective 06/23/94</td>
<td>Unauthorized Practice: Provides a penalty for persons who engage in certain acts in conjunction with the unauthorized practice of law. [Same as SB 671].</td>
</tr>
<tr>
<td>NV</td>
<td>AB 286</td>
<td>66th Leg.</td>
<td>02/24/93</td>
<td>To Assembly Committee on Labor &amp; Mgmt 02/24/93; 6/31/93 Died in Committee</td>
<td>Continuing Legal Education: Persons representing a party in worker's compensation matters must meet certain continuing legal education requirements.</td>
</tr>
<tr>
<td>NV</td>
<td>AB 341</td>
<td>66th Leg.</td>
<td>03/10/93</td>
<td>To Assembly Committee on Labor &amp; Mgmt 03/10/93; 6/31/93 Died in Committee</td>
<td>Paralegal: Requires registration and licensing of paralegals and prohibits certain acts by those not registered as such.</td>
</tr>
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<tr>
<td>NY</td>
<td>SB 4750</td>
<td>215th GA</td>
<td>04/29/93</td>
<td>Amended bill returned to Senate Labor Committee (2/22/94; 12/31/94) Died in Committee</td>
<td>Nonlawyer Practice: Provides for the registration of agents (including nonlawyers) who represent parties in unemployment insurance proceedings.</td>
</tr>
<tr>
<td>NY</td>
<td>SB 5173</td>
<td>215th GA</td>
<td>05/05/93</td>
<td>To Senate Committee on Codes 05/05/93; 12/31/94 Died in Committee</td>
<td>Attorney's Fee: Fees awarded in actions challenging a state rule or regulation includes fees for work performed by law students and paralegals.</td>
</tr>
<tr>
<td>NY</td>
<td>AB 5446</td>
<td>215th GA</td>
<td>03/02/93</td>
<td>To Assembly Judiciary Committee 03/02/93; 1/5/94 Referred to Judiciary, died in Committee</td>
<td>Nonlawyer Practice: Allows tenants in housing actions limited representation by nonlawyers (w/o fee).</td>
</tr>
<tr>
<td>NY</td>
<td>AB 10922</td>
<td>215th GA</td>
<td>06/06/94</td>
<td>Amended bill returned to Assembly Committee on Codes 06/24/94; 12/19/94 died in Committee</td>
<td>Nonlawyer Practice: The act of offering for sale a document relating to the creation of a revocable intestate trust by one other than an attorney in the course of his or her practice is unlawful.</td>
</tr>
<tr>
<td>OK</td>
<td>HB 1628</td>
<td>44th Leg.</td>
<td>02/01/93</td>
<td>To Senate Judiciary Committee 02/17/93; 5/27/94 Died in Committee</td>
<td>Attorney's Fee: Fees awarded in civil actions include paralegal costs.</td>
</tr>
<tr>
<td>OR</td>
<td>SB 252</td>
<td>67th Leg.</td>
<td>01/21/93</td>
<td>To Senate Judiciary Committee 02/02/93; 8/5/93 Died in Committee</td>
<td>Nonlawyer Practice: Allows Board of Governors of the State Bar to subpoena witnesses in investigations related to the unauthorized practice of law.</td>
</tr>
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<td>OR</td>
<td>SB 379</td>
<td>67th Leg.</td>
<td>02/04/93</td>
<td>To Senate Judiciary Committee 02/10/93; 8/5/93 Died in Committee</td>
<td>Nonlawyer Practice: Allows qualified nonlawyers to act as immigration consultants.</td>
</tr>
<tr>
<td>OR</td>
<td>SB 410</td>
<td>67th Leg.</td>
<td>02/12/93</td>
<td>Signed by Governor 07/28/93; Effective 11/04/93</td>
<td>Nonlawyer Practice: Allows Adjutant General to appoint legally trained nonlawyers as temporary Assistant State Judge Advocates.</td>
</tr>
<tr>
<td>OR</td>
<td>SB 941</td>
<td>67th Leg.</td>
<td>03/19/93</td>
<td>To Senate Committee on Business, Housing &amp; Consumer Affairs 03/24/93; 8/5/93 Died in Committee</td>
<td>Legal Technician: Establishes certification and regulation program, sets fees, creates a State Board of Legal Technician Examiners, and exempts certified legal technicians from prohibitions on unlawful practice of law.</td>
</tr>
<tr>
<td>PA</td>
<td>SB 1059</td>
<td>178th GA</td>
<td>04/29/93</td>
<td>Enacted 12/7/94; Effective 2/6/95</td>
<td>Unauthorized Practice: In unauthorized practice of law statute includes provision concerning practice by associations, limited liability partnerships and limited liability companies.</td>
</tr>
<tr>
<td>PA</td>
<td>HB 1719</td>
<td>178th GA</td>
<td>05/28/93</td>
<td>Enacted 12/7/94; Effective 2/6/95 (same as above)</td>
<td>Unauthorized Practice: Provides a penalty for unauthorized practice of law. Includes provision concerning practice by associations, limited liability partnerships and limited liability companies.</td>
</tr>
<tr>
<td>RI</td>
<td>HB 7021</td>
<td>93 RS</td>
<td>02/24/93</td>
<td>To House Judiciary Committee 04/22/93 (Recommended not to pass); Died in Committee</td>
<td>Unauthorized Practice: Would require that rules and regulations established by the Unauthorized Practice of Law Committee be subject to approval by the General Assembly.</td>
</tr>
<tr>
<td>SC</td>
<td>HB 3092</td>
<td>93 SS</td>
<td>01/13/93</td>
<td>To Judiciary Committee 2/16/93; 4/2/94 Died in Committee</td>
<td>Nonlawyer Practice: Employee of professional corporation may represent corporation in magistrate's court and does not engage in the unauthorized practice of law in doing so.</td>
</tr>
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<tr>
<td>TX</td>
<td>SB 647</td>
<td>73d Leg.</td>
<td>03/05/93</td>
<td>To Senate Committee on Jurisprudence 03/08/93; 5/30/93 Died in Committee</td>
<td>Legal Technicians: Provides for licensing and regulation of legal technicians. [Same as HB 1800].</td>
</tr>
<tr>
<td>TX</td>
<td>SB 1167</td>
<td>73d Leg.</td>
<td>03/13/93</td>
<td>To Senate Economic Development Committee 03/15/94; 5/30/93 Died in Committee</td>
<td>Nonlawyer Practice/Unauthorized Practice: Pertains to the regulation of public insurance adjusters. Allows licensed adjusters to perform specifically defined acts on behalf of the insured and provides that such action (in &quot;strict conformity&quot; with statute) does not constitute the unauthorized practice of law.</td>
</tr>
<tr>
<td>TX</td>
<td>SB 1227</td>
<td>73d Leg.</td>
<td>03/12/93</td>
<td>Signed by Governor 06/17/93; Effective 09/01/93</td>
<td>Unauthorized Practice: Defines barratry, falsely holding oneself out as a lawyer, and unauthorized practice and provides penalties for such conduct.</td>
</tr>
<tr>
<td>TX</td>
<td>HB 1800</td>
<td>73d Leg.</td>
<td>03/09/93</td>
<td>To House Committee on State Affairs 03/11/93</td>
<td>Legal Technicians: Provides for licensing and regulation of legal technicians. [Same as SB 647].</td>
</tr>
<tr>
<td>TX</td>
<td>HB 2408</td>
<td>73d Leg.</td>
<td>05/14/93</td>
<td>House Committee on Licensing &amp; Administrative Procedures reported favorably with substitute bill 05/14/93; 5/30/93 Died on Local &amp; Consent Calendar</td>
<td>Unauthorized Practice: Provides that any state licensed business broker shall have his/her license revoked upon proof that that person has engaged in the unauthorized practice of law.</td>
</tr>
<tr>
<td>VA</td>
<td>SB 132</td>
<td>94/95 RS</td>
<td>01/19/94</td>
<td>Enacted 04/20/94; Effective 07/01/94</td>
<td>Nonlawyer Practice/Unauthorized Practice: Court appointed special advocate in child abuse cases may not provide legal counsel or advice, appear as counsel in court or engage in the unauthorized practice of law.</td>
</tr>
</tbody>
</table>

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<th>Status</th>
<th>Summary</th>
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</thead>
<tbody>
<tr>
<td>VA</td>
<td>HB 253</td>
<td>94/95 RS</td>
<td>01/18/94</td>
<td>Enacted 04/10/94; Effective 07/01/94</td>
<td>Nonlawyer Practice/Unauthorized Practice: Court appointed special advocate in child abuse cases may not provide legal counsel or advice, appear or counsel in court or engage in the unauthorized practice of law.</td>
</tr>
<tr>
<td>VA</td>
<td>SB 571</td>
<td>94/95 RS</td>
<td>01/25/94</td>
<td>Enacted 04/08/94; Effective 07/01/94</td>
<td>Unauthorized Practice: Collection agency's referral of debts to an attorney for collection with creditor's approval does not constitute the unauthorized practice of law.</td>
</tr>
<tr>
<td>VA</td>
<td>HB 837</td>
<td>94/95 RS</td>
<td>01/25/94</td>
<td>Enacted 04/10/94; Effective 07/01/94</td>
<td>Unauthorized Practice: Requires that birthing hospitals provide signed parents information and forms related to establishment of paternity and provides that such conduct does not amount to the unauthorized practice of law.</td>
</tr>
<tr>
<td>VA</td>
<td>HB 898</td>
<td>94/95 RS</td>
<td>01/25/94</td>
<td>Enacted 04/09/94; Effective 07/01/94</td>
<td>Unauthorized Practice: Provides that furnishing advice and/or services for compensation in connection with debt-paying plans amounts to the unauthorized practice of law.</td>
</tr>
<tr>
<td>WY</td>
<td>SB 98</td>
<td>52d Leg.</td>
<td>01/18/93</td>
<td>To Conference Committee 02/23/93; 3/5/93 Died in Conference Committee</td>
<td>Nonlawyer Practice: Allows nonlawyer representation in worker's compensation actions.</td>
</tr>
</tbody>
</table>

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NATIONAL PARALEGAL ORGANIZATIONS' POSITION STATEMENTS ON REGULATION, CERTIFICATION AND EDUCATION

According to the U.S. Department of Labor, paralegals held 95,000 jobs in 1992. On the basis of this data, it is estimated that today there are approximately 100,000 paralegal jobs in the United States. Two national professional associations represent approximately one-third of the practicing paralegals: The National Association of Legal Assistants, Inc. ("NALA") and the National Federation of Paralegal Associations, Inc. ("NFPA"). Both of these organizations present oral and written testimony to the Commission. Approximately 95% of the paralegals represented by these associations are traditional paralegals who work in private law firms, corporations, or other entities and for whose work a lawyer is accountable.

In addition, there are two allied professional associations: the American Association for Paralegal Education (AAIPE) and the Legal Assistant Management Association ("LAMA"). AAIPE represents approximately 300 paralegal education programs throughout the country. LAMA represents approximately 400 legal assistant managers who have assumed supervisory responsibilities over other paralegals in traditional law firm settings. AAIPE met with the Commission in executive session. LAMA presented oral and written testimony to the Commission.

AMERICAN ASSOCIATION FOR PARALEGAL EDUCATION

The American Association for Paralegal Education (AAIPE) is an organization for paralegal educators and higher education programs. The President of AAIPE met with the Commission in executive session to discuss the current education provided for paralegals. AAIPE does not have a formal position on whether or not nonlawyers should be allowed to provide services directly to the public. AAIPE works closely with the ABA Approval Commission and other law-related organizations to ensure that paralegal programs are providing quality education to paralegals.

The main objective of AAIPE is the improvement and promotion of the paralegal profession through the fostering of high standards of paralegal education. AAIPE represents quality paralegal programs and believes that anyone who offers legal services directly to the public or under the supervision of a lawyer should have a quality education commensurate with the services performed.

AAIPE is confident that given a definition of the type of direct paralegal services to be provided, a curriculum to prepare practitioners to provide services to the public can be developed. AAIPE suggested that if a curriculum is developed that it be knowledge and skill competency based. The Board of Directors of AAIPE on October 11, 1994 adopted an aspirational document providing that paralegal programs should impart the following core competencies.

I. SKILLS DEVELOPMENT

A. CRITICAL THINKING SKILLS

Paralegal education programs should be able to demonstrate that their courses incorporate learning strategies that develop their students' abilities to:

1. Analyze a problem by identifying and evaluating alternative solutions.

2. Logically formulate and evaluate solutions to problems, and arguments in support of specific positions.

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3. Identify interrelationships among cases, statutes, regulations and other legal authority.
4. Apply recognized legal authority to a specific factual situation.
5. Recognize when and why varied fact situations make it appropriate to apply exceptions to general legal rules.
6. Determine which areas of law are relevant to a particular situation.
7. Apply principles of professional ethics to specific fact situations.
8. Distinguish evidentiary facts from other material and/or controlling facts.
9. Identify factual omissions and inconsistencies.

B. ORGANIZATIONAL SKILLS
Paralegal education programs should be able to demonstrate that their courses incorporate learning strategies that develop their students' abilities to:
1. Categorize information
2. Prioritize information
3. Organize information
4. Utilize time efficiently

C. GENERAL COMMUNICATION SKILLS
Paralegal education programs should be able to demonstrate that their courses incorporate learning strategies that develop their students' abilities to:
1. Read with comprehension.
2. Listen effectively, including the ability to interpret nonverbal communication.
3. Write in clear, concise and grammatically correct English.
4. Speak in clear, concise and grammatically correct English.
5. Use language to persuade.
6. Tailor the nature of one's communication so as to best maximize understanding in the intended audience, including those with different levels of education and different cultural backgrounds.

D. INTERPERSONAL SKILLS
Paralegal education programs should be able to demonstrate that their courses incorporate learning strategies that develop their students' abilities to:
1. Establish rapport and interact with lawyers, clients, witnesses, court personnel, co-workers, and other business professionals.
2. Be diplomatic and tactful.
3. Be flexible and adaptable.
4. Be assertive without being aggressive.
5. Work effectively as apart of a team when appropriate.
6. Work independently and with a minimal amount of supervision when appropriate.
E. LEGAL RESEARCH SKILLS
Legal research involves the application of the critical thinking, organization, and communications skills listed above. Courses should teach students how to apply these skills in such a way as to be able to:

1. Use the resources available in a standard law library to be able to locate applicable statutes, administrative regulations, constitutional provisions, court cases, and other primary source materials.

2. Use LEXIS, WESTLAW, and/or other computer-assisted legal research programs to locate applicable statutes, administrative regulations, constitutional provisions, and court cases, and other primary source materials.

3. Use the resources of a standard law library to be able to locate treatises, law review articles, legal encyclopedia, and other secondary source materials that help to explain the law.

4. "Cite check" legal sources.

F. LEGAL WRITING SKILLS
Legal writing involves the application of the critical thinking, organization, and communications skills listed above. Courses should teach students how to apply these skills in such a way as to be able to:

1. Report the results of one's legal research in a standard interoffice memo and/or other appropriate format.

2. Use appropriate citations for one's sources.

3. Use the proper format and include the proper content in drafting client correspondence and legal documents.

4. Modify standardized forms found in form books, pleadings files, or in a computer data bank.

G. COMPUTER SKILLS
Although it is certainly possible for an individual to perform many paralegal tasks without the use of computers, increasing levels of computer literacy will be demanded in the future. Courses should teach students how to be able to:

1. Utilize the basic features of at least one commonly used wordprocessing program, database program, and spreadsheet program.

2. Utilize the basic features of a computer-assisted legal research program and other electronic resources.

H. INTERVIEWING AND INVESTIGATION SKILLS
Interviewing and investigation involve the application of the critical thinking, organization, and communications skills listed above. Courses should teach students how to:

1. Identify witnesses or potential parties to a suit.

2. Conduct an effective interview and record appropriate, accurate statements.

3. Gain access to information that is commonly kept by government agencies.

4. Prepare releases and requests to gain access to medical and corporate records.

II. ACQUISITION OF KNOWLEDGE
Although paralegals work in a variety of specialty areas, there is a common core of legal knowledge that all paralegals should possess.

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A. ORGANIZATION AND OPERATION OF THE LEGAL SYSTEM

Paralegal education programs should be able to demonstrate that their curriculum includes courses or segments of courses (see B below) that provide their students with an understanding of:

1. Some of the major functions the law serves in modern society.

2. How common law traditions are reflected in today's legal system. How law is classified on the basis of its source and its function; the difference between substantive and procedural rules of law; and the difference between civil and criminal law.

3. The general structure of the U.S. legal system at the federal, state and local levels.

4. The detail structure of the state and local courts in the state within which the paralegal program is located.

5. The differences in function and procedure among trial courts, appellate courts, and administrative hearings.

6. The functions performed by the various officials involved in the court system (police, lawyers, judges, court clerks, court reporters, etc.).

B. ORGANIZATION AND OPERATION OF LAW OFFICES

Paralegal education programs should be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The various types of practice arrangements lawyers use for the delivery of legal services to the general public, as well as to corporations, government agencies, and the indigent.

2. The functions performed by the various people typically working in a law office, including lawyers (partners and associates), paralegals/legal assistants, clerical personnel, investigators, etc.

3. The organisational structure and the administrative procedures (including time-keeping and billing systems) that are commonly used in most law offices.

C. THE PARALEGAL PROFESSION AND ETHICAL OBLIGATIONS

Paralegal education programs should be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The factors which lead lawyers to utilize paralegals/legal assistants.

2. The types of duties paralegals/legal assistants perform when working in various areas of the law.

3. Definitions that are most commonly used for the following terms: paralegal, legal assistant, independent paralegal, legal technician, free-lance paralegal, certification, registration, licensure.

4. An understanding of the ethical responsibilities that have been established by statutes, court decisions, and court rules that affect paralegals/legal assistants and lawyers (including areas of conflicts of interest, confidentiality, competence, solicitation, fees and billing, obligations of lawyers to clients, and protection of client funds).

5. The nature of the supervision that must be present in order to avoid situations that constitute the unauthorized practice of law.

D. CONTRACTS

Although it is certainly possible for paralegals/legal assistants to work in some specialty areas without an extensive knowledge of contracts, an understanding of some of the most basic principles of con-
tracts is frequently very useful in a wide variety of specialty areas. Paralegal education programs should, therefore, be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The manner in which contracts are formed and what elements must be present for a contract to be valid.
2. The rights and obligations of the various parties to contract, as well as the rights of third parties.
3. Remedies that are available when contracts are breached and the steps that must be taken to invoke those remedies.

**E. TORTS**

Although it is certainly possible for paralegals/legal assistants to work in some specialty areas without an extensive knowledge of torts, the basic principles of this area of law are applicable to such a large number of matters as to justify its inclusion in the core competencies that should be included in quality paralegal programs. Paralegal education programs should, therefore, be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The concepts of negligence, duty, breach, proximate cause, intentional torts, and strict liability.
2. The various types of damages that can be awarded and what needs to be established in order to collect such damages.

**F. BUSINESS ORGANIZATIONS**

Although it is certainly possible for paralegals/legal assistants to work in some specialty areas without an extensive knowledge of business organizations, the basic principles of this area of law are applicable to a large enough number of matters as to justify its inclusion in the core competencies that should be included in quality paralegal programs. Paralegal education programs should, therefore, be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The basic forms and functions of business organizations, including sole proprietorships, partnerships, limited partnerships, for-profit corporations, and not-for-profit corporations.

**G. LITIGATION PROCEDURES**

Although it is certainly possible for paralegals/legal assistants to work in jobs where they are not directly involved in litigation, the number of matters that end up in some form of litigation are great enough to justify its inclusion in the core competencies that should be included in quality paralegal programs. Paralegal education programs should, therefore, be able to demonstrate that their curriculum includes courses or segments of courses that provide their students with an understanding of:

1. The basic difference between civil and criminal procedure.
2. The nature of the remedies that are available through civil litigation.
3. The form, content, and function of the legal documents that are typically prepared as part of the litigation process.
4. The types of docketing systems that are frequently used as part of a "case management" system.
LEGAL ASSISTANT MANAGEMENT ASSOCIATION

The Legal Assistant Management Association strongly supports any effort to expand the role paralegals play within traditional legal environments. The growing concerns about the increase in costs and inaccessibility of legal services make the continued expansion of the role of traditional paralegals not only the logical, but also the necessary, next step.

For example, LAMA supports paralegals being able to attend administrative hearings, attend record depositions, conduct real estate closings, prepare routine corporate filings and prepare guardianships and adoption papers. LAMA believes that expansion of paralegal functions and qualifications to improve expertise could positively impact all practice areas.

LAMA also supports establishing criteria, qualifications, and a system to address complaints about improper or unethical performance, similar to, or in conjunction with, the one already in place to scrutinize lawyers. LAMA believes that the long term effects of increasing accessibility to legal services are well worth the time and effort.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC.

The National Association of Legal Assistants, Inc. (NALA) was incorporated in 1975 as a non-profit organization. The Association represents 15,000 legal assistants through its individual members and 88 affiliates. NALA has adopted a Code of Ethics and Professional Responsibility and Model Standards and Guidelines for Utilization of Legal Assistants. NALA administers the Certified Legal Assistant Program, a professional certification program offering the "CLA" and "CLA Specialist" designations which are registered certification marks. NALA monitors legislation affecting the legal assistant profession, and files amicus briefs in federal courts in cases concerning matters related to legal assistants and paralegals.

NALA does not support the delivery of legal services to the public by nonlawyers, without some supervision by licensed lawyers. The Association's viewpoint is that the legal needs of the public are left unaddressed by discussions of the pros and cons of allowing the delivery of legal services by nonlawyers, the costs remain prohibitive, and the potential for public harm is great.

NALA further believes there is no relationship between the legal technician concept and the legal assistant/paralegal career field, that the skills, education and training, and those served by these fields differ significantly. NALA supports distinguishing the terms legal assistant and paralegal from the concept of "legal technicians." NALA supports the expansion of the role of legal assistants/paralegals working with the supervision of lawyers.

NATIONAL FEDERATION OF PARALEGAL ASSOCIATIONS, INC.

The National Federation of Paralegal Associations, Inc. (NFPA) was founded in 1974 and represents approximately 38,000 paralegals. NFPA has adopted a Model Code of Ethics for paralegals. NFPA monitors federal and state legislation and routinely files testimony on fee recovery and regulation legislation. NFPA files amicus briefs on matters which affect the paralegal profession. NFPA does not support the delivery of legal services directly to the public by unregulated nonlawyers. NFPA has a formal policy, adopted by its members, on education standards and regulation of paralegals and the delivery of legal services by paralegals directly to the public.

NFPA supports the expansion of the role of the traditional paralegal to provide more affordable legal services. NFPA believes the role of the traditional paralegal cannot continue to be expanded to provide certain standardized services thereby allowing the lawyer the opportunity to provide more complicated legal services at their customary billing rates, thus providing more cost-efficient services to the public. NFPA's vision of an expanded role is not to compete with lawyers in the marketplace, but to complement the lawyer.

NFPA is developing a Paralegal Advanced Competency Exam ("PACE") which is a multi-sectional evaluation of advanced paralegal skills and knowledge. Its two-tiered testing scheme consists of 1) knowledge common to all paralegal practice as well as ethics and state specific sections and 2) evaluation of skills and
knowledge directly related to specific areas of law. Educational and work experience qualifications must be met in order to sit for PACE, although limited grandfathering may allow waiver of the education criteria in exchange for extensive years of paralegal experience.

In order for paralegals to provide services directly to the public, NFPA endorses a two-tier licensing scheme—entry level and specialty. NFPA believes that anyone applying for a license as a paralegal must pass a proficiency-based examination, meet a standard of character and fitness and fund a mechanism for consumer redress. Practice specific licensing would be the second tier.

**SUMMARY**

The National Association of Legal Assistants Inc. and the National Federation of Paralegal Associations Inc. presented extensive oral and written testimony to the Commission. NALA opposes a system that would allow the delivery of legal services directly to the public by unsupervised nonlawyers, while advocating expansion of the duties and responsibilities of legal assistants and paralegals who, by definition, work with the supervision of lawyers. NFPA supports the delivery of legal services to the public by paralegals under a two-tier licensing scheme of entry level licensing and specialty licensing.

The Legal Assistant Management Association supports an expanded role for paralegals within traditional legal environments. LAMA supports paralegals being able to attend administrative hearings, attend record depositions, conduct real estate closings, prepare routine corporate filings and prepare guardianships and adoption papers. Representatives of the American Association for Paralegal Education advised the Commission in executive session that, if the current paralegal delivery system is expanded, AAIPE would assist in developing a curriculum to prepare practitioners to provide quality services.
LEGAL NEEDS STUDIES FROM 1985–1995

The following are summaries of the primary conclusions reached in each of the state (and one pilot nationwide) legal needs studies conducted during the period 1985 to 1995. There were several different methods used to acquire the information and to analyze the data collected. As a result, a scientifically reliable composite picture of the legal needs of the citizens in these states cannot be constructed.

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<th>YEAR</th>
<th>STATE</th>
<th>REPORT &amp; ITS CONCLUSIONS</th>
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This study of low-and moderate-income households estimated 39% of low-income and 45% of moderate-income households developed a new legal need. The most frequently mentioned types of needs for both income groups were housing/real property needs. The legal/judicial system was involved in 30% of these needs while no action was taken in another 30%.
This study's inclusive definition of "legal needs" does not require contact with the legal/judicial system and estimates 38% of low-income households experienced a new legal need. The legal/judicial system was involved in a third of legal needs, nothing was done in another third and 15% involved a non-legal third party, with service providing agencies and community groups being the most frequent of such providers.
Almost half of all low-and moderate-income households (50.7% and 44.2% respectively) reported encountering one or more legal problems during the five year period. The most common legal needs experienced were related to financial matters with 25.9% of households reporting consumer problems and 10.9% reporting employment problems. Although 60% of all low-and moderate-income households with identified legal problems got no legal help of any kind only 4.1% of households seeking legal assistance hired a legal technician and less than 1% used secretarial form services.

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This is the latest national Comprehensive Legal Needs Study (CLNS). This study of the legal needs of the low- and moderate-income households in the United States revealed that half of these households confront situations that raise legal issues each year. Most of these problems are never taken to lawyers or other elements of the civil justice system for resolution. Except in the family law area, most American households either attempt to deal with the problem on their own, take no action at all, or turn to nonlegal third parties.

1993 Kentucky


Thirty percent of all Kentucky households with incomes below the poverty line reported a problem that constitutes a legal need, but only 39% sought any legal assistance. A fundamental problem in legal equity was observed by the study, as well as with public policy efficiency and an overall low rate of pursuit of legal aid. Among the reasons low-income people may not have sought legal assistance are a sense of helplessness and hopelessness, ignorance of legal rights and perceived costs of hiring a lawyer.

1993 New York

THE NEW YORK LEGAL NEEDS STUDY, Robert L. Springer, et al. (New York State Bar Association, June 1990, revised and reprinted December 1993)

The New York State Bar Association report was originally released in 1990 and updated in 1993. It found that not more than 14% of the legal needs of the poor were being met; the unmet need was 3 million legal problems per year. Legal needs were most critical in the areas of housing and public benefits programs. Legal services in New York lacked adequate funding and were faced with staff cutbacks, forcing a restriction in the kinds of cases that could be undertaken. The practical availability of legal services to the poor of New York was uneven throughout the state.

1992 Indiana

LEGAL NEEDS STUDY OF THE POOR IN INDIANA, Legal Services Organization of Indiana, Inc. and United Way/Community Service Council of Central Indiana (Indianapolis, IN, February 1992)

The study concluded that fewer than 10% of the legal needs of low-income people were being met.

1992 San Antonio, TX

NO ACCESS TO JUSTICE, THE UNMET LEGAL NEEDS OF THE POOR, Partnership for Hope and Community Law Center (San Antonio, TX, May 1992)

A private organization reported that only 15% of the legal needs of the poor people in the area were being served by a lawyer.
In a study of family law representation, a task force of the D.C. bar found that there is an "enormous unmet need for legal services" and that many families have to negotiate the family law system without assistance.

1991 Ohio 
During the study period, the poor households in the state experienced nearly 1,000,000 civil legal problems. Only 17% of these matters were being addressed by the legal services delivery system.

1991 Texas 
LEGAL NEEDS OF THE POOR ASSESSMENT PROJECT (State Bar of Texas, Texas Lawyers Care, Legal Services to the Poor in Civil Matters Committee, Texas Equal Access to Justice Foundation, and the Texas Bar Foundation, September 1991)
Here, 69% of the potential legal problems did not receive the attention of a lawyer.

1991 Virginia 
PRO BONO AND THE LEGAL NEEDS OF INDIGENT VIRGINIANS, Survey Research Laboratory Virginia Commonwealth University (The Virginia State Bar, 1991)
Among low-income households, 41% reported experiencing at least one legal problem during the three years prior to the study. Only 16% of the households having a legal matter were able to obtain the services of a lawyer.

1991 Wisconsin 
The first comprehensive attempt to assess the civil legal needs of the state's elderly population disclosed that despite the state's commitment and funding of the Benefits Specialist Program which was responsive, many economically vulnerable elders, especially members of minority groups, faced important legal problems without the assistance of a lay advocate or lawyer. During the study period, Wisconsin's older population reported over 150,000 civil legal problems, but only 18% received legal assistance.

1990 Maine 
The state's poverty level population of 230,000 received legal assistance for only 23% of the legal problems they reported in a one year period. It was reported that many of the providers, to include lawyers, did not have adequate knowledge of the legal issues that especially affect the poor. It should be noted that the definition of legal assistance used for the purposes of this survey included the use of "information, self-help guidance and referral (to a lawyer)."

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<tr>
<th>YEAR</th>
<th>STATE</th>
<th>CONCLUSIONS</th>
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<tbody>
<tr>
<td>1990</td>
<td>Pennsylvania</td>
<td>REPORT OF THE PENNSYLVANIA BAR ASSOCIATION TASK FORCE FOR LEGAL SERVICES TO THE NEEDY, Pennsylvania Bar Association (Pennsylvania, 1990) Due to reductions in funding, the legal services programs in the state estimated that they turned away between 67% and 75% of the eligible people who seek assistance from them.</td>
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<td>1990</td>
<td>West Virginia</td>
<td>REPORT ON THE LEGAL NEEDS OF LOW INCOME HOUSEHOLDS IN WEST VIRGINIA, The Pro-Bono Referral Project Advisory Committee of The West Virginia State Bar (May 11, 1990) Although 69% of the responding households reported having a serious legal problem during the preceding year, only 27.1% had seen a lawyer during that year.</td>
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<td>1989</td>
<td>ABA</td>
<td>TWO/NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY, Consortium on Legal Services and the Public (Washington, D.C., 1989) This pilot study concluded that each household experienced 1.09 legal problems per year, but 80% of all civil legal problems did not receive the attention of a lawyer.</td>
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<tr>
<td>1989</td>
<td>Alabama</td>
<td>ALABAMA LEGAL NEEDS STUDY, Davis, Penfield &amp; Associates (Alabama State Bar, IOLTA, LSCLA Committee on Access to Legal Services, October, 1989) The study determined that 19% of the state’s population is at or below poverty level.</td>
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<td>1989</td>
<td>Illinois</td>
<td>ILLINOIS LEGAL NEEDS STUDY, Robert L. Spangenberg, et al. (Illinois State Bar Association and Chicago Bar Association, Chicago, 1989) The survey determined that there were 1.69 non-criminal legal matters that were not resolved with the assistance of a lawyer; overall, only 20% of the need for civil legal assistance was being met.</td>
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<td>1986</td>
<td>Maryland</td>
<td>ACTION PLAN FOR LEGAL SERVICES TO MARYLAND’S POOR, Advisory Council of the Maryland Legal Services Corporation (Maryland Legal Services Corporation, Baltimore, MD, 1980) It was estimated that each of the 400,000 poverty-level households in the state experienced 3 legal problems per year. Only 37% of these households consulted a lawyer at least once during the five year period preceding the study.</td>
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<td>1987</td>
<td>Massachusetts</td>
<td>MASSACHUSETTS LEGAL SERVICES CORPORATION PLAN FOR ACTION, Lonnie A. Powers, et al. (Massachusetts Legal Services Corporation, Boston, MA, 1987) There were .94 unmet legal needs per household per year; the inquiry covered a five year period, with a total of 4.7 unmet legal needs occurring during those five years. Only 15% of these needs were met by the existing legal services system.</td>
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1985  Colorado

CONCLUSIONS


This survey of the civil legal needs of low-income persons found 61% of the households reporting at least one legal problem during the year, with over a third of the respondents reporting a consumer problem. Only a fraction of the respondents saw a lawyer and that was usually in matters involving a court appearance or review.