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There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law

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There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*

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* An anonymous attorney reportedly told a member of the California Bar's Public Protection Committee (Protection Committee), "If your recommendations are adopted, there goes our monopoly." Austin, *An Argument for Registering Non-Attorney Legal Service Providers*, L.A. Daily J., Aug. 12, 1988, at 13, col. 3.

I. INTRODUCTION

Lawyers love to compete, but only with each other. The legal profession consistently has fought outside competition and successfully has controlled competition to ensure professional survival.¹ Lawyers control competition through participation in bar associations, legislatures, and courts. For example, state statutes and bar association regulations² forbid the practice of law by nonlawyers.³ To enforce this prohibition, all states require that state and professional bar associations certify individuals as competent legal practitioners before they can practice law.⁴ Courts generally have upheld these statutes and regulations.⁵ Thus, lawyers have succeeded in limiting outside competition.

These limitations, however, may be resulting in denial of access to the legal system to the indigent public.⁶ Consequently, several states

1. See *infra* subpart II(A).

2. Although the American Bar Association (ABA) issues regulatory guidelines in its Model Rules of Professional Conduct (Model Rules), the states regulate the unauthorized practice of law (UPL).

3. C. WOLFRAM, MODERN LEGAL ETHICS § 15.1.1, at 824 (1986). Restrictions apply primarily to nonlawyers representing others and not to *pro se* representation. *Pro se* representation generally is regarded as a federal right, see 28 U.S.C. § 1654 (1988), and all states recognize its legitimacy. See C. WOLFRAM, *supra*, § 14.4, at 803, & n.36.

For an example of state regulation, see CAL. BUS. & PROF. CODE § 6127 (West 1990), which reads:

The following acts or omissions in respect to the practice of law are contempts of the authority of the courts:

- (a) Assuming to be an officer or attorney of a court and acting as such, without authority.
- (b) Advertising or holding oneself out as practicing or as entitled to practice law or otherwise practicing law in any court, without being an active member of the State Bar.

Id.

4. The certification process usually necessitates successfully completing the course of study at an ABA approved law school and passing the bar examination. *But see, e.g.,* ALASKA STAT. § 08.08.207 (1987) (allowing a law clerk to receive three years of legal training as an apprentice after completing one year of law school); CAL. BUS. & PROF. CODE § 6060(e)(3) (West 1990) (allowing the study of law for four years either in an unaccredited but approved law school, or under the supervision of a practicing attorney or judge).

5. See *infra* notes 17-65 and accompanying text.

6. A 1989 survey initiated by the ABA assessed the unmet legal needs of the poor by focusing on a nationwide sample of households at or below 125% of the poverty level. *Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally*, American Bar Association Consortium on Legal Services and the Public, May 1989, at 3, 18 (at app. 14). The survey revealed that within the past year almost 40% of the households surveyed had needed, but could not obtain, legal assistance. *Id.* The survey also concluded that in 1987 low income households could not receive legal assistance for approximately 19 million legal problems. *Id.* at 4, 38. The most frequently cited reason for not having a lawyer was that legal services are "too expensive." *Id.* at 34, table 23.

A separate study concluded that, in California's Orange County in particular, middle class and working poor individuals who do not qualify for legal assistance cannot afford a private attorney. *Study: Legal Aid Aids Few*, Orange County Register (June 7, 1990) (attached at app. 13). In addition, the Board of Governors of the State Bar of California (Board) found that "there is an overwhelming unmet need of California residents for better access to the legal process, and that 'legal

are attempting to alter existing restrictions on the unauthorized practice of law (UPL).⁷ In particular, the State Bar of California currently is considering a proposal to replace its restrictions with a rule of court allowing nonlawyers to practice law.⁸

In July 1990 the California Bar's Commission on Legal Technicians (Commission) issued a proposal (1990 Report) setting forth specific guidelines allowing nonlawyers to practice law.⁹ The Commission attached to the 1990 Report two proposed bills¹⁰ drafted by California legislators to regulate nonlawyers. In August 1990 the Board of Governors of the State Bar of California (Board) released the 1990 Report including the attached bills without endorsement for a ninety day public comment period. That period ended November 28, 1990.¹¹ The Board now must consider the 1990 Report, the public comments, and its course of action.

This Note examines the 1990 Report and the attached bills in light of current trends toward increased nonlawyer participation in the legal profession. Part II reviews the history of regulation of UPL in the United States and specifically examines the difficulty courts have had in defining "the practice of law." Part III discusses recent developments in other jurisdictions that have tried, some successfully, to allow limited nonlawyer participation in the profession. Part IV overviews the development and content of the 1990 Report and attached bills and concludes that the 1990 Report and proposed legislation reflect, and

technicians' may provide greater access so long as their activities do not pose an unreasonable risk of harm to the public." Nov. 1989 Resolution by the Board of Governors of the State Bar of California (on file at *Vanderbilt Law Review*).

7. See *infra* Part III.

8. The Commission on Legal Technicians (Commission), a committee of the California Bar, has recommended that the Bar petition the California Supreme Court and support legislation to regulate nonlawyers providing out-of-court legal services to the public. July 1990 Report of the State Bar of California Commission on Legal Technicians 8 [hereinafter 1990 Report] (on file at *Vanderbilt Law Review*). Another State Bar committee, the Public Protection Committee, originally described nonlawyers who provide limited out-of-court legal services without direct supervision by attorneys as "legal technicians." The Protection Committee later substituted the term "independent paralegals" for "legal technicians" to "distinguish the new potential licensees from those who today advertise themselves as legal technicians and do not meet the requirement of proposed licensure." *Id.* at 11. This Note uses the terms interchangeably.

9. In November 1989 the Board appointed the Commission to draft specific guidelines allowing legal technicians to practice law. 1990 Report, *supra* note 8, at 8. The Board created the 10 member Commission in response to negative public comments reported in April 1988 by the Bar's Public Protection Committee. *Id.*

10. Preprint Senate Bill No. 9 (the Presley Bill) and Preprint Assembly Bill No. 14 (the Eastin Bill) are identical. News Release, State Bar of California 1 (Aug. 30, 1990) [hereinafter News Release] (on file at *Vanderbilt Law Review*). Both bills are supported by HALT (Help Abolish Legal Tyranny). *Id.*

11. Telephone interview with Susan Scott, Media Relations, California State Bar (Aug. 30, 1990). The public comment period had not ended by the time this Note went to print.

perhaps are at the forefront of, an emerging national sentiment favoring greater access to the legal system and a more competitive legal economy. In addition, Part IV suggests that the State Bar of California should defer to the State the task of regulating nonlawyers so that the new plan truly will protect the public interest. This Note concludes that nonlawyer participation in the legal profession may benefit not only the public, but also the profession.

II. LEGAL BACKGROUND

A. *Early Regulation of the Unauthorized Practice of Law*¹²

Regulation of UPL in the United States¹³ has fluctuated between periods of public and private control of the profession.¹⁴ For the most

12. For a more thorough history of UPL, see Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 161-201.

13. Governmental protection of the legal profession is an ancient concept with origins outside of the United States. In 457 B.C. the Japanese emperor beheaded laymen who settled estates for the wealthy because he believed that laymen did not have the conscience and responsibility to guard such confidential trusts. Otterbourg, *A 1960 Resume: Unauthorized Practice of the Law*, 46 A.B.A. J. 46 (1960). In 1292 and then again in 1402 England passed legislation to restrict the practice of law to capable individuals. *Id.* at 47.

14. The early origins of the existing UPL doctrine demonstrate this fluctuation. Because colonial America did not require complex laws or many lawyers, the colonies feared lawyers and passed legislation to curb lawyers' excesses and perceived evils. Christensen, *supra* note 12, at 162-65. Regulation of UPL in the United States began, then, as a public attempt to prevent lawyers from "stirring up" litigation and charging excessive fees. *Id.* at 166. Virginia in 1658, for example, disallowed lawyers from earning any money for practicing law. Rigsby, *Virginia: The Unauthorized Practice of Law Experience*, 19 U. RICH. L. REV. 499 (1985).

Between the mid-1700s and 1776, the number of attorneys increased, and the colonies began to form trained bar associations. Christensen, *supra* note 12, at 166. The emerging class of trained lawyers limited entry into the profession, *see id.* at 168 (stating that the colonial bar required extensive training, even in subjects such as metaphysics, and high moral standards for admittance to the bar), and campaigned against UPL. *See id.* at 177 (stating that before the 1776 Revolution in the United States, John Adams, a practicing attorney who later became the second President, feared competition from nonlawyers and conducted a campaign against UPL).

During the 100 years after the Revolutionary War, however, the public again controlled the legal profession as distrust of and hostility toward lawyers was revived. These sentiments arose partly in response to attempts by government attorneys to collect debts from financially ruined citizens after the war, *id.* at 171, and partly from the prevailing feeling that individuals were free to work as they wished. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 236 (1953). Between 1800 and 1860, the number of jurisdictions requiring legal education and professional training for lawyers declined from three-fourths of the jurisdictions to less than one-fourth. *See id.* at 15-16, 231. In addition, the 1850 Michigan Constitutional Convention overwhelmingly approved a provision allowing anyone who was of good moral character and 21 years of age to practice law. *See id.* at 225-26. The 1850 Indiana Constitutional Convention, which was not repealed until 1933, C. WOLFRAM, *supra* note 3, § 15.1.1, at 824, only required good moral character and registration to vote. Thus, through state legislatures and constitutional conventions, the public "deprofessionalized" the law by enabling virtually anyone to practice law. R. POUND, *supra*, at 229-30 (reporting that the New England Bar abolished the requirement of preliminary general education; Ohio required only that an attorney certify the applicant as having had "regularly and attentively studied

part, however, states have permitted members of the legal profession to regulate themselves through organized bar associations. Public influence on bar practices appears strongest after periods of either excessive litigation by attorneys or aggressive enforcement of UPL statutes by the bar.

Between 1870 and 1920 the organized bar eventually came to control the practice of law and established the roots of the existing UPL regulation.¹⁵ During this period, bar associations raised their admission standards¹⁶ and vigorously pursued suits against nonlawyers who practiced law.¹⁷ This litigation yielded a broad definition of "the practice of law," one not limited to courtroom appearances only.¹⁸

Between 1920 and 1960, professional bar associations further dominated the legal profession. Significantly, the bar suppressed UPL¹⁹ by suing unauthorized practitioners under the newly fashioned UPL statutes.²⁰ The common-law doctrines established during this period excluded nonlawyers from the practice of law.²¹ Lawyers and courts justified these statutory and common-law measures for reasons of both

law"; and, in 1860 Pennsylvania remained the only state that required law students to register at the beginning of their studies). As a result, many state and local bar associations disbanded between 1836 and 1870. *Id.* at 227.

15. Christensen, *supra* note 12, at 186. Barlow Christensen calls this era "The Beginning of the Modern Unauthorized Practice Movement . . . —the Profession Resurgent." *Id.* at 175. California and 12 other states have had UPL regulations since the late 1800s. *Id.* at 180 & nn.113, 114, 117. Alabama, Colorado, Idaho, Illinois, Maryland, Massachusetts, Mississippi, Montana, Nebraska, South Dakota, Utah, and Wisconsin have legislation allegedly dating from between 1715 (Maryland) and 1898 (Utah). By 1920 Connecticut, Michigan, Missouri, New Mexico, New York, North Dakota, Rhode Island, and Virginia had enacted statutes governing UPL. *Id.*

16. *Id.* at 177. This change occurred slowly. For example, in 1902, 17 of 45 states did not require legal education. *Id.* at 176 n.89. In 1915 13 states, including California, still did not require any definite amount of legal training or education. *Id.* at 176.

17. *Id.* at 182, 188.

18. *Id.* at 182. For example, some courts deemed the practice of law to include the collecting of debts by collection agencies through lawsuits, the giving of legal advice in relation thereto, and the hiring of attorneys by trust companies to draft wills. *Id.* at 183. The court decisions, however, were extremely inconsistent. *Id.* at 184.

19. *Id.* at 196.

20. During this period, state legislatures either had enacted new or had broadened old statutes governing UPL. See Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 9 (1981). Increased educational and investigational efforts also contributed to the bar's success. For example, in 1930 the ABA founded its committee on unauthorized practice and published the first issue of *Unauthorized Practice News* four years later. C. WOLFRAM, *supra* note 3, § 15.1.1, at 825. By 1940, 400 state and local bar associations had formed committees to investigate UPL and to educate bar members about lay competition. Christensen, *supra* note 12, at 189.

21. C. WOLFRAM, *supra* note 3, at 825-26. Also during this period, local and state bars began to negotiate interprofessional treaties prohibiting nonlawyer groups from engaging in a wide range of competitive activities with accountants, realtors, law book publishers, and insurance companies. *Id.* at 826. By 1958 the ABA had negotiated treaties at the national level. *Id.*

public and professional protection.²² In recent years, however, the tension between the stated and unstated justifications for regulation of UPL has evoked critical speculation that self-serving motives are the impetus for most of the regulation.²³

Thus, since 1960 voters,²⁴ courts,²⁵ and the Department of Justice (DOJ) have challenged the privileged position of the bar.²⁶ Moreover, in

22. Stated justifications have included the following: (1) protecting the public from incompetent practitioners, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 comment (1983) (stating that "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons") [hereinafter MODEL RULES]; C. WOLFRAM, *supra* note 3, § 15.1.2, at 829; Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 *NOVA L.J.* 363, 371 (1980); Rhode, *supra* note 20, at 37 (reporting that 59% of surveyed bar officials believe UPL poses a threat to the public), (2) preventing harm to the court system, C. WOLFRAM, *supra* note 3, § 15.1.3, at 832, (3) assuring a basis for professional discipline, *id.* at 833, and (4) preserving the attorney's professional independence and an adequate attorney-client relationship, Christensen, *supra* note 12, at 200. One court even claimed that "[t]he degradation of the bar is an injury to the state." *See id.* at 188 (quoting *In re Co-operative Law Co.*, 198 N.Y. 479, 480, 92 N.E. 15, 16 (1910)).

23. Lawyers rarely admit to protectionist motives. C. WOLFRAM, *supra* note 3, § 15.1.3, at 833. *But see* Rhode, *supra* note 20, at 35-36 (stating that although over 66% of surveyed bar officials perceived a significant amount of lay competition, 86% believed that competition from UPL posed no economic threat to lawyers because lawyers typically would not want to perform the services lay practitioners perform).

One commentator has cautioned against assuming that the bar's purpose is to serve the public good because all lawyers' organizations are self-serving. *See* Clark, *Involvement in the Legal Profession*, 12 *STETSON L. REV.* 771, 772 (1983). Because no empirical evidence supports other motives, another commentator doubts the viability of all the above justifications except the self-serving reason. Charles Wolfram suggests that lawyers will speak of motives of public protection and keep secret their real objectives because these objectives smack of monopolistic behavior. C. WOLFRAM, *supra* note 3, § 15.1.3, at 829. Indeed, the vigorous pursuit of unauthorized practitioners by bar associations, Rhode, *supra* note 20, at 42-43, combined with the apparent lack of interest by consumers on their own behalf suggests that UPL regulation is actually trade protectionism under a paternalistic guise. *Id.* *See generally* Christensen, *supra* note 12, at 201 (stating that "nowhere, in all of the literature or in any of the court decisions, is there evidence of a public voice" interested in advocating public protection from incompetence); Rhode, *supra* note 20, at 33, 43 (stating that only 2% of the 1188 inquiries, investigations, and complaints reported by bar officials concerned an injured client, and only 19% of those involved nonlawyers claiming to be lawyers).

24. In 1962 Arizona voters approved a constitutional amendment allowing realtors to draft all real estate documents independent of an attorney. Rhode, *supra* note 20, at 3. In addition, 41 states passed a total of 50 statutes allowing various forms of the limited practice of law by nonattorneys between 1960 and 1972. J. FISCHER & D. LACHMANN, *UNAUTHORIZED PRACTICE HANDBOOK* 86-97 (1972). California passed two of these statutes—one barring attorneys from small claims court and allowing exclusively *pro se* representation, *id.* at 88, and the other allowing representation by an "agent" before the unemployment compensation board. *Id.* at 89.

25. In 1966 the Illinois Supreme Court allowed real estate brokerage firms to fill in blanks on standard form preliminary contracts. *See* Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E.2d 771 (1966); *see also* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964) (finding that first amendment protections permitted a union to advise members of need for legal advice and refer them to counsel); NAACP v. Button, 371 U.S. 415 (1963) (providing staff lawyers for NAACP members pursuing racial discrimination cases was not UPL because of overriding first amendment rights).

26. Christensen, *supra* note 12, at 200-01. Christensen maintains that the significance of this

1975 the United States Supreme Court held that federal antitrust laws applied to anticompetitive activity by the legal profession.²⁷ The DOJ began to monitor monopolistic behavior by local and state bars soon thereafter.²⁸ Consequently, enforcement of UPL regulations declined, and several states and the American Bar Association (ABA) disbanded their UPL committees.²⁹

Yet bar associations continue to sue lay practitioners for violating the state UPL statutes, and state courts continue to enforce the statutes and common-law doctrines.³⁰ Lawyers and courts justify this activity with the need to protect the public from incompetence and to preserve the professional independence of lawyers. Despite recent challenges to the legitimacy of these motives, these enforcement efforts are unlikely to abate without legislative intervention.³¹

B. Difficulty in Defining "the Practice of Law"³²

Through the common law, courts and to some extent local bar associations³³ have shaped the definition of "the practice of law."³⁴ While

era is that important decision makers "refuse[d] to accept solely on faith the bar's campaign against unauthorized practice and its rationale but . . . [began] to ask searching questions." *Id.*

27. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Bar associations continued to police the legal profession by disciplining noncooperating lawyers and by actively pursuing lay practitioners until the mid-1970s when federal courts held that anticompetitive practices of lawyers violated the antitrust laws. See C. WOLFRAM, *supra* note 3, at 826-27.

28. For example, in 1980 the Department of Justice (DOJ) notified the California Bar that the Bar's statements of principles of cooperation with other professional groups would be investigated for Sherman Act violations. *Statements of Principles: Are They on the Way Out?*, 66 A.B.A. J. 129, 130 (1980). Soon thereafter, California's Bar was the first major bar to rescind its statements of principles. *Id.*

29. C. WOLFRAM, *supra* note 3, at 827.

30. *Id.*; see *Florida Bar v. Consolidated Bus. & Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980) (enjoining a for-profit corporation from providing legal services to the public through full-time employed lawyers). Commentators have noted that state enforcement of UPL may be immune from federal antitrust laws under the state action doctrine. See C. WOLFRAM, *supra* note 3, at 827 n.26; Rhode, *supra* note 20, at 53-55 & n.182.

31. See Christensen, *supra* note 12, at 200-01; Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPPERDINE L. REV. 1 (1984) (suggesting a limited consumer preference test to define the practice of law); Morrison, *supra* note 22, *passim*; see also *supra* notes 22-23 (discussing the professed motives and recent challenges).

32. Black's Law Dictionary defines the practice of law as the "rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent." BLACK'S LAW DICTIONARY 1055 (5th ed. 1979). Although this definition appears adequate, courts have struggled with the meaning of terms used in that definition, such as "legal principles and technique" and "application." For a discussion of court methods for defining "the practice of law," see *infra* notes 40-65 and accompanying text.

33. Before 1980 the local bar initiated most civil proceedings to enjoin UPL. Rhode, *supra* note 20, at 15, 19, 43. By contrast, state prosecutors rarely initiated civil cases or sought criminal sanctions. *Id.* at 19; see also *People v. Enfeld*, 136 Misc. 2d 252, 518 N.Y.S.2d 536 (Sup. Ct. 1987) (authorizing a district attorney to bring a criminal suit against an individual practicing law without a license).

34. Michelman, *supra* note 31, at 4, 6; Rhode, *supra* note 20, at 11.

individual states have the authority to regulate UPL,³⁵ state statutes rarely define "the practice of law" with sufficient specificity.³⁶ Moreover, the *Model Rules of Professional Conduct* do not propose a universal definition and acknowledge that the definition varies among jurisdictions.³⁷ Thus, statutory law provides little guidance in determining whether activity constitutes the practice of law.

1. Role of Local Bar Associations

In general, bar associations define "the practice of law" as preparing documents or giving legal advice.³⁸ Because local bar associations often initiate UPL cases, the bar has a great deal of influence over the state's decision to investigate and ultimately to prosecute a statutory violation by a nonlawyer.³⁹ For example, the local bar vigorously may

35. C. WOLFRAM, *supra* note 3, § 15.1.3, at 835. Nevertheless, courts often assert an inherent or constitutional power to define "the practice of law" based on their authority to regulate lawyers as officers of the court. *Id.* at 834; Michelman, *supra* note 31, at 4 n.5, 6; Rhode, *supra* note 20, at 11. These courts consider definitions given by a legislature or bar association as advisory opinions only. Michelman, *supra* note 31, at 4 & nn.6-7. Moreover, some state courts have held that legislative attempts to define "the practice of law" are unconstitutional usurpations of judicial power. C. WOLFRAM, *supra* note 3, § 15.1.3, at 834 n.58; *see also* Bennon, VanCamp, Hagen & Ruhl v. Kassler Escrow, Inc., 96 Wash. 2d 445, 635 P.2d 730 (1981); Washington Bar Ass'n v. Great Western Fed. Sav. & Loan Ass'n, 91 Wash. 2d 48, 586 P.2d 870 (1978) (finding by the Washington Supreme Court that legislative attempts to define UPL are unconstitutional under separation of powers doctrine).

36. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6125-6127 (West 1990) (stating that individuals cannot practice law or hold themselves out as entitled to practice law unless they are active members of the State Bar). *But see* TEX. GOV'T CODE ANN. § 81.101 (Vernon 1988). That Code reads:

(a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

Id. Almost all jurisdictions have statutes or court rules prohibiting UPL. *See* Rhode, *supra* note 20, at 11.

37. MODEL RULES, *supra* note 22, Rule 5.5 comment (stating that "whatever the definition," the rule against UPL protects the public from unqualified persons providing legal service).

38. In 1979 a comprehensive study showed that about 75% of UPL activity investigated by bar associations outside of California concerned preparing documents or giving advice. Rhode, *supra* note 20, at 10, 30. These investigations generally focus on lay persons such as real estate brokers, uncontested divorce service representatives, insurance brokers, debt collectors, bankruptcy advisors, immigration advisors, and trust and probate advisors who prepare documents or give related advice. Forty-two percent of California Bar complaints related to preparing documents and giving legal advice. *Id.* at 31.

39. Wolfram states that "the proliferation of unauthorized practice situations seems bounded

oppose conduct that injures the public or that competes with attorneys for legal fees. Because the bar largely controls which cases are brought to court, the bar's definition of "the practice of law" necessarily influences court definitions as well.

2. Theoretical Approach by Courts

Courts usually employ one of four tests to determine whether conduct constitutes "the practice of law" and is therefore unauthorized.⁴⁰ The definition varies among jurisdictions, and the inconsistencies often confuse both lawyers and nonlawyers.⁴¹ The oldest⁴² and most commonly used test is the traditional practice test.⁴³ This test requires courts to determine whether the challenged service traditionally is performed by lawyers.⁴⁴ The inquiry sometimes focuses on whether the service establishes an attorney-client relationship.⁴⁵ The relationship is more likely to exist if the provider receives compensation or actually poses as an attorney.⁴⁶ Despite these guidelines, commentators have criticized the traditional practice test as being overbroad, inconsistent, and unworkable⁴⁷ because lawyers traditionally perform many services

only by limits on the imaginative powers of bar association unauthorized practice committees in creating legal theories and of those who wish to share in the pie of potential legal fees in distinguishing precedent." C. WOLFRAM, *supra* note 3, § 15.1.3, at 836.

40. Michelman, *supra* note 31, at 6.

41. *Id.* at 5.

42. Christensen, *supra* note 12, at 192. The traditional practice test was first articulated in 1919.

43. C. WOLFRAM, *supra* note 3, at 836; Michelman, *supra* note 31, at 6-7.

44. Justice Pound accepted this test in his 1919 concurring opinion in *People v. Title Guar. & Trust Co.*, 227 N.Y. 366, 125 N.E. 666, 670 (1919) (Pound, J., concurring) (declaring that the legislature, in enacting the penal law forbidding UPL, intended to prohibit "the practice of rendering . . . services of the character now generally performed by lawyers as a part of their ordinary routine"). Justice Pound opined that services "customarily rendered [by lawyers] should be characterized as legal services." *Id.* Justice Benjamin Cardozo, although dissenting for evidentiary reasons, agreed with Justice Pound's conception of legal services. *Id.* at 671 (Cardozo, J., dissenting); see also Christensen, *supra* note 12, at 184.

45. Michelman, *supra* note 31, at 6-7 & nn.24-26.

46. *Id.*; see also Law. Man. on Prof. Conduct (ABA/BNA) 801:1104-05 (Ala. 1985) (stating that law school graduates not admitted to any state or local bar may not describe themselves as "attorneys" while working as sports agents); *id.* at 801:1026 (Ala., undated) (stating that a law student who has not passed the bar examination may not open a joint bank account with a lawyer and entitle the account "attorneys").

47. See, e.g., C. WOLFRAM, *supra* note 3, § 15.1.3, at 836; Christensen, *supra* note 12, at 195 (stating that lawyers do many things also properly done by others and observing that "[t]here is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized") (quoting Griswold, *A Further Look: Lawyers and Accountants*, 41 A.B.A. J. 1113 (1955)). One lawyer opined that the practice of law is "anything [the] . . . client will pay me to do." Morrison, *supra* note 22, at 365. Today, this definition would include traveling, filing, sitting in court, and making copies. Another commentator remarked that if the definition of "the practice of law" included applying a statute, regulation, or court decision, then policemen, city clerks, doctors, and

that other professionals, business people, and public officials perform as well.⁴⁸

A second test, the professional judgment test, asks whether the challenged service requires specialized legal skill, training,⁴⁹ or ability beyond that possessed by the average person.⁵⁰ Courts subjectively examine the difficulty of the service to determine whether a lay person can perform it capably.⁵¹ If a court instead determines that society should entrust performance of the service only to a trained lawyer, it constitutes the practice of law.⁵²

Few jurisdictions have accepted the third test, known as the incidental legal services test.⁵³ This test asks whether the challenged service is merely incidental to another commercial, nonlegal enterprise, such as completion of forms in the real estate business.⁵⁴ These incidental services are not UPL. Courts are more likely to deem the challenged service as UPL when the actor has a pecuniary interest in the act or receives a separate fee for the act.⁵⁵

The final test requires the court to examine whether the activity harms the public.⁵⁶ If so, the act should be impermissible. Activity that

legislators would engage daily in UPL. Christensen, *supra* note 12, at 194-95 (quoting Griswold, *supra*, at 1113, 1114).

48. Under the traditional practice test, courts regard giving legal advice, drafting wills, filing suit for a collection agency, conducting a real estate closing, and preparing deeds as the practice of law. See Christensen, *supra* note 12, at 193 & nn.192-96, and cases cited therein. Activity not so clearly UPL under the traditional practice test includes representation before administrative agencies, tax services by accountants, and certain services of lay organizations such as labor unions and automobile clubs. *Id.* at 193-95.

49. Kountz v. Rowlands, 46 Pa. D. & C. 461, 463 (C.P. 1942); C. WOLFRAM, *supra* note 3, § 15.1.3, at 836; Michelman, *supra* note 31, at 6.

50. See *In re Arthur*, 15 Bankr. 541, 546 (Bankr. E.D. Pa. 1981); Baron v. City of Los Angeles, 2 Cal. 3d 535, 543, 469 P.2d 353, 358, 86 Cal. Rptr. 673, 678 (1970); Blair v. Motor Carriers Serv. Bureau, 40 Pa. D. & C. 413 (C.P. 1939).

51. Michelman, *supra* note 31, at 6.

52. C. WOLFRAM, *supra* note 3, § 15.1.3, at 836.

53. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 581 n.26 (1989).

54. C. WOLFRAM, *supra* note 3, § 15.1, at 836. Perhaps the earliest case articulating this test is *People v. Title Guar. & Trust Co.*, 191 A.D. 165, 181 N.Y.S. 52 (App. Div.) (finding that a title company's drafting deeds, bonds, mortgages, and contracts of sale was incidental to the real estate business and, thus, was not UPL), *aff'd*, 230 N.Y. 578, 130 N.E. 901 (1920); see also *Merrick v. American Sec. & Trust Co.*, 107 F.2d 271, 276 (D.C. Cir. 1939) (finding that a trust company's giving of elementary legal advice to customers in connection with its business is incidental to its business and is not UPL), *cert. denied*, 308 U.S. 625 (1940).

55. See C. WOLFRAM, *supra* note 3, § 15.1, at 836; Michelman, *supra* note 31, at 6.

56. Michelman, *supra* note 31, at 7 & n.27. For a recent case, see *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987) (stating that the purpose of UPL regulation is not protection of the legal profession, but rather protection of the public from the potentially severe economic and emotional consequences that may flow from erroneous legal advice).

affects legal rights potentially harms the public.⁵⁷ Another consideration may be whether the parties concerned know that they have been harmed.⁵⁸

Courts and local bar associations have used these four tests as starting points for determining whether challenged activity constitutes the practice of law. These tests, however, are ambiguous and yield inconsistent results. Thus, courts have adopted a seemingly less complex approach that identifies situations in which UPL frequently exists.⁵⁹

3. Situational Approach by Courts

Courts applying the situational approach to defining the practice of law have identified three general kinds of activities constituting the practice of law: representing individuals in court, drafting documents, and providing legal advice.⁶⁰ Representation of another in court is the most egregious form of UPL, yet exceptions to the general rule that a nonlawyer may not provide court representation exist.⁶¹ Despite these exceptions, the courts and local bar associations are unlikely to relax controls on court representation any further.⁶²

57. Michelman, *supra* note 31, at 7; *see also* Florida Bar v. Moses, 380 So. 2d 412, 414 (Fla. 1980) (quoting Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1191 (Fla. 1978)).

58. Michelman, *supra* note 31, at 7-8.

59. C. WOLFRAM, *supra* note 3, at 836.

60. Annotation, *What Amounts to the Practice of Law*, 151 A.L.R. 781 (1944); *see also* South Carolina Medical Malpractice v. Frolich, 297 S.C. 400, 402, 377 S.E.2d 306, 307 (1989). In *Frolich* the court stated:

It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of . . . legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.

Frolich, 297 S.C. at 402, 377 S.E.2d at 307 (citing *In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)).

61. These exceptions include: *Pro se* representation, representation before federal administrative agencies, representation before small claims courts in some jurisdictions, representation before state administrative proceedings, and representation by law students under the supervision of either a school-sponsored legal clinic or a public agency's intern program. *See* *People v. Perez*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979) (discussing representation by supervised law students); Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U. J. PUB. L. 219, 222 (1988) (discussing representation before federal administrative agencies); Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245 (1990) (discussing representation before state administrative proceedings). For a criticism of law student representation of indigent criminal defendants, see Galperin, *Law Students As Defense Counsel in Felony Trials: The "Guiding Hand" Out of Hand*, 46 ALB. L. REV. 400 (1982).

62. Florida, for example, recently made court representation by nonlawyers more difficult by forbidding court appearances of government officials who had appeared regularly in court in juvenile dependency proceedings. Florida Bar *In re* Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909, 911 (Fla. 1989). The Florida Supreme Court stated that this restriction best served the parties' interests and the need for efficient and fair proceedings. *Id.* In the past Florida has also

Preparation of legal forms by nonlawyers is a less egregious undertaking than court representation, but still constitutes UPL when the practice requires legal skill or knowledge and is done for a fee.⁶³ Lay practitioners are less likely to violate UPL regulations if preparation of a form is incidental to another business.⁶⁴

Nonlawyers often give legal advice; in fact, advice is the most common form of UPL. Courts consider whether the provision of legal advice by a nonlawyer constitutes UPL on a case-by-case basis because the inquiry is more difficult when the advice is gratuitous. Courts generally consider providing legal advice to be the practice of law if the provider

prohibited a nonlawyer labor relations specialist from appearing before a hearing officer in an unfair labor practice proceeding. *Moses*, 380 So. 2d at 412.

In addition, an Alaska state court has found that a criminal defendant does not have a federal constitutional right to lay representation. See *Skuse v. State*, 714 P.2d 368, 369, 371 (Alaska Ct. App. 1986) (stating that lower court did not abuse discretion when defendant, self-described as "not a well-versed public speaker," was allowed to consult with friends at counsel table, but was not allowed to have friends address the court for him). The court noted, however, that the UPL statute does not preclude a trial court from exercising discretion to allow lay representation. *Id.* But see Note, *The Criminal Defendant's Sixth Amendment Right to Lay Representation*, 52 U. CHI. L. REV. 460 (1985).

63. See *Geibank Indus. Bank v. Martin*, 97 Bankr. 1013 (Bankr. N.D. Ga. 1989) (stating that an attorney may not authorize nonattorneys to prepare bankruptcy documents and then sign attorney's name to them); *United States v. Hardy*, 681 F. Supp. 1326 (N.D. Ill. 1988) (reporting that drafting simple documents that require some degree of legal knowledge is practice of law); *Lynch v. Cannatella*, 122 F.R.D. 195, 198-99 (E.D. La. 1987) (stating that an attorney could not allow a legal secretary to prepare, sign, and file an amended complaint), *aff'd*, 860 F.2d 651 (5th Cir. 1988); *In re Anderson*, 79 Bankr. 482 (Bankr. S.D. Cal. 1987) (holding that a paralegal may not prepare bankruptcy schedules that require the exercise of legal judgment beyond knowledge and capacity of a lay person); *Burrell v. Disciplinary Bd. of Alaska Bar Ass'n*, 777 P.2d 1140, 1143 (Alaska 1989) (stating that a suspended attorney may not write a letter to another attorney of intent to file suit); *Florida Bar*, 547 So. 2d 909 (stating that lay counselors may not draft legal documents for the Department of Health and Rehabilitative Services); *Florida Bar v. Matus*, 528 So. 2d 895 (Fla. 1988) (finding that a nonlawyer may not prepare immigration forms that require legal training such as tourist visa extensions, student visas, political asylum requests, and residency requests); *Florida Bar v. Mickens*, 505 So. 2d 1319 (Fla. 1987) (stating that a nonattorney may not file eviction complaints or type or print orally communicated information on tenant eviction forms for residential landlords); *Louisiana State Bar Ass'n v. Edwins*, 540 So. 2d 294 (La. 1989) (holding that an attorney may not delegate to a paralegal the preparation of documents); *Kennedy v. Bar Ass'n*, 316 Md. 646, 561 A.2d 200 (1989) (finding that an attorney admitted to practice in the federal district court in the state, but not admitted to practice in that state, may not prepare legal documents based on federal or foreign law).

64. See *Mills v. Bing*, 181 Ga. App. 475, 352 S.E.2d 798 (Ct. App. 1987) (finding that *pro se* defendants may draft letter for themselves and co-defendant spouses when spouse concurs fully in contents of letter); *First Fed. Sav. & Loan v. Sadnick*, 162 Ill. App. 3d 581, 515 N.E.2d 1354 (Ct. App. 1987) (finding that preparation of mortgage documents by mortgagee who acted on own behalf and did not provide legal advice was not UPL); *In re Discipline of Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986) (stating that a nonlawyer may prepare legal documents for approval and signature by attorney). But see *Buyers Serv.*, 292 S.C. at 126, 357 S.E.2d at 15 (holding that a commercial title company assisting homeowners in purchasing residential real estate may not prepare deeds, notes, and other legal documents concerning mortgage loans even though the forms required no creative drafting).

receives compensation in exchange and if the advice concerns either a matter requiring professional legal judgment or the drafting of legal documents.⁶⁵ These standards reveal that the situational approach to defining the practice of law, like the theoretical approach, may yield ambiguous and inconsistent results and thus undermine predictability.

4. Consideration by the California Bar Association

The California Bar's Public Protection Committee (Protection Committee) has acknowledged that courts and legislatures historically have had difficulty defining "the practice of law" for the purpose of determining what constitutes UPL.⁶⁶ The Protection Committee also admitted that in California the state has not defined or enforced the term "unauthorized practice of law" adequately.⁶⁷ As a result, regulation of UPL has little societal benefit.⁶⁸ Thus, in 1988 the Protection Committee proposed to eliminate confusion surrounding the definition of "the practice of law" by limiting regulation to a prohibition against nonactive members of the State Bar holding themselves out to be attorneys.⁶⁹

The Commission on Legal Technicians, drafters of the 1990 Report, did not adopt the Protection Committee's recommendation and

65. See *Unauthorized Practice of Law Comm. v. Prog.*, 761 P.2d 1111 (Colo. 1988) (stating that a nonattorney may not advise trust settlers on opposing foreclosure and filing lawsuit); Florida Bar—*In re Advisory Opinion*, 544 So. 2d 1013 (Fla. 1989) (stating that nonlawyers may help customers complete forms, but may not give legal advice concerning the preparation and service of the notices); *Edwins*, 540 So. 2d at 294 (finding that attorneys may not allow paralegals to evaluate client's claim or advise client on settlement); *Kennedy*, 316 Md. at 646, 561 A.2d at 200 (holding that an attorney who is not admitted to practice in state may not advise clients by applying legal principles to client's problems or by interviewing, analyzing, and explaining legal rights); *Brown v. Unauthorized Practice Comm.*, 742 S.W.2d 34 (Tex. Ct. App. 1987) (stating that a nonattorney may not give legal advice that encourages litigation). *But see El Gemayal v. Seaman*, 72 N.Y.2d 701, 533 N.E.2d 245, 536 N.Y.S.2d 406 (1988) (finding that a foreign attorney did not practice law in New York by discussing progress of legal proceeding in Lebanon with a client in New York).

66. The Protection Committee reported:

One reason [that the State Bar has not enforced the UPL statutes] . . . is that there is no adequate definition of what constitutes the practice of law. From our own investigation, it seems clear that the courts have fairly broadly defined what constitutes the practice of law. The problem is that, in our law-dominated society, many fairly common activities fall within the traditional definition of what constitutes the practice of law. . . . 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. We have concluded that the solution is to amend "unauthorized practice of law" statutes so as to protect the public from persons who are not active members of the State Bar but are holding themselves out to be lawyers authorized to appear in court.

Report of the Public Protection Committee, Office of Professional Standards, State Bar of California (Apr. 22, 1988) [hereinafter 1988 Report] (on file at *Vanderbilt Law Review*).

67. *Id.* at 1.

68. *Id.* at 8.

69. *Id.* at 9.

decided against providing a new legal definition.⁷⁰ The Commission concluded that statutes and cases adequately define "the practice of law," but that financial limitations have impeded enforcement of the statutes.⁷¹ As a result of the Commission's rejection of the Protection Committee's recommendations, the problems traditionally encountered by courts, legislatures, and bar associations in defining "the practice of law" remain. These problems are not unique to California and have moved states other than California to institute their own UPL reforms.⁷²

III. A CHRONOLOGY OF RECENT DEVELOPMENTS IN THE UNAUTHORIZED PRACTICE OF LAW ARENA

Because of the definitional problems of the present system, public pressure to increase legal services for indigents and others who are unable to afford adequate legal services,⁷³ a growing public mistrust of attorneys,⁷⁴ or the Reagan-era commitment to a competitive rather than a protectionist economy,⁷⁵ the legal profession has begun to rethink its

70. 1990 Report, *supra* note 8, at 9.

71. *Id.* at 39.

72. See *supra* notes 32-65 and accompanying text (discussing the definitional approaches taken by jurisdictions).

73. See, e.g., 1990 Report, *supra* note 8, at 14 (suggesting that legal technician services are used frequently in California).

74. See Jost, *Public Image of Lawyers: What Image Do We Deserve?*, A.B.A. J., Nov. 1, 1988, at 47 (maintaining that negative images of lawyers have increased because of extensive media coverage of the ethical crises in the Justice Department, rapidly increasing salaries for associates, and enormous legal costs for Texaco and Pennzoil in their 1985 merger battle); *White House Spokesman Lashes at Lawyers, But They Hit Back*, Reuter Libr. Rep., Feb. 23, 1990 (citing the statement of White House spokesman Marlin Fitzwater that America's lawyers "'deserve all the criticism they can get'"); Osiel, *Lawyers As Monopolists, Aristocrats and Entrepreneurs* (Book Review), 103 HARV. L. REV. 2009 (1990); Brown, *America's Legal Profession Is in Trouble, What Are We Going to Do About It?*, N.Y. St. B. J., May 1990, at 16; see also *supra* notes 23-31 and accompanying text.

75. In 1988 the United States had approximately 800,000 lawyers, or one lawyer for every 300 persons. Discussion with Harold Levinson, Vanderbilt law professor (Nov. 26, 1990). The United States has at least 20 times more attorneys per capita than Japan. See Baker, *Lawyers For Cars*, N.Y. Times, June 8, 1983, at A23, col. 5; see also McBride, *Sue-it-Yourself or How to Live Without a Lawyer*, Christian Sci. Monitor, Sept. 1, 1983, at B14 (stating that in 1983 the United States had 44 times more lawyers per capita than Japan). The number of attorneys in the United States doubled from 1963 to 1983. Baker, *supra*, at A23, col. 5. Experts attribute the declining economy in the United States, at least in part, to the increasing number of attorneys. *Lawyers Cost GNP Half a Trillion Dollars, Study Says*, Proprietary to the United Press International 1990, Feb. 26, 1990. For example, the activities of lawyers hurt the economy by more than one-half trillion dollars annually because those activities not only create no new wealth, but also seek to acquire the wealth of others. *Id.*; see also Gregory, *Incentives and Engineers*, Aviation Week and Space Tech., Apr. 4, 1983, at 9 (blaming much of the shortage of engineers and scientists in the United States to a "convoluted reward structure that coerces bright students to pursue parasitic [such as lawyers and accountants] rather than productive careers"); McBride, *supra* (claiming that the cost of legal services accounts for more of the GNP than the steel industry). The recent increases in lawyer

restrictions on the practice of law. Slowly and sporadically, the profession has been relaxing its control of the practice of law. The District of Columbia, Florida, Illinois, Nevada, and Washington recently have taken decisive steps in this direction. On the other hand, attempts to relax restrictions in Oregon and Maryland have failed. The drafters of the California proposal researched several of these state developments before preparing the proposal.⁷⁶ The reforms and their results also may influence the future of California's proposal.

A. *Washington Supreme Court Rule*

In particular, the California Commission on Legal Technicians focused on the Washington Supreme Court Rule when researching state developments. Since 1983 Washington has allowed "limited practice officers" to select and prepare certain legal documents for closing real and personal property transactions.⁷⁷ The Limited Practice Board, which is appointed by the Washington Supreme Court, must preapprove the form of these legal documents.⁷⁸ In addition, limited practice officers may render services only after the officers stipulate in writing that they are not representing any of the parties. The limited practice officers cannot give legal advice, and all parties to the particular transaction must consent to the officer's participation.⁷⁹ The Rule holds all limited practice officers to the standard of care required of attorneys.⁸⁰

Limited practice officers must be at least eighteen years old, possess good moral character, and pass an examination and background check. The Rule does not mandate initial educational requirements, but requires completion of ten hours per year of continuing education courses to remain certified.⁸¹ Moreover, limited practice officers must

activity harken back to colonial fears of lawyers' excesses and stirring up litigation. *See supra* note 14.

76. 1990 Report, *supra* note 8, at 5.

77. *Id.* at 47. The Washington Supreme Court Rule uses the term "limited practice officers" for nonattorneys practicing law pursuant to the Rule. *Id.* The Rule restricts legal activities of limited practice officers to the following:

select[ing], prepar[ing] and complet[ing] documents in a form previously approved by the [Limited Practice] Board for use in closing a loan, extension of credit, sale or other transfer of real or personal property. Such documents shall be limited to deeds, promissory notes, guaranties, deeds of trust, reconveyances, mortgages, satisfactions, security agreements, releases, Uniform Commercial Code documents, assignments, contracts, real estate excise tax affidavits, and bills of sale.

Id. at app. 21 (Washington Supreme Court Rule 12(d)).

78. *Id.*

79. *Id.* at 21 (Washington Supreme Court Rule 12(e)(2)). An officer also must disclose in writing that the documents prepared will affect the legal rights of the parties, that the parties' interests may differ, and that the parties have a right to be represented by lawyers. *Id.*

80. *Id.* at 47.

81. *Id.*; *see also id.* at app. 21 (Rules for Admission and Certification to Limited Practice

prove that they are financially able to cover potential liability.⁸²

The Limited Practice Board oversees the limited practice program. The Board administers the certification examination, admits qualified applicants, approves an educational program, hears grievances, disciplines officers, approves standard forms used by officers, and establishes necessary fees and regulations.⁸³ The disciplinary rules enforced by the Board prohibit officers from committing acts involving moral turpitude, dishonesty, or corruption.⁸⁴

The Washington Supreme Court Rule heavily influenced the preparation of California's 1990 Report.⁸⁵ The 1990 Report, however, will allow nonlawyers to practice law in a greater capacity than currently allowed in Washington. In addition, California's independent paralegals may have to meet higher initial educational requirements than Washington's limited practitioners.⁸⁶ The 1990 Report also recommends ten hours per year of continuing education courses.⁸⁷

B. Oregon Judiciary Committee Bill

In 1986 an attempt to allow nonlawyers to practice law failed in Oregon. The Oregon Judiciary Committee sponsored a "legal scriveners" bill at the request of an independent paralegal service.⁸⁸ The bill would have allowed nonlawyers to complete legal forms in divorce, bankruptcy, real estate, and adoption matters.⁸⁹ The bill, however, died at the committee level.⁹⁰ One reason for this failure may be that the bill was motivated by the self-interest of an independent paralegal service rather than public sentiment. Public sentiment was a prime motivating factor behind the California 1990 Report, which, thus, has a better chance of survival.

under APR 12, Rule No. 15).

82. As proof of financial ability, the Limited Practice Board accepts individual errors and omissions insurance policies in the amount of \$100,000, agency policies, or financial responsibility forms from corporate sureties. *Id.* at 47; *see also id.* at app. 21 (Rules for Admission and Certification to Limited Practice under APR 12).

83. *Id.* at app. 21.

84. *Id.* (Disciplinary Rules for Limited Practice Officers, Rule 1.1(a)).

85. *See id.* at 47.

86. The Director of the Department of Consumer Affairs upon the advice of an advisory committee will determine the requisite level of initial education and experience for California's independent paralegals. *Id.* at 31.

87. *Id.* at 32.

88. *Id.* at app. 3 (excerpt from Suskin, *An Overview of Recent Development in Various States with Respect to the Utilization of Legal Assistants*).

89. *Id.*

90. *Id.*

C. Florida Bar Association Rule

One year later, in 1987, public sentiment influenced the Florida State Bar Association to institute new rules regulating the Florida Bar. The changes to the rules focused on the Bar's investigation and prosecution of UPL.⁹¹ The new rules accomplished four major changes.

First, the term "unauthorized practice of law" became "unlicensed practice of law."⁹² This change emphasizes the legal licensing requirement and perhaps clarifies the definition of "the practice of law."⁹³ Second, instead of prosecuting individuals for UPL directly, the Florida Bar now must refer UPL cases to the state attorney for prosecution under criminal misdemeanor statutes.⁹⁴ Third, nonlawyers will hold seats on investigating committees, which previously were comprised only of lawyers.⁹⁵ Finally, the public can seek advisory opinions before engaging in a particular activity, thereby avoiding the time and expense of litigation.⁹⁶

Later in the year the Florida Bar once again petitioned its Supreme Court to amend the rules regulating the Florida Bar.⁹⁷ This second amendment allows "limited oral communications" by nonlawyers to aid individuals in the completion of legal forms.⁹⁸ Thus, nonlawyers can provide routine administrative information such as the number of forms to file, the amount of filing fees, the method of payment, and the

91. *Florida Bar v. Furman*, 451 So. 2d 808 (Fla. 1984), a long, bitter, and highly publicized case against nonlawyers rendering divorce services, spawned the rule changes. Boggs, *The New Face of Unlicensed Practice of Law*, FLA. B.J., July/Aug. 1987, at 55. The new Florida Bar rules were "designed to instill greater public confidence in the Bar's handling of unlicensed practice [cases]." *Id.* at 56. The change was unique because it had come from within the profession instead of from the legislature, the courts, or the public. Nevertheless, the Florida Bar merely had responded to media and public suspicions. *Id.* at 55.

92. Boggs, *supra* note 91, at 55.

93. *See supra* subpart II(B).

94. Boggs, *supra* note 91, at 55-56. H. Glenn Boggs reports that UPL cases have been "among the most vigorously litigated cases." *Id.*

95. *Id.* at 56.

96. *Id.*

97. Amendment to Rules Reg. Fla. Bar (Chapter 10), 510 So. 2d 596 (Fla. 1987). A class of divorce plaintiffs who could not afford a lawyer, obtain legal aid, or prepare the forms themselves supported the proposed amendment. *Id.* at 597.

98. *Id.* Amended Rule 10-1.1(b) reads:

(b) Definition of UPL. The unlicensed practice of law, as prohibited by statute, court rule, and case law of the State of Florida. For purposes of this chapter, it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of legal forms approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form(s) and inform the individual how to file such form(s).

RULES REG. FLA. BAR 10-1.1(b).

waiting period before the court will schedule a hearing.⁹⁹ Despite the relaxed restrictions, nonlawyers still may not draft legal documents or legally represent individuals in court.¹⁰⁰ Yet Florida's reforms illustrate the potential impact of public sentiment in this area.

D. Maryland House of Delegates Bill

In February 1988 the Maryland House of Delegates considered Bill 1029, which would have allowed licensed legal assistants to perform "substantive legal work" as independent public contractors.¹⁰¹ In addition, the bill would have established a state regulatory board to review paralegal and legal assistant services.¹⁰² Like the Oregon legal scriveners bill, opponents defeated the Maryland bill soon after consideration.¹⁰³

In part, the bill may have failed because it did not limit the scope of nonattorney practice by delineating the specific areas of practice that would be open to licensed paralegals. The California 1990 Report does limit the scope of nonattorney practice and, thus, has a better chance of survival. The 1990 Report, however, resembles the failed Maryland bill in its regulatory structure, educational requirements, and disciplinary procedures for denying or revoking licenses.

E. Nevada Court Guidelines

In 1990, however, the move toward allowing nonattorneys to practice law appears to be gaining momentum. A Nevada district court recently issued guidelines for "scrivener services," or nonlawyers performing legal services, in the areas of family law and bankruptcy.¹⁰⁴ In *State Bar of Nevada v. Johnson*¹⁰⁵ the Nevada State Bar sued a group of companies, including Ace Paralegal & Secretarial Services and Divorce Made Easy, for UPL. The companies neither had specialized legal training nor represented themselves as having legal skills. Yet the

99. *Amendment to Rules*, 510 So. 2d at 597.

100. In 1989 a Florida court held that nonlawyers in the Department of Health and Rehabilitative Services could not draft legal documents or represent the Department in court proceedings on juvenile dependency despite evidence that legal representation at all stages of the proceedings used excessive public resources compared to the concomitant benefits. See Florida Bar *In re Advisory Opinion HRS Nonlawyer Counselor*, 547 So. 2d 909 (Fla. 1989).

101. 1990 Report, *supra* note 8, at app. 4. The bill would allow a licensed paralegal to "perform . . . substantive legal work requiring knowledge of legal concepts customarily, but not exclusively, performed by an attorney." *Id.* at 2.

102. *Id.* at 2-4.

103. *Id.* at 5.

104. See *State Bar of Nevada v. Johnson*, No. CV89-5814 (Nev. Dist. Ct. Apr. 12, 1990) (attached in Appendix 2 of 1990 Report, *supra* note 8, on file at *Vanderbilt Law Review*).

105. *Id.* Although the trial judge found that most of the defendants had "an honest desire to avoid the unauthorized practice of law," the issues were so complex that it was a "practical necessity" to issue particularized guidelines for the several defendants. *Id.* at 2, 3.

State Bar had hired a private investigator to solicit services from these companies.

In its opinion the trial court noted that other states are beginning to allow nonlawyers to provide assistance in a narrow range of ministerial matters, and concluded that nonlawyers would be practicing law if they caused the customer to rely on their written or oral technical expertise.¹⁰⁶ The court issued particularized guidelines for these scrivener services.¹⁰⁷ The guidelines exempted from UPL regulation stenographic and scrivener services that furnish kits to their customers, provided the kits are simple and straightforward so that customers can make self-informed decisions to use the kits.¹⁰⁸

The Nevada guidelines regulate the activities of scriveners to a lesser degree than the 1990 California Report would regulate independent paralegals. Moreover, while the 1990 Report proposes a supreme court rule or legislation, the Nevada Supreme Court has not passed on the district court guidelines. Thus, the guidelines do not have the same force of law that a California court rule or legislation would have. Nevertheless, the court opinion indicates that the same concerns which prompted the 1990 Report—excessive legal costs and denied access to courts—fueled Nevada's move toward allowing increased lay participation.¹⁰⁹

F. District of Columbia Rule of Professional Conduct

In March 1990 the District of Columbia Court of Appeals approved a new Rule of Professional Conduct (Rule) that also will impact state decisions to allow nonattorneys to practice law. The Rule allows nonlawyers to become partners in law firms.¹¹⁰ Nonlawyers may have

106. *Id.* at 20.

107. *Id.* at 3.

108. *Id.* at 21.

109. The Nevada court acknowledged an amicus brief filed by HALT. The brief noted that 80% of the legal needs of low-income people are not being met and that businesses providing self-help books, kits, and other materials earn approximately \$50 million per year. *Id.* at 16.

110. *Non-Lawyer Partners Rule Released*, Nat'l L.J. Mar. 12, 1990, at 7, col. 1; cf. *In re Cooperative Law Co.*, 198 N.Y. 479, 92 N.E. 15, 16 (1910) (stating that "[t]he bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged . . . in the business of conducting litigation for others" and that "[t]he degradation of the bar is an injury to the state").

The Rule originated in the late 1970s as part of the Kutak Commission's proposal to revise the ABA Model Rules. See Andrews, *supra* note 53, at 593-96. The Kutak Commission proposed Rule 5.4 to allow nonlawyer participation in the business of law. *Id.* Rule 5.4 ultimately was defeated by the ABA's House of Delegates because of concerns that the Rule would allow Sears or Montgomery Ward to open law offices in their stores. *Id.* at 595 n.107.

Rule 5.4 of the District of Columbia Rules of Professional Conduct was submitted to the District of Columbia Court of Appeals in November 1986. Samborn, *Non-Lawyers As Firm Partners*, 12 Nat'l L.J., Mar. 5, 1990, at 1, col. 1. The Rule was adopted on Mar. 1, 1990, and became effec-

financial or managerial roles in a law firm provided (1) that the law firm's sole purpose is to provide legal service to clients; (2) that the nonlawyer performs professional services to assist the firm in servicing its clients; (3) that the nonlawyer agrees to follow the District of Columbia Rules of Professional Conduct; and (4) that the firm's partners assume responsibility for acts of the nonlawyers just as if the nonlawyers were lawyers.¹¹¹

Proponents of the Rule claim that it will benefit clients, firms, and society.¹¹² Many nonlawyers already participate in law firm management, planning, and development.¹¹³ The potential for partnership status ideally will motivate these professionals to perform well and then reward successful performance. Thus, firms are more likely to attract the most highly skilled professionals.¹¹⁴ In addition, proponents claim that the increased scope of services will benefit clients.¹¹⁵

One advocate of the Rule argues that ABA prohibitions¹¹⁶ on partnerships between nonlawyers and lawyers are not justified by a need to protect the legal profession because less restrictive alternatives are available.¹¹⁷ Instead, the prohibitions serve only the legal profession's economic self-interest.¹¹⁸ Empirical evidence showing that harm would result if the ABA lifted its prohibitions is unavailable.¹¹⁹ Moreover, public needs demand diversified law firms for better, more efficient service.¹²⁰

tive on Jan. 1, 1991. *Non-Lawyer Partners Rule Released*, *supra*, at 7, col. 1.

111. Samborn, *supra* note 110, at 1, col. 2. Pursuant to the Rule, economists, psychologists, lobbyists, accountants, and professional managers could assist a firm in their respective area of expertise "without being relegated to the second-class status employee." *Id.* at 46, col. 4.

112. Clay, *Law Firm Partnerships: Should Non-Lawyers Be Admitted As Partners? Yes: Excellence Must Be Rewarded*, A.B.A. J., May 1990, at 38.

113. These professionals include engineers, real estate and zoning specialists, certified public accountants, statisticians, economists, professional administrators, and psychologists. *Id.*; Samborn, *supra* note 110, at 46, col. 4.

114. Clay, *supra* note 112, at 38.

115. *Id.*

116. The ABA's original prohibition on partnerships between lawyers and nonlawyers appeared in ethics codes around 1928. Andrews, *supra* note 53, at 584. The 1969 ABA Model Code of Professional Responsibility prohibited these combination partnerships if activities of the nonlawyers constituted the practice of law as defined in Disciplinary Rule (DR) 3-103(A). *Id.* at 588. Rule 5.4 of the 1983 ABA Model Rules of Professional Conduct currently prohibits lawyer and nonlawyer partnerships. MODEL RULES, *supra* note 22, Rule 5.4.

117. Andrews, *supra* note 53, at 579. Professor Thomas Andrews is an assistant professor of law at the University of Washington. *Id.* at 577.

118. *Id.* at 677.

119. *Id.* at 621. One year before the D.C. Court of Appeals adopted Rule 5.4, Professor Andrews had recommended that the ABA consider adopting a modified version of Rule 5.4. *Id.* at 641. He argued that "it defies common sense to severely restrict" nonlawyers from cooperating with lawyers in business and client representation. *Id.*

120. *Id.* at 579.

Critics of the Rule, including a large segment of the organized bar,¹²¹ claim that it will increase UPL by nonlawyers¹²² and threaten the independence of the legal profession.¹²³ In addition, the Rule allegedly will hinder professional judgment, violate attorney-client privileges, and promote improper client solicitation.¹²⁴ Because nonlawyers are not subject to disciplinary rules governing lawyers, critics fear that the Rule will alter radically the traditions, values, and social commitments honored by the legal profession and will erode further the disciplinary rules governing lawyers.¹²⁵ More specifically, critics have attacked the Rule itself because it does not limit clearly the financial interest a nonlawyer may have in a partnership.¹²⁶

Though advocates of the Rule do not recommend that nonlawyer partners should be permitted to practice law, the Rule necessarily has sparked debate over the proper role of nonattorneys in the legal profession. Much of the debate involves the same issues faced by the California Bar. Additionally, the District of Columbia Bar has considered whether other jurisdictions such as California will adopt similar rules;¹²⁷ whether the Rule will apply to the branch offices of firms based in

121. Samborn, *supra* note 110, at 46, col. 3. The ABA Litigation Section also disagrees with Rule 5.4. In a task force recommendation and report on a related topic, the Litigation Section urged "strict limits on law firm diversification" because law firms stand to lose their independence and could mislead the public by the label "law firm." RECOMMENDATION AND REPORT ON LAW FIRMS' ANCILLARY BUSINESS ACTIVITIES PREPARED BY THE SECTION OF LITIGATION OF THE AMERICAN BAR ASSOCIATION, Feb. 8, 1990 (on file at *Vanderbilt Law Review*). The ABA also considered a provision opposing "any attempts to permit non-lawyers to obtain equity interests in law firms or otherwise permit them to share in legal fees generated by lawyers." Samborn, *supra* note 110, at 47, col. 1.

122. See Samborn, *supra* note 110, at 46, col. 4.

123. See Levinson, *Law Firm Partnerships: Should Non-Lawyers be Admitted As Partners? No: Keep the Profession Distinctive*, A.B.A. J., May 1990, at 39.

124. Samborn, *supra* note 110, at 46, col. 4 (paraphrasing Dennis J. Block of New York's Weil, Gotshal & Manges).

125. Levinson, *supra* note 123, at col. 2. Professor L. Harold Levinson maintains that law firms must be independent because lawyers are fiduciaries of the legal system. Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 235 (1990). To remain independent, law firms, at a minimum, must consist only of partners who are lawyers and must allow all lawyers to exercise independent professional judgment. *Id.* at 230. Professor Levinson believes that lawyers have a special obligation to refrain from delegating legal duties to nonlawyers because the profession's unique connection to the legal system reflects "society's achievements and its aspirations for structuring an orderly community." *Id.* at 235.

126. Samborn, *supra* note 110, at 47, col. 1 (citing Professor Levinson of Vanderbilt Law School).

127. At the time Rule 5.4 was approved, 28 firms in the District of Columbia already employed nonlawyer specialists. *Id.* at 46, col. 2. The District of Columbia had the greatest concentration of these firms. *Id.* In addition to District of Columbia firms, 51 firms nationwide currently provide nonlawyer services. *Id.*; see also Roberts, *Schism Between California and D.C. Bar Rules*, 102 L.A. DAILY J., Aug. 15, 1989, at 1, col. 6 & 24, col. 1.

Washington, D.C.;¹²⁸ whether the Rule will result in increased instances of UPL; and whether adoption of the Rule marks the beginning of a movement toward diversification of the legal market. Answers to these questions will add new dimensions to the question of whether nonattorneys should be allowed to practice law.

G. Illinois Senate Bill

A pending Illinois Senate bill introduced in June 1990 resembles the California proposal. The Independent Paralegal Licensing Act (Act) allows licensed independent paralegals to draft wills and trusts, appear at administrative hearings, and handle real estate closings without attorney supervision.¹²⁹ Under the Act, individuals cannot become independent paralegals without a license.¹³⁰ To receive a license, an individual must complete a paralegal course of study approved by the ABA and pass a licensing examination established by the Department of Professional Regulation.¹³¹ The Illinois Act, like the California Report, allows continued enforcement of UPL against unlicensed independent paralegals.¹³²

With respect to the licensed paralegals, the Act delegates regulatory powers to a Director of Professional Regulation and disciplinary power to a Paralegal Licensing and Disciplinary Board.¹³³ The Act outlines grounds for discipline and dismissal.

California's 1990 Report resembles the Illinois Act in several ways. For example, both proposals outline grounds for discipline and dismissal and both continue enforcement of UPL against unlicensed independent paralegals.¹³⁴ Like the 1990 Report, the Illinois Act purports to protect the public safety and welfare.¹³⁵ Moreover, both proposals identify the areas of law that are open to nonattorneys. The 1990 Report, however, would authorize a broader scope of practice than the Illinois Act.

128. See Roberts, *supra* note 127, at 1, col. 6.

129. S. 2314 86th Gen. Assembly §§ 3(d), (e) (Ill. 1990), reprinted in 1990 Report, *supra* note 8, at app. 1. Senator Jones introduced the Act. S. 2314, *supra*, § 1. The Act authorizes an independent paralegal to practice in only one of the three permissible areas. *Id.* § 4. The paralegal must specify an area of practice in the initial application. *Id.*

130. S. 2314, *supra* note 129, § 2.

131. Instead of taking an exam, an independent paralegal may opt to complete 1000 hours of practice in the specified areas or an additional 15 hours of paralegal training in these areas. *Id.* § 7(d).

132. *Id.* § 24.

133. *Id.* §§ 4-6.

134. *Id.* § 24.

135. *Id.* § 2.

IV. THE CALIFORNIA BAR PROPOSAL

A. *Development of the Current Proposal*

By 1983, when Washington passed the first major court rule allowing nonattorneys to practice law, debate already had begun in California over whether to relax restrictions on the practice of law.¹³⁶ Yet neither the Bar nor the courts took action for three years. In December 1986 the Board of Governors of the State Bar of California created the Public Protection Committee and appointed four attorneys and four nonattorneys to the Committee.¹³⁷ The Board asked the Protection Committee to consider the role of the Bar in UPL prosecution and to propose a system for regulation and enforcement of UPL.¹³⁸ In formulating a proposal, the Protection Committee held three hearings,¹³⁹ received written comments, surveyed consumer protection agencies and other state bars,¹⁴⁰ and conducted other research and investigation.¹⁴¹

In April 1988 the Protection Committee completed its report (1988 Report). The Committee members unanimously endorsed a repeal of the State's laws governing UPL.¹⁴² The 1988 Report proposed allowing "legal technicians" to perform certain legal services¹⁴³ provided the technicians register with appropriate authorities and disclose to clients that they are not attorneys.¹⁴⁴ The Protection Committee recommended this proposal based on evidence of dramatic growth in the number of nonlawyers providing legal services, public benefit from their availabil-

136. See 1988 Report, *supra* note 66, at 9 (stating that "[t]he State Bar has, for some time now, not sought to enforce unauthorized practice of law statutes"); Burkett, *Policing the Lay Practice: The Public Deserves and Expects the Bar to Handle Complaints*, 3 CALIF. LAW., Aug. 1983, at 18; Michelman, *supra* note 31, at 1 (suggesting UPL reforms); Rhode, *Policing the Lay Practice: It Is Time the Bar Relinquished the Barricades*, 3 CALIF. LAW., Aug. 1983, at 19 (containing an empirical study of UPL and criticizing the pro-restriction focus as being "dominated by the wrong people asking the wrong questions").

137. Austin, *An Argument for Registering Non-Attorney Legal Service Providers*, L.A. Daily J., Aug. 12, 1988, at S13. The Board was responding to a request by the Los Angeles County Bar to investigate consumer fraud by certain typing services. *Id.*

138. *An Unauthorized Practice: State Bar Leaders Are Unhappy with a Report from Their Own Committee*, 8 CALIF. LAW., Aug. 1988, at 11 [hereinafter *Unauthorized Practice*].

139. 1988 Report, *supra* note 66, at 3 (reporting that hearings took place in Los Angeles on June 16, 1987, San Francisco on Sept. 15, 1987, and Fresno on Oct. 8, 1987).

140. *Id.* at 3-6.

141. Austin, *supra* note 137, at 13.

142. *Unauthorized Practice*, *supra* note 138, at 11; see 1988 Report, *supra* note 66, at 9. "[T]he committee was originally split regarding whether non-lawyers should be permitted to perform some legal work." Dorfman, *Repeal of Unauthorized Practice Law Urged*, L.A. Daily J., Feb. 23, 1988, at 6, col. 3.

143. The Protection Committee recommended that a legal technician be allowed to render "legal assistance," which would include court representation of another. 1988 Report, *supra* note 66, at 10.

144. *Id.* at 11.

ity, and, at the same time, a risk of public harm from the unsupervised activities of nonlawyers.¹⁴⁵ Significantly, the Committee found no evidence suggesting that the public would suffer harm from legal services performed by nonattorneys. Moreover, the Committee concluded that the term "unauthorized practice of law" was neither definable nor enforceable, notwithstanding current prosecution of legal technicians for UPL.¹⁴⁶

Many Bar officials openly criticized the 1988 Report,¹⁴⁷ and neither the Board nor the media expected the proposal to survive the Bar's approval process.¹⁴⁸ Instead the Board sought alternative solutions to UPL problems.¹⁴⁹ The Standards Committee, however, approved the 1988 Report's proposal in July 1989.¹⁵⁰ One month later the Board sur-

145. *Id.* at 1.

146. *Id.*

147. Initially, the Board vehemently opposed the 1988 Report. Terry Anderlini, President of the Bar at the time, publicly expressed keen disappointment in the proposal. Anderlini, *New Rules for Non-Lawyers: Our Duty Is to Protect the Public*, L.A. Daily J., May 6, 1988, at 4, col. 5. He believed that the report was inadequate and seriously flawed. The 1988 Report lacked guidelines for educational requirements, see Announcement by the State Bar of California, State Bar Seeks Comment on Provision of Law Related Services by Non-Lawyers, State Bar of California (undated) (on file at *Vanderbilt Law Review*), minimum qualifications, and services that nonlawyers could provide. Anderlini, *supra*, at 4, col. 3. Anderlini opined that "[i]nstead of being protected . . . consumers would be set up as a target for the unscrupulous, the untrained and the uncaring." *Id.* at 4, col. 4. Anderlini also criticized the Committee's lack of hard data. *Id.* Moreover, he stated that the report's recommendation of a simple registration of legal technicians instead of a licensing procedure was a "strange departure from normal public protection efforts [that require licensing for other professions such as doctors, architects, and accountants]." *Id.* at 4, col. 3. Colin Wied, who later became the State Bar's president, criticized the lack of licensing procedures and opined that the Committee "would license any damn fool to practice law as long as he paid \$50." Marcotte, *Calif. Dreaming: Expanded Role for Non-Lawyer Specialists Considered*, A.B.A. J., June 1989, at 36, col. 3; see also *Unauthorized Practice*, *supra* note 138, at 11 (noting Bar President Anderlini's claim that the Committee's suggestion was tantamount to "letting nurses do brain surgery").

148. See Marcotte, *supra* note 147, at 36, col. 1 (stating that "[w]hile it's unlikely . . . the bar committee's proposal will win approval, the ideas are generating considerable discussion"). An anonymous attorney perhaps expressed the State Bar's ultimate fear when he told a member of the Protection Committee, "If your recommendations are adopted, there goes our monopoly." Austin, *supra* note 137, at 13, col. 3.

149. The Board held three public hearings to receive comment on the Report. See 1988 Report, *supra* note 66, at 3; see also note 139 and accompanying text. One proposed alternative was a 6% service tax on law firms that netted more than \$1 million annually. The revenue would finance legal services for the indigent and subsidize the training of legal specialists in state-accredited institutions. Marcotte, *supra* note 147, at 36, col. 3. This alternative may have been the most promising, but the Board did not consider it seriously. *Id.* (stating that only this alternative received media attention).

150. Hall, *Bar Panel OKs Paralegal Plan on 6-1 Vote*, L.A. Daily J., July 24, 1989, at 1, col. 5. The Standards Committee voted 6-1 to approve the Protection Committee's proposal after noting that California residents had an overwhelming need for better access to the courts. *Id.* The Standards Committee recommended the formation of a special nine member commission to draft rules, training, and licensing standards for legal technicians. *Id.*

prisingly found that legal technicians may improve access to the legal process and authorized the creation of the Commission on Legal Technicians to determine guidelines¹⁵¹ for practice by legal technicians.¹⁵²

In preparing its own report, the Commission distributed five surveys targeted at different groups to assess need, researched licensing requirements of other occupations,¹⁵³ examined the Washington Supreme Court Rule allowing limited practice officers to select and prepare certain legal documents for property closings,¹⁵⁴ and formed bankruptcy, family, immigration, and landlord and tenant law consulting groups.¹⁵⁵ The Commission issued its Report in July 1990, attaching two bills drafted by California legislators to regulate nonlawyers.¹⁵⁶ After review, the Board released the 1990 Report and attached bills without endorsement for a public comment period that ended November 28, 1990.¹⁵⁷ At present, the Board's position on the proposal is unclear, particularly in light of its initial outrage at the 1988 Report and then surprising approval of it.¹⁵⁸ In addition, the future of the Report and proposed legislation is unclear.¹⁵⁹

151. Among other things, the guidelines would include:

1. The standards for training, licensing and regulation of legal technicians;
2. The entity (that may or may not be the State Bar) that should be responsible for their regulation; and
3. The areas of practice and scope of tasks, if any, that may be carried out by legal technicians.

Resolution Adopted by the State Board of Governors (Aug. 26, 1989) [hereinafter Resolution] (on file at *Vanderbilt Law Review*).

152. *Id.* On November 7, 1989, the Board appointed 10 members to the Commission on Legal Technicians. The Board appointed three lawyers, two judiciary members, two nonlawyer providers of legal services, two nonlawyer consumer representatives, and one representative from the California Department of Consumer Affairs. The Board's Vice-President chairs the Commission, but does not vote. News Release, State Bar Names Members to Commission on "Legal Technicians," State Bar of California Office of Bar Communications & Public Affairs (Nov. 7, 1989) (on file at *Vanderbilt Law Review*). At its first meeting the Commission focused on four issues: (1) whether there was a need for legal technicians; (2) if so, the quantification of that need; (3) what actual and potential harm could result from legal technicians; and (4) how to regulate legal technicians. 1990 Report, *supra* note 8, at 9. The Commission did not hold public hearings, in an effort to prevent duplication of the Protection Committee's activities. *Id.*

153. Forty agencies within the Department of Consumer Affairs regulate these occupations. 1990 Report, *supra* note 8, at 10.

154. *Id.* at 47.

155. Resolution, *supra* note 151, at 11.

156. See 1990 Report, *supra* note 8, at 1-3; see also *supra* notes 9-11 and accompanying text.

157. See News Release, *supra* note 10.

158. See *supra* notes 147-52 and accompanying text.

159. The public comment period had not ended at the time this Note went to print. State Bar President Charles S. Vogel has encouraged vigorous debate on this issue by insisting that lawyers "talk about it loudly and plainly." News Release, *supra* note 10.

B. Overview of the Proposal

1. The 1990 Report

The 1990 Report appears to be the most radical proposal for deregulation of the legal profession to date.¹⁶⁰ The Report contains six recommendations: (1) that the Board petition the California Supreme Court to adopt a rule of court authorizing independent paralegals to engage in the limited practice of law initially in the areas of bankruptcy, family, and landlord and tenant law;¹⁶¹ (2) that the Board sponsor regulatory legislation to place these independent paralegals under the direct control of the Director of the Department of Consumer Affairs, who should adopt the regulations subject to supreme court approval; (3) that the Director establish licensing requirements such as a minimum level of education or experience, a written examination, and an annual fee to a client security fund; (4) that the Director submit for supreme court approval a code of professional conduct for licensed independent paralegals; (5) that the Board include provisions for professional discipline, mediation, and arbitration in its regulatory system; and (6) that the authorities vigorously enforce regulations governing UPL against nonlicensees.¹⁶²

The Report proposes that the California Supreme Court oversee legal activities of independent paralegals by delegating regulatory duties to an executive agency, the Department of Consumer Affairs.¹⁶³ Legislation also should establish a seven member Advisory Committee to counsel the Director of the Department of Consumer Affairs on regulations including practice standards, disciplinary guidelines, and licensing requirements.¹⁶⁴ The Report notes that this regulatory scheme avoids constitutional problems that may arise if the legislature tries to circumvent authority of the judiciary to regulate the practice of law.¹⁶⁵ All three branches of the government would play a role in implementing

160. One legal newspaper called the original Protection Committee proposal "the most significant deregulation . . . in California history." Hall, *supra* note 150, at 1, col. 5.

161. If the initial areas of practice are approved, the Commission will consider allowing non-attorneys to participate in matters concerning probate, government benefits, small business incorporation, and adoptions, guardianships, and name changes. 1990 Report, *supra* note 8, at 26. The Commission assumed that the supreme court would not authorize court appearances by independent paralegals. *Id.* at 33.

162. *Id.* at 1-3.

163. *Id.* at 28.

164. *Id.* at 28-29.

165. *Id.* at 27; *see also* Minority Report to the Commission on Legal Technicians, July 1990 Report, at 59-60 [hereinafter Minority Report] (stating that the scheme also may violate the separation of powers doctrine because it essentially will give the supreme court a veto power over the Department of Consumer Affairs, an executive branch administrative agency); *supra* note 35 and accompanying text.

the program.¹⁶⁶ On the other hand, the Commission specifically recommends that the State Bar avoid a role in the regulation of independent paralegals.¹⁶⁷

The Report recommends that the Director and Advisory Committee establish requirements for education, experience, or both.¹⁶⁸ The Report's most significant deficiency is its lack of specific requirements. The Commission made only two specific recommendations: that every independent paralegal pass a two-part written examination and complete ten hours per year of continuing education courses.¹⁶⁹

The Commission provides specific guidelines for establishing a code of professional conduct.¹⁷⁰ The Commission suggests that the supreme court extend attorney-client and work product privileges to licensed independent paralegals. The Report also recommends that licensees pay fees to a client security fund, which would compensate victims of independent paralegal thefts.¹⁷¹

The Commission suggests statutory language for professional discipline of independent paralegals and continued enforcement of UPL regulations. The language includes examples of unprofessional conduct that will result in denial of a license or other discipline.¹⁷² Moreover, the Commission suggests that the Administrative Procedure Act govern disciplinary action, thus ensuring that licensees receive notice and an

166. Pursuant to the proposal, the judiciary delegates regulatory duties to the Department of Consumer Affairs; the legislature passes enabling legislation; and the executive implements the program. 1990 Report, *supra* note 8, at 27-28.

167. *Id.* at 27.

168. *Id.* at 29, 31.

169. *Id.* Other Commission suggestions include: (1) allowing individuals who had engaged in UPL for two years prior to implementation of the Act to take a licensing examination without meeting additional entry requirements; (2) requiring at least graduation from high school or holding a valid GED certificate if both educational and experience requirements are mandated; and (3) requiring at least 30 continuous semester hours of classes from an institution approved by the Director if paralegal certification is necessary. *Id.* at 32.

170. The Commission recommends a specific code governing conduct of independent paralegals. The State Bar Committee on Professional Responsibility and Conduct assisted the Commission in developing the 1990 Report's proposed rules of professional conduct. The Report contains a comprehensive list of issues that the code should address. The Director and Advisory Committee would establish the code of professional responsibility for independent paralegals. The supreme court must approve this code. *Id.* at 33.

171. *Id.* at 2, 34. The Commission recommends additional areas for consideration including regulation of independent paralegals and lawyer referral services, limitation of referral fees, and regulation of profit sharing with lawyers. *Id.* at 33.

172. Unprofessional conduct under the proposed statute includes, but is not limited to, the following: negligence or incompetence, conviction of a crime substantially related to the qualifications, functions, and duties of an independent paralegal, fraud in obtaining a license, dishonesty substantially related to the duties of an independent paralegal, failure to maintain confidentiality, performing or representing oneself as able to perform duties beyond the scope of the independent paralegal's license, false advertising, drug or alcohol abuse, or failure to return customer files. *Id.* at 36-37.

opportunity to be heard prior to revocation, suspension, or denial of a license on grounds of unfitness.¹⁷³ The Commission further recommends citations and fines for less severe violations.¹⁷⁴ To enforce UPL regulations, the Director can impose civil fines, and injured parties may bring civil causes of action against unlicensed paralegals.¹⁷⁵ Finally, the Commission recommends procedures for mediation and arbitration of disputes between licensed paralegals and dissatisfied clients.¹⁷⁶

The Commission analogizes its Report to regulation of specialized health professionals, such as opticians, podiatrists, and psychologists, who practice limited forms of medicine without a medical degree that would allow them to diagnose and treat all physical and mental conditions.¹⁷⁷ The Commission concludes that allowing licensed independent paralegals to engage in the limited practice of law is reasonable and worthwhile.¹⁷⁸ The Commission also maintains that public protection is its paramount goal.¹⁷⁹

2. Proposed Legislation

The bills that the Commission attached to its 1990 Report included one sponsored by California State Senator Robert Presley.¹⁸⁰ The Presley Bill includes legislative findings justifying the limited law practice by legal technicians for the public benefit.¹⁸¹ Based on these findings,

173. *Id.* at 35. The Commission also would allow recovery of all investigation and prosecution costs by the Director as a condition of probation or reinstatement of the paralegal. *Id.*

174. *Id.*

175. *Id.* at 41-42.

176. *Id.* at 37-38. The Commission suggests that the Director informally mediate complaints so that dissatisfied clients may be satisfied financially. The Commission also recommends legislation containing procedures similar to those for arbitration of fee disputes between attorneys and clients.

177. *Id.* at 48-49.

178. *Id.* at 51-53. The Commission also makes additional suggestions to improve access to the legal system. These suggestions include endorsing pending legislation that would increase small claims courts' jurisdictional limits to \$5000 and municipal courts' limits to \$100,000, endorsing efforts to provide information centers inside courthouses and neighborhood justice centers, and advocating mandatory *pro bono* assistance by all active members of the State Bar. *Id.* at 51.

179. The Commission believes that its guidelines "will protect consumers, serve the public's expanding needs for affordable legal assistance, and foster the growth of well-trained, dedicated paraprofessionals to serve those needs." *Id.* at 53.

180. Two bills are attached to the 1990 Report. See *infra* note 10 and accompanying text for a discussion concerning the bills. These bills are identical, and thus, only one of these bills is discussed in this Note. News Release, *supra* note 10, at 1.

181. These findings indicate that many low- and middle-income Americans cannot get legal assistance because of the high costs of legal services and that traditional solutions to this problem cannot accommodate the demand. Other findings include:

The factors chiefly to blame for the high cost of legal services are the high costs involved in becoming a lawyer and the profession's monopoly over delivery of service. The time and money necessary to enter the field (college, law school, bar exam passage) involve high costs which, unless mitigated by a presence of competition, are inevitably passed on to the con-

the Presley Bill deviates from the 1990 Report; the bill allows "legal technicians" to practice in more areas of the law than does the 1990 Report.¹⁸² Additionally, the bill, like the Public Protection Committee Report issued in 1988, proposes to repeal the current statute prohibiting nonlawyers from "practicing law" and to replace it with a provision prohibiting individuals who are not active members of the Bar only from claiming to be a lawyer.¹⁸³

The bill requires legal technicians to disclose that they are not attorneys and that communications with them are not privileged.¹⁸⁴ The bill also requires licensing of legal technicians by the Department of Consumer Affairs through a Board of Legal Technicians. Under the bill, unprofessional conduct other than negligence is deemed a misdemeanor.¹⁸⁵ The bill includes procedures for handling client complaints and code violations.¹⁸⁶

The California Bar has acknowledged Senator Presley's proposed regulation for legal technicians by sending the bill with the 1990 Report for public comment. Nevertheless, the Commission strongly recommended that the State Bar draft its own legislative proposal.¹⁸⁷ Significant differences exist between the Presley Bill and the Commission's recommendations. In particular, the scope of practice open to legal technicians is an area of disagreement. Thus, although the Bar, the legislature, and the public appear to support allowing nonattorneys to practice law, the specific regulations for this practice are not settled and may stall legislation indefinitely.

C. Recommendations Concerning the Proposal

1. Adoption of the Proposal

In the midst of a trend toward liberalizing restrictions on the practice of law, California may have more reasons to relax restrictions than any other state. First, and most importantly, Californians appear to support allowing nonattorneys to practice law. California has an over-

sumer. . . [The high cost of legal services] has resulted in a two-tiered system of justice, with only the very rich able to afford legal services and the vast majority being shut out of the legal system.

1990 Report, *supra* note 8, at app. 5.

182. The bill states that legal technicians should be afforded the "widest possible range of services, with the least burdensome . . . regulatory scheme" because the "benefit of delivering low-cost legal services to a majority of the population justifies some risk of harm." *Id.* at 6.

183. *Id.* at 2.

184. *Id.* at 12.

185. *Id.* at 13-14.

186. *Id.* at 17-22.

187. *Id.* at 5.

whelming need for better access to the legal process.¹⁸⁸ For example, the Commission cited several studies showing that the unmet legal needs of citizens have reached crisis proportions,¹⁸⁹ and that one cause of this crisis was the high cost of legal assistance. Even critics of the proposal agree that legal technicians may alleviate some of this need.¹⁹⁰ Legal technicians are in demand in California as evidenced by present use of their services by consumers.¹⁹¹ Moreover, most lawyers do not provide the services provided by legal technicians.¹⁹²

Second, California has a peculiar market for unlicensed services. One reason for this unique position is that California's current educational requirements for attorneys are the most permissive in the country.¹⁹³ Admission to the bar and enforcement of UPL statutes are the two forms of regulation used by the legal profession. California already has relaxed admission requirements and should reform UPL regulations for the same reasons. California also has a higher number of *pro se* litigants than other states.¹⁹⁴ Finally, demand for immigration services in California is overwhelming, and illegal aliens often desire assistance from lay practitioners rather than attorneys because attorneys

188. Meyberg, *A Case Against Legitimizing the Unlicensed Practice of Law*, L.A. Daily J., Aug. 19, 1988, at 9, col. 1.

189. An ABA Consortium on Legal Services and the Public found that almost 40% of a nationwide sample had had a civil legal problem in the past year for which they did not have legal assistance. Another study revealed that of the 6,000 people turned away by the Legal Aid Society of Orange County in 1987, only 6% could afford the \$175 to \$200 hourly fees charged by a private attorney. 1990 Report, *supra* note 8, at 15.

190. Resolution, *supra* note 151.

191. 1990 Report, *supra* note 8, at 14. Legal technicians provide services in 41 of California's 58 counties, primarily in the areas of bankruptcy, landlord and tenant, immigration, and family law.

192. 1988 Report, *supra* note 66, at 8 (reporting belief of Public Protection Committee that Bar opposition to the proposal would result in "a public relations disaster without any economic benefit").

193. In 1988 California was one of four states that admitted law school applicants without undergraduate degrees. Mavity, *State Rules Governing Admission to the Bar: Comparisons and Comments*, in *Bar Admission Rules and Student Practice Rules* 18 (1978); see also CAL. BUS. & PROF. CODE § 6060 (West 1990). California also accepted Bar applicants who graduated from unaccredited law schools. Mavity, *supra*, at 13-17; CAL. R. CT., RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA xix (1990), at 931-33. California was one of ten states that allowed satisfaction of legal education requirements at least in part through law office study or judicial clerkships. Mavity, *supra*, at 19-20. Moreover, it was only one of five states that allowed such training in lieu of law school education completely. *Id.* at 13-17.

194. Rhode, *supra* note 20, at 22 & n.69. In addition, the Commission found that a significant portion of court filings in bankruptcy, family, and landlord and tenant law were done *in pro per*. From October to November 1989, *in pro per* filings in the bankruptcy courts ranged from 34.6% of total filings in the Central District of California to 10.8% in the Southern District. Bakersfield Municipal Court experienced the highest percentage of *in pro per* filings with 75.71% of its landlord and tenant law plaintiffs filing *in pro per*. 1990 Report, *supra* note 8, at 13.

generally have contacts with the authorities.¹⁹⁵

Third, California's present system of UPL regulation appears to be failing.¹⁹⁶ In particular, the common-law definition of "the practice of law" is inadequate for enforcement purposes.¹⁹⁷ The definitional problems yield inconsistent and ambiguous results. Because of these problems, the California Bar perhaps should look more closely at reforming the definition of "the practice of law." The Protection Committee's 1988 Report and the Presley Bill both recommend this reform.

Fourth, regulation of practice by nonlawyers may help alleviate present abuses by lay practitioners. The Commission found that the unregulated practice of law by nonattorneys caused public harm.¹⁹⁸ For example, California accounted for over one-half of the total number of UPL inquiries, investigations, and complaints in the entire United States during 1979.¹⁹⁹ In addition, notary publics often take advantage of California's large Spanish speaking population by posing as attorneys because in Mexico and many Latin American countries "Notario Publico" translates as "lawyer."²⁰⁰ Regulation of nonattorneys could alleviate not only these current abuses, but also fears about opening the legal market to individuals with no education or professional responsibility. Regulations could contain minimum requirements that nonattorneys must meet and rules that they must follow.

Finally, the quality of services provided by the Bar may improve with competition. For example, more individuals who received legal assistance from a legal technician, typing service, or paralegal were satisfied than were individuals who consulted an attorney.²⁰¹ The number

195. Rhode, *supra* note 20, at 32; *see also* Committee Report, Committee on Immigration and Naturalization, 30 CAL. Sr. B.J. 322, 324 (1955) (reporting that while the problem of non-California lawyers practicing immigration law could be solved by an amendment to the Code of Federal Regulations, "[t]he notary public and laymen practice appears to be susceptible only to action by the State Bar through the Unlawful Practice of Law Committee. . . .")

196. *See infra* notes 198-200 and accompanying text.

197. *See supra* subpart II(B). Note that after allowing licensed nonattorneys to practice law, Florida changed the term "unauthorized practice of law" to "unlicensed practice of law," to clarify the definitional problems. *See supra* notes 92-93 and accompanying text.

198. 1990 Report, *supra* note 8, at 17. The Commission believes that: training, experience, examinations, and a client security fund will greatly relieve the harm currently experienced from some legal technicians. An "above ground" licensed profession, coupled with stronger enforcement mechanisms for those who continue to practice without licensure, will provide necessary legal assistance and discourage consumers from using unscrupulous providers.

Id.

199. Rhode, *supra* note 20, at 22. California like all other states appears to practice "low-visibility enforcement" because only 3% of the inquiries, investigations, and complaints were referred to law enforcement agencies. *Id.* at 28.

200. In 1980 California outlawed the use of the confusing term, but unscrupulous notaries still take advantage of the language barrier and charge excessive fees for legal assistance. *Id.* at 32.

201. Sixty-seven percent of individuals receiving assistance from a lawyer were happy overall

one reason for this discrepancy was cost: legal technicians charged less than lawyers.²⁰² Competition also should drive down the cost of services, thereby benefiting the poor who do not qualify for legal aid. This change also may benefit the Bar by influencing more individuals to consult attorneys.

2. The Regulatory Role of the California Bar Association

A combination of concern for both the public and the profession motivated the recent change in the Board's attitude toward allowing nonlawyers to practice law.²⁰³ In an attempt to accommodate these potentially conflicting interests, the Board may decide that a modified proposal, which would allow the Board to have a measure of control over the nonattorneys, warrants consideration.²⁰⁴ With this modification the California proposal would appear to be another attempt to protect the profession while purporting to protect the public.²⁰⁵ If the Board retains control over the licensing and regulation of legal technicians, the substance of this proposal, specifically the vital separation from the source of attorney regulation, will disintegrate. Thus, while the Bar should support legislation that protects the public from fraudulent or negligent legal technicians, that requires education and competence standards for registration, that subjects legal technicians to a code of

with the services, while 76% were happy with the services provided by legal technicians. 1990 Report, *supra* note 8, at 14.

202. Although 30% of *pro per* individuals who retained lawyers paid no fee, 8% paid over \$750 in legal fees. Only 4% of users of nonattorney services paid over \$750. *Id.* Forty-two percent of users of nonattorney services paid between \$100 and \$250. *Id.*

203. The change may reflect a genuine interest in providing better access to the legal system, a trend toward diversifying the legal economy, or an attempt by the Bar to control its unregulated competitors with a comprehensive system of regulation. The Commission did recognize that public injury can result from the unmonitored practice of law by nonlawyers. *Id.* at 17. The Commission's surveys revealed that the unregulated practice of law by nonlawyers had resulted in fraud, inadequate advice, boilerplate orders, and missed issues, defeuses, and remedies. *Id.*

204. See Resolution, *supra* note 151 (reporting the Board's belief that it may be the entity responsible for regulation). The Commission recognized the complexities inherent in attempting to design a program that both protects the public and expands the role of authorized providers of legal services, and thus, recommended that the State Bar "remain a participant in the public dialogue" on the issue of legal technicians. 1990 Report, *supra* note 8, at 5.

205. The Public Protection Committee may have foreseen an attempt by the Bar to gain greater control over its competitors with this proposal when it warned that the State Bar should not become directly involved in combatting the risks of consumer fraud and negligence caused by legal technicians. The Protection Committee stated that it would be a "serious political and public relations mistake for the State Bar to attempt to police consumer fraud . . . because the public will view the Bar's efforts not as 'public protection'; but an effort by the organized bar to protect the self-interests of its constituents." 1988 Report, *supra* note 66, at 8. *But see* Minority Report, *supra* note 165, at 59 (arguing that allowing supreme court oversight of the Department of Consumer Affairs is tantamount to Bar regulation because the supreme court historically is predisposed "to adopt recommendations of the State Bar Association . . . on matters related to the practice of law . . .").

ethics, and that allows defrauded or injured customers recovery in a court of law, it should not involve itself directly in overseeing the new class of legal providers. An effort to protect the public without restricting access to the courts or legal system would benefit not only the public, but also the Bar by improving its public image.²⁰⁶

V. CONCLUSION

Historically, lawyers have controlled outside competition to ensure professional survival through participation in bar associations, legislatures, and courts.²⁰⁷ In particular, UPL statutes and common-law doctrine have facilitated the enforcement of penalties against unauthorized practitioners. Yet enforcement has been unpredictable because of inconsistent pursuit of unauthorized practitioners by the local bar, ambiguous interpretations of "the practice of law" by courts, and financial burdens on enforcement agencies.

Problems encountered in addressing UPL are not unique to California. Enforcement problems coupled with concerns about satisfying an overwhelming need for services and providing access to the legal system for indigents recently have moved a number of states to attempt reforms in the UPL arena. While these attempts failed in Oregon and Maryland, developments in Washington, Florida, Nevada, the District of Columbia, and perhaps soon Illinois, have relaxed monopolistic restrictions. These more recent, successful developments represent a growing trend toward increasing participation by nonlawyers to provide

206. Deborah Rhode articulated this sentiment when she wrote:

Particularly at a time when lawyers are justifiably concerned about their public image, the bar itself has much to gain from abdicating its role as self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, prudential as well as policy considerations argue for greater consumer choice. Absent evidence of significant injuries resulting from lay assistance, individuals should be entitled to determine the cost and quality of legal services that best meet their needs. Where there are demonstrable grounds for paternalism, it should emanate from institutions other than the organized bar. A profession strongly committed to maintaining both the fact and appearance of impartiality in other contexts should recognize the value of more dispassionate decisionmaking in unauthorized practice enforcement.

Rhode, *supra* note 20, at 98-99.

Similarly, Christensen has opined:

Perhaps not the least of the incidental benefits that might flow from an unauthorized practice approach fully recognizing the public's interest in freedom of choice would be a substantial improvement in the bar's public image. No longer would lawyers appear to be greedy monopolists, seeking to keep everyone else out of what they regard as their private preserve. Rather, they would appear to be what they should be—proud, self-confident, able professionals, willing to be judged by the public on their merits. . . . If we lawyers are the splendid fellows that we claim to be[,] . . . then we have nothing to fear from open competition.

Christensen, *supra* note 12, at 216.

207. See *supra* subpart II(A).

legal assistance and diversify the legal market. The failed attempts demonstrate the importance of public support and proper regulation in implementing a program for nonattorney services.

California could be the next jurisdiction to allow participation by nonlawyers in providing legal services. The California proposal appears to be the most radical deregulation of the profession to date. The 1990 Report would allow nonlawyers who register with the state as independent paralegals to provide nonlitigation services. To fully protect the public, however, legislation also must set standards for education and competence, registration, ethical conduct, and enforcement. This proposal may be a way to regulate nonattorney practice that benefits both the profession and the public.

California should not pass over this opportunity. In particular, California will benefit because it has a peculiar need for reform. Demand for legal services without lawyer involvement is high because of large numbers of *pro se* litigants and Spanish speaking, indigent immigrants. Moreover, access to legal services often is denied to the indigent public. Current abuses of UPL and concomitant public harm also are severe problems in California.²⁰⁸ Enforcement efforts appear to be failing.

If effected properly, the 1990 Report may alleviate these concerns. The State Bar's concerns about licensing legal technicians are real. The task of preventing consumer fraud and negligence, however, belongs to law enforcement agencies and the courts rather than the Bar. The Bar should defer the regulation of nonlawyers to the State. Thus, the public might view the 1990 Report as a serious effort to protect the public.

The Bar should support this court rule and any potential legislation, and resist further involvement. This position would provide increased access to the legal system at an affordable price and show the public that the legal profession is confident that it can compete freely and openly.²⁰⁹ The reform would benefit not only the public, but the profession.

Kathleen Eleanor Justice

208. See *supra* notes 198-200 and accompanying text.

209. Christensen, *supra* note 12, at 214. Christensen believes:

The legal profession is now strong, well organized, and thriving. Perhaps it is sufficiently mature to forgo the crutch of protective laws. If so, then maybe the bar is now ready to consider a different approach to unauthorized practice. . . . If lawyers were to offer themselves to the public solely on merit, without the protection of unauthorized practice laws, professional discipline would . . . assume new importance. . . . [and] [t]he bar could . . . turn its attention to finding and implementing new and better ways of serving the public.

Id.