PROHIBITIONS ON NONLAWYER PRACTICE

An Overview and Preliminary Assessment

Committee on Professional Responsibility
Association of the Bar of the City of New York

Introduction

A profession's traditional monopoly over the terms and conditions of its practice has long been the subject of controversy. During the past twenty years, the near-exclusive control of legal, medical, and accounting services has dissolved substantially due to the increased use of paraprofessionals or substitute services. However, this movement has had greater impact on professions other than law. In medicine, for example, midwives, nurse practitioners, and physical therapists frequently work under the somewhat distant supervision of medical doctors.[1] Rather than retaining a Certified Public Accountant (CPA) for tax preparation, many individuals use a storefront service.

Some of these developments, particularly the rise of walk-in tax preparation, also reflect an effort to extend the provision of professional services to new users, most of whom were thought to have been excluded from the use of traditional professional services due to barriers of cost, information, or reasonable

[1] The substantial number of practicing Chiropractors, Podiatrists, and Osteopaths also reflects some movement in the health services community away from exclusive dominance by traditional Medical Doctors with "full dress" medical education and training or education that conforms strictly to the M.D. model.

availability. The average individual filing a federal income tax return was thought to have been deterred from using an accountant because of the (real or perceived) high cost, difficulty selecting an accountant, or intimidation at the thought of making an appointment and coming to a practitioner's office. With the advent of storefront tax preparers, people can walk into a storefront while shopping, expecting to pay $25 for a 1040 short form.[2]

The practice of law has not moved so strongly in this direction but reflects some movement toward decentralized provision of services involving greater use of nonlawyers. For example, although paralegals officially work under the close supervision of an attorney, the number of legal assistants and their level of responsibility has grown substantially during the past two decades. But despite the absence of a myriad of nonlawyers hanging shingles on the street, nonlawyer practice has seen significant de facto growth in less public ways.[3]

[2] We of course take no position on whether this was a good deal for the consumer. It seems undeniable, however, that storefront providers have increased the number of taxpayers using preparation services. In addition, they probably did not siphon significant business away from traditional accounting firms, particularly Big Six (then Big Eight) accounting firms. *See generally*, Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1100-07 (1983) (standardized legal services provided by legal clinics have not drawn business away from firms focusing on specialized or high stakes legal work but may have prevented some general service firms from using standardizable legal services such as wills as "loss leaders" designed to initiate client relationships).

[3] For example, nonlawyers appear to be increasingly permitted to provide party representation before administrative

Some of these developments were also spurred by political pressure or judicial decision. For example, the Supreme Court's *Bates v. Arizona* decision[4] overturned the state's blanket prohibitions on lawyer advertising. The Court's first amendment analysis was driven in large part by a view that consumers benefit from greater information about legal services and prices. The Court implicitly adopted this view for commercial speech generally, so long as the content is not false or misleading.[5] This analysis rests on the notion that consumers are more likely to use professional and other services if information and access barriers are lowered, and advertising lowers these barriers. Advertising may also prompt greater use of needed services to the extent it informs consumers that desired products or services are less expensive than they had believed.

A similar view animates much of the discussion surrounding the provision of legal and law-related services by nonlawyers.

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agencies or specialized tribunals such as the housing court. *See* pp. 15-16, *infra*. In addition, there is a long-standing tradition of nonlawyer practice in tax matters, where CPAs and Registered Treasury Agents often represent taxpayers in disputes before the Internal Revenue Service.

[4] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The Supreme Court may revisit the permissibility of lawyer marketing this term. *See* Florida Bar v. McHenry, No. 94-226.

[5] Subsequent Court cases have adhered to the *Bates* approach and philosophy. *See, e.g.*, In re R.M.J., 455 U.S. 191 (1982)(striking down state limitation on information content in lawyer advertisements); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)(illustrated advertising for Dalkon Shield users as prospective clients is constitutionally protected); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (attorney may make truthful mass mailing to prospective clients).

Advocates of greater nonlawyer practice argue that this will lower cost, increase the availability of information, and reduce barriers to access without spurring destructive competition within the profession. Consequently, more people will be served but persons or entities with complex or high stakes legal matters are unlikely to be misserved since they are unlikely to retain the services of nonlawyers for such matters.

Those opposed to greater nonlawyer practice contest some or all of these assertions. Although few advocate an outright protectionist argument against nonlawyer practice, such concerns may lurk beneath the surface of the opposition. Critics of the recent trend most often argue that nonlawyers pose too great a risk to clients in that they are more likely to misdiagnose or mishandle a legal matter.[6]

This report reviews the current regulatory situation regarding nonlawyer practice and unauthorized practice of law and examines the underpinnings of the unauthorized practice rules and their application to various forms of nonlawyer practice. We also review developments in other professions and their experience with expanded availability of paraprofessional

[6] However, this risk is significantly reduced when a nonlawyer correctly determines that a matter is beyond his or her professional capabilities and promptly refers the client to a competent attorney. In fact, to the extent nonlawyer practice prompts users to seek consultation for matters they would have previously ignored or undertaken themselves, it may reduce the risk of legal harm to those currently underrepresented. *See* Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980)(many Americans with legal problems appear to fail to seek legal assistance of any sort).

services. Finally, we recap the major policy positions on the issue of nonlawyer practice. We reach the preliminary conclusion that a hybrid regulatory model permitting some forms of state-licensed nonlawyer practice, possibly requiring some form of attorney involvement, provides the most effective means of expanding the reach of legal services in our society without compromising the traditional quality of American lawyering. In short, the Report concludes that there should be no *per se* bar to select forms of nonlawyer practice, that market forces should have greater freedom to operate, but that some form of regulatory oversight remains necessary to protect the public.

I. Unauthorized Practice of Law Rules in New York

Like most jurisdictions, New York generally prohibits the practice of law by nonlawyers. The practice of law includes rendering legal advice, appearing in court and holding oneself out as a lawyer.[7] Section 478 of the New York's Judiciary Law provides: "[i]t shall be unlawful for any natural person to practice or appear as an attorney-at-law...for a person other than himself in a court of record in this state,...or to hold himself out to the public as an attorney...."[8] Section 484 of the Judiciary Law further provides that a nonlawyer cannot ask for "or receive, directly or indirectly, compensation for

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[7] *See* El Gemayel v. Seaman, 72 N.Y.2d 701, 533 N.E.2d 245, 536 N.Y.S.2d 406 (1988).

[8] N.Y. Jud. Law § 478 (McKinney 1993).

appearing for a person other than himself as attorney in any court...or for preparing..."[9] legal documents including deeds, mortgages, and wills.

New York law permits some exceptions to this general prohibition. Legal services may be provided by officers of societies for the prevention of cruelty to animals and law students who have attended at least two semesters of law school or have graduated and did not pass the bar examination and who are acting under a program approved by the appellate division of the Supreme Court.[10] The courts have also carved out exceptions through interpretation of these statutes. For example, the court adjudicating *In the Matter of Sharon B.*[11] allowed representation by a nonlawyer for officers of a nonprofit corporation for prevention of cruelty to children. Courts have also excluded from "the practice of law" publication and sale of legal texts which guide consumers through legal problems.[12]

In addition to preventing nonlawyers from practicing, New York's Code of Professional Responsibility prohibits lawyers from

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[9] N.Y. Jud. Law § 484 (McKinney 1993).

[10] *See* N.Y. Jud. Law §§ 478, 484 (McKinney 1993).

[11] 72 N.Y.2d 394, 530 N.E.2d 832, 534 N.Y.S. 124 (N.Y. 1988).

[12] *See* State v. Winder, 42 A.D. 2d 1039, 348 N.Y.S.2d 270 (4th Dept. 1973) (publication and sale of "divorce yourself kits" not "practice of law"). However, preparation of patent applications constitutes the "practice of law". *See* People v. Lawrence Peska Associates, Inc., 90 Misc.2d 59, 393 N.Y.S.2d 650 (N.Y. Sup. Ct. Part II 1977) (also stating that New York only has jurisdiction to regulate patents not registered with the United States Patent Office).

assisting or sharing fees with nonlawyers. Disciplinary Rule 3-103(A) states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[13] Furthermore, DR 3-102(A) states that "a lawyer or law firm shall not share legal fees with a nonlawyer."[14]

II. Rationales for Unauthorized Practice of Law Rules

Unauthorized practice rules tend, of course, to create at least a limited monopoly for lawyers. Consequently, many laypersons perceive self-interest as the motivation for such rules. However, advocates of the rules have advanced a number of benign justifications.

One rationale is that the rules against nonlawyer practice are needed to protect the public from representation by unqualified persons.[15] According to Ethical Consideration 3-1, "[b]ecause of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and

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[13] Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 588 (1989).

[14] *Id.*

[15] *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 829 (1986).

regulations imposed upon members of the legal profession."[16] Advocates of rules against unauthorized practice stress the extensive training required and the minimum level of expertise[17] needed for admission into the bar. For example, lawyers must (1) pass the bar examination for the state in which they want to practice, (2) have both an undergraduate and law school degree, and (3) be 21 years of age or older.[18] Although certain legal services are not particularly complex, advocates of the rules stress that complex matters frequently arise from even simple transactions and that laypersons may overlook such problems.[19]

A second rationale for limiting nonlawyer practice notes that lawyers are subject to special ethical regulations inapplicable to nonlawyers. Regulations such as the Code of Professional Responsibility and the Model Rules of Professional Conduct are imposed on attorneys to assure the client of a minimum level of ethics and to place a sense of fiduciary obligation on the lawyer. Many lawyers also emphasize the screenings for integrity imposed in connection with bar

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[16] Stokes v. Village of Wurtsboro, 474 N.Y.S.2d 660, 661, 123 Misc. 2d 694, 695 (N.Y. Sup. Ct. 1984) (quoting EC 3-1) *See also* Wolfram *supra* note 15; 18 Int'l. Ltd. v. Interstate Exp., Inc., 455 N.Y.S.2d 224, 225, 116 Misc.2d 66, 67 (N.Y. Sup. Ct. Part I 1982) (purpose of the prohibition against nonlawyer practice is to protect citizens against the dangers of being represented and advised by someone not trained, examined and licensed for such work).

[17] *See* 18 Int'l, Ltd. v. Interstate Exp., Inc., *supra*, 455 N.Y.S.2d at 226.

[18] *See* Wolfram, *supra* note 15 at 849.

[19] *Id.* at 831.

admission.[20] Most states require a bar applicant to undergo a character review[21] and every lawyer must take a prescribed oath in order to be admitted.

A third rationale for restricting nonlawyer practice is that lawyers' activities are subject to discipline. In contrast, as stated in EC 3-3, "a non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer."[22] Since nonlawyers are not subject to the rules, there is no prospect of disciplinary sanction that would deter them from unethical or negligent behavior. In addition, if nonlawyer practice were allowed under these circumstances, the disciplinary rules would probably lose their effectiveness with licensed attorneys since they would no longer risk losing their livelihood if suspended or disbarred.

A fourth rationale holds that limitations on nonlawyer practice serve to protect the legal system. This argument posits that the incompetence of nonlawyers will result in a flood of unnecessary claims in the court system, delay caused by procedural errors, and more litigation arising from improperly

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[20] *Id.*

[21] *Id.* at 856-64 (character reviews usually consist of a questionnaire that inquires about any prior arrests, conviction, bankruptcy, civil judgments, and other matters. These questionnaires usually attempt to assess whether the applicant is law-abiding, trustworthy and reliable).

[22] *Id.* at 830.

prepared documents such as wills, contracts and deeds.[23]

III. Practice of Law by Nonlawyers

Although most state statutes still prohibit "unauthorized practice of law" and ostensibly greatly restrict delivery of legal services by nonlawyers, significant nonlawyer practice nonetheless exists and has expanded in recent years. The two most common examples are self-representation, including the attendant self-help literature, and paralegal activity.

A. Self-representation

Even under unauthorized practice of law rules, nonlawyers are permitted to represent themselves. This right was affirmed in *Faretta v. California*,[24] which held that an "attorney is merely an assistant who helps a citizen protect his legal rights and present his case to the courts...[so a] person should not be forced to have an attorney represent his interests if he does not consent to such representation." The public's increasing reluctance or inability to retain the services of lawyers has been evidenced by the increased use of the right to self-representation. In Arizona, pro se filings increased from 24 to 47 percent of all divorce cases from 1980 to 1985.[25] By the late 1980s, California pro se filings ranged from 39 to 62

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[23] *Id.* at 833.

[24] 422 U.S. 806 (1975).

[25] Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 214 (1990).

percent of family law cases, 14 to 34 percent in landlord-tenant matters, 10 to 34 percent in bankruptcy cases, and 70 to 80 percent in divorce cases.[26]

The rise in self-representation has been partially caused by the simplification of various procedures and the rise in consumer awareness and organization.[27] The right to self-representation has led to a growing acceptance of the publication of self-help books and forms. Since *New York County Lawyers' Association v. Dacey*,[28] which involved the publication and sale of Norman Dacey's *How to Avoid Probate*, New York and many other states have legalized the publication and sale of self-help information and forms, excluding them from the definition of "practice of law." In fact, the Florida Supreme Court, after its *Rosemary Furman* decision finding unauthorized practice by a storefront secretary operating a misleading divorce assistance practice, directed the Bar to prepare legal forms for the public. The bar responded by publishing a book of simplified forms selling at $20.00.[29] New

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[26] *Id.* at 215.

[27] *Id.* *See also* ABA COMMISSION ON NONLAWYER PRACTICE, NONLAWYER PRACTICE IN THE UNITED STATES: SUMMARY OF THE FACTUAL RECORD BEFORE THE AMERICAN BAR ASSOCIATION COMMISSION ON NONLAWYER PRACTICE 6, 23 (Discussion Draft for Comment, April 1994) (discussing significant impact and potential of personal computer software that "can retrieve, organize and format information; evaluate and choose among some legal options; and prepare, transmit and, in some jurisdictions, electronically file pleadings with the appropriate court, or submit completed applications or other legal documents to the appropriate local or federal governmental agency").

[28] 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967).

[29] Patricia A. Seitz, *President's Page: Whither Goest Us?*, FLA. B.J., Nov. 1993, at 4 (discussing case of Florida Bar v.

York is among the many other states that allow the publication and sale of these materials. In *State v. Winder*,[30] the court stated that the sale of "divorce yourself kits" was not the practice of law because it did not include personal advice to an individual, which was an essential element in legal representation.

The acceptance of these do-it-yourself legal forms by both the public and the courts have led nonlawyer entrepreneurs to commercialize books and kits containing forms and information and to create various scrivener services.[31] When these services have been challenged, the defenders have relied on the first amendment's prohibition against suppressing publications based on their legal content or the possible legal consequences that might result from their use.[32]

B. Paralegal Provision of Legal Services

Beyond self-help books and forms, the most common nonlawyer practice is by paralegals. Paralegals either work for lawyers or work independently. The U.S. Department of Labor has classified paralegals as the second fastest growing occupation of the 1990's.[33]

Furman, 451 So. 2d 808 (Fla. 1984) and 376 So. 2d 378 (Fla. 1979)).

[30] 42 A.D. 1039, 348 N.Y.S.2d 270 (4th Dept. 1973).

[31] *See* Wolfram, *supra* note 15, at 839.

[32] *Id.*

[33] *See* Jill Chanen, *Legal Profession Questions Scope of*

Paralegals are most commonly found working in law firms, and their work is usually split between legal and administrative tasks. They review documents, draft pleadings and motions, and may even perform legal research or conduct residential real estate closings.[34] However, since paralegals are not governed by the Rules of Professional Conduct, all of their work must be supervised by an attorney. The only section of the Model Rules applicable to paralegals is Rule 5.3 which "mandates a lawyer to make reasonable efforts to make sure that the non-lawyer's conduct is compatible with a lawyer's ethical obligation."[35] In New York and other states still governed by the Code, EC 3-6 authorizes an attorney to delegate tasks to nonlawyers only "if the lawyer maintains a direct relationship with the client, supervises the delegated work and has complete professional responsibility for the work product."[36] Currently, paralegals are only regulated indirectly through the lawyers who employ them.

Although the provisions of the Model Rules and Code give lawyers the authority to delegate work, there are still many tasks not permitted of paralegals. Paralegals are not allowed to handle any tasks that require the exercise of professional legal

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the Expanding Role of Paralegals, CHICAGO LAWYER, July 1994, at 4.

[34] *Id.*

[35] *Id.*

[36] N.Y. Code of Professional Responsibility EC 3-6.

judgment.[37] Therefore, paralegals are only authorized to perform ministerial tasks. In practice, however, paralegals often competently handle tasks involving discretion without close supervision.

For example, litigation paralegals in large law firms will review documents or summarize deposition testimony without having all aspects of their work reviewed by attorneys. Paralegals in law firms, government agencies, and legal aid societies often handle non-delegable duties such as client interviewing, factual investigation, and review of records. In New York, the Legal Aid Society is the largest provider of legal services to the poor.[38] The primary reason for their ability to provide legal assistance to so many clients stems from the increased involvement of paralegals.[39] These paralegals have many varied responsibilities. They assist clients with problems involving public entitlements, emergency shelter and permanent housing.[40]

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[37] N.Y. County Lawyers Assoc., ETHICS OPINION No. 641 (1975).

[38] For example, the Civil Division processed 30,000 individual cases in 1993. See Testimony of Roland Acevedo before ABA Nonlawyer Practice Commission (Aug. 5, 1993). Although Legal Aid imposes no specific educational or experience requirements, these factors are considered during the paralegal hiring process. Also, new legal assistants are required to attend a comprehensive month-long training program which is also required of new attorneys. Legal assistants and attorneys are given the same training on substantive law, administrative remedies and procedure, and ethical issues. Most legal assistants work independently but their activities are supervised and evaluated by attorneys.

[39] Id.

[40] *Id.*

They help clients fill out pro se papers for Housing Court and represent clients at administrative hearings at the State Department of Social Services, the New York City Housing Authority and the United States Immigration and Naturalization Service. They have also represented clients at hearings involving Social Security and Medicaid Benefits.

Since many paralegals have been allowed to handle legal matters, many have become quite capable of handling simple legal transactions independently.[41] This has led to a substantial increase of paralegal firms. The number of these types of firms have increased from 200 in 1985 to more than 6,000 in 1993.[42] The rising tide of independent paralegals reflects a growing acceptance by consumers of nonlawyer services, especially for simple transactions such as uncontested divorces and simple real estate closings. The state of Washington adopted a statute in 1983 that allows nonlawyers to perform legal work in real estate closings.[43]

Independent nonlawyer practice is facilitated by administrative agencies that allow nonlawyer representation in their proceedings.[44] A 1992 study by the New York County Lawyers' Association Committee on Legal Assistance found that 63

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[41] *See also* Acevedo Testimony (describing paralegal-style advocacy by interest groups that is not supervised by attorneys).

[42] KATHRYN AND ROSS PETRAS, JOBS '94 161 (1993).

[43] *See* James Podgers, *Legal Profession Faces Rising Tide of Nonlawyer Practice*, A.B.A.J., Dec. 1993, at 52.

[44] *Id.* at 51.

percent of New York City agencies and 70 percent of New York State agencies permit some form of nonlawyer representation. In addition, the Federal Administrative Procedure Act authorizes federal agencies to permit nonlawyer representation in their proceedings.[45]

The securities industry has also experienced a significant increase in nonlawyer representation. Since the Supreme Court's decision in *McMahon v. Shearson*[46], most disputes within the securities industry are subject to arbitration. Traditionally, nonlawyers were permitted to represent the disputants in these arbitrations.[47] However, between 1980 and 1993, the number of disputes resolved through arbitration increased from 830 to 6,561 cases.[48] The arbitration boom brought with it an attendant increase in legal argument and court-like procedure in arbitration proceedings, which raised concern regarding whether non-attorney representation should be allowed to continue.[49] Although an outright ban on nonlawyer advocates was considered, this has apparently been rejected by the Securities Industry Conference on Arbitration, which instead has opted to begin

[45] 5 U.S.C. § 555(b) (1988); Sperry v. Florida, 373 U.S. 379 (1963).

[46] 482 U.S. 220 (1987).

[47] *See* Dave Pettit, *Securities Arbitration Group to Develop Tight Ethics Restrictions on Nonlawyers*, WALL ST. J., Oct. 17, 1994 at A5 col. 3.

[48] SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, REPORT # 8, 29 (June 1994).

[49] *Id.* at 4.

developing guidelines for permissible nonlawyer arbitration.[50]

In addition, New York has authorized nonlawyer representation in domestic violence cases. Under the New York Family Court Act § 838,[51] petitioners are "entitled to a non-witness friend, relative, counselor or social worker present in the court room," although these persons may not participate in the proceedings beyond accompanying a party. Nevertheless, this section has encouraged many battered women's groups to send representatives with petitioners to provide support and legal advice.

Many other social services organizations also provide services that resemble nonlawyer practice. For example, the Parents Information Center, a grass-roots non-profit organization, provides information, counseling and support for parents who have special educational problems with their disabled children.[52] They do not employ lawyers. Rather, they use volunteers who receive extensive training and arguably have expertise similar to that of lawyers.[53] Because areas of public interest like housing, domestic violence and special entitlement matters face a serious shortage of lawyers, many states have

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[50] *See* Pettit, *supra* note 46, at A9A, col. 4.

[51] N.Y. Family Court Act § 838 (McKinney 1993).

[52] *See* ABA COMMISSION ON NONLAWYER PRACTICE, *supra* note 27, at 18. This group appears not to actually assume the role of the advocate in proceedings with the government but provides support for parents acting as their own advocates.

[53] *Id.*

passed legislation that allows non-profit organizations to provide the necessary services.[54]

IV. Authorization to Practice in Fields Other Than Law

In general, most professions require practitioners to be licensed. In New York, admission to practice a specific profession and regulations for that profession are supervised by the New York State Board of Regents and administered by the New York State Education Department, with the assistance of a board from each profession.[55] These groups collectively establish and enforce rules that prescribe conduct and licensing requirements such as education, experience and character.[56] Anyone without a license who practices, offers to practice, or purports to be a professional is considered guilty of a Class E felony[57] and, similar to the legal profession, permitting, aiding or abetting an unlicensed person to practice is considered professional misconduct.[58]

The rationale for licensing requirements in other

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[54] In Maryland, a statute authorizes the Tenant Advocacy Project to train "tenant advocates" to appear in eviction proceedings. *Id.* at 19.

[55] N.Y. Education Law § 6504 (McKinney 1993).

[56] N.Y. Education Law § 6506 (McKinney 1993).

[57] N.Y. Education Law § 6512 (McKinney 1993).

[58] N.Y. Education Law § 6509 (McKinney 1993). These laws apply to over twenty professions, including medicine, dentistry, veterinary medicine, physical therapy, pharmacy, engineering, public accounting and architecture.

professions parallels that of the legal profession. Most proponents of licensing laws state that the primary purpose is "to protect the public health, morals, safety, and general welfare."[59] However, many observers argue that these laws have not accomplished their stated goals. "Little evidence suggests that the quality of professional services has improved as a result of licensing laws, disciplinary actions are woefully inadequate, and the prevention of illegal practice is generally spotty, often being aimed at eliminating competition, rather than incompetence."[60]

Other professions have faced issues similar to the unauthorized practice of law. Some have begun to restructure regulations in order to meet the changing demands on the profession and needs of society. For example, the medical profession has expanded the role of nurses. In addition, the accounting profession has recognized that certain types of services do not need the level of skill required of CPAs. To remedy this problem, they have structured their licensing regulations to allow for two types of public accountants. New York law now allows anyone to practice psychology but prohibits use of the title "psychologist" to those without sufficient

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[59] Daniel B. Hogan, *The Effectiveness of Licensing: History, Evidence, and Recommendations*, 7 LAW AND HUM. BEHAV. 117 (1983).

[60] *Id.* at 121. *Accord*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 475 (1988) (prominent scholars see licensing statutes as particularly vulnerable to serving special interests rather than public interest).

credentials.

A. Medicine

In the medical profession, nurses are analogous to paralegals. Their primary role is to assist doctors in providing health care. Similar to paralegals, the scope of their practice has expanded to include many services formerly provided only by doctors. However, they differ from paralegals because their profession is separately regulated by the states.

Every state has legislation that defines the practice of nursing and sets forth the licensing requirements. The development of these statutes can be divided into three distinct phases. Between 1903 and 1938, states started to adopt legislation requiring the registration of nurses. In 1938, New York was the first state to enact a mandatory licensing law which defined the practice of nursing and prohibited unlicensed persons engaging in acts that constituted nursing practice.[61] Other states soon passed similar legislation. Between 1939 and the early 1970's, the practice of nursing expanded so that many nurses were now performing services that were formerly only done by doctors. As there was no corresponding amendment of statutes to reflect these changes, many nurses were in danger of violating unauthorized practice rules. In 1971, states began to amend statutes to reflect the expanding scope of nursing practice. For example, states have expanded the complementary roles of nurses.

[61] Elizabeth Harrison Hadley, *Nurses and Prescriptive Authority: A Legal and Economic Analysis*, 15 AM. J. OF LAW & MED. 245, 249 (1989).

In New York, a 1988 statute expanded the role of nurses by authorizing them to diagnose and prescribe drugs if there is a "written agreement and practice protocols to ensure that nurse practitioners exercising prescriptive authority function as complements to a supervising physician."[62]

Analogous to the growth of independent paralegals, the medical profession has seen a similar growth in the practice of midwives. Just as the demand for paralegal services increased due to the high cost of lawyer's services and the lack of access by many to legal services, the demand for midwives has increased because their services are cheaper than doctors and because of their greater perceived commitment to patient control of the birthing process. In addition, there are few doctors willing to provide home birth. Like doctors, midwives are generally subject to malpractice claims and carry their own malpractice insurance. Many parents today are choosing to retain midwives in order to exercise more control over the birth process both in the hospital and at home.[63]

For many years, state legislatures and the medical profession chose to ignore or to try to abolish this phenomenon. Many states lacked any legislation governing mid-wives and some, including New York, prohibited the practice altogether.[64]

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[62] 1988 N.Y. Laws 257 (McKinney 1993).

[63] Charles Wolfson, *Midwives and Home Birth: Social, Medical, and Legal Perspectives*, 37 HASTINGS L.J. 909, 912 (1986).

[64] *Id.* at 930 (1986)(nine states prohibit midwifery).

Failure to directly address the popularity of midwife services appears only to have increased the risk of home births by forcing the practice underground.[65]

Today, most states address midwifery by authorizing and regulating the practice. New York amended its statute to allow licensed midwives. Under the Education Law,[66] midwives are allowed to preside over the "normal" pregnancies of "essentially healthy" women. There must be a written agreement with a physician or hospital, and the agreement must provide guidelines and procedures for pregnancies that are not "normal".

New York's guidelines are essentially the same as most other states that authorize the practice of Certified Nurse-Midwives (CNMs). The CNM's are "registered nurses who have completed an accredited program of midwifery education and have passed a national certification examination."[67] They are either employed by a physician or work independently and retain an affiliated physician to provide medical consultation, collaboration, or referral services.[68] The scope of midwife practice varies from state to state, but all states restrict their practice to normal pregnancies. Some states allow midwives to manage the complete health care of women, to manage the care of newborns, to perform

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[65] *Id.* at 949.

[66] N.Y. Educ. Law § 6951 (McKinney 1992).

[67] Barbara A. McCormick, *Childbearing and Nurse-midwives: A Woman's Right to Choose*, 58 NYU L. REV. 661, 666 (1983).

[68] *Id.*

gynecological evaluations or to provide family planning services.[69] These regulations are usually determined by the nursing and medical professions.

Although the medical profession has not completely resolved its problem of unauthorized practice, it appears to have taken substantially greater steps than has the legal profession. Medical regulation now allows for alternative health care providers which indirectly reduce the cost of health care by promoting competitive pricing. More importantly, midwife regulation appears to have ensured a minimum level of competence and safety for the public. Similarly, lawyers might also reduce the cost of some legal services by allowing paralegals and other nonlawyers to provide simple legal services.

B. Accountants

Accounting practice encompasses a range of difficulty and required expertise. Some services are very complicated and require a high level of education and experience. But, like uncontested divorces and simple wills in the legal profession, some accounting services are largely noncomplex and routine and do not require the full range of skills of a CPA. It thus seems wasteful to require a CPA to implement such transactions and charge a fee disproportionate to the complexity of the task. Some states have allowed for different types of accountants, CPAs and "Public Accountants," who may practice independently despite

[69] *Id.* at 667.

having less rigorous authorization procedures than CPAs.

In New York, CPAs need a bachelor's or a higher degree in accounting and at least two years' experience.[70] They also must pass a written examination[71] that is arguably more difficult than the bar examination. In contrast, Public Accountants who had been in practice more than six years prior to 1959 need only file an application and a declaration of intent to practice as a Public Accountant on the basis of evidence of prior experience as a Public Accountant or as an employee of a Public Accountant.[72] These "grandfathered" accountants need not fulfill the education or written examination requirements imposed on CPAs. Both can provide a range of services. The principal difference between the two is the use of the title "Certified Public Accountant."[73]

Outside New York, licensing and regulation of accountants appears mixed regarding this two tiered approach. Like New York, most states permit Public Accountants previously in practice to continue public practice without obtaining CPA certification. However, only about a dozen states appear to be using a differentiated system of licensing for new (as opposed to grandfathered) accountants. In addition, most of these

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[70] N.Y. Education Law § 7404 (1) (McKinney 1993).

[71] *Id.*

[72] N.Y. Education Law § 7405 (McKinney 1993).

[73] *See* Davis v. Sexton, 207 N.Y.S. 377, 378, 211 A.D. 233 (3d Dept. 1925) (persons can practice accounting without certification but cannot assume the title of "Certified Public Accountant"); People v. Marlowe, 203 N.Y.S. 474, 477 (N.Y. Spec. Ses. Ct. 1923).

differentiating states require public accountants to pass a portion (usually the Audit or ARE sections) of the Uniform CPA examination.[74]

Although the current patchwork of accounting regulations can be viewed at evidencing a move toward more restrictive licensing of accountants themselves, it should be remembered that non-CPAs nonetheless continue to perform a great volume of work under the supervision of licensed accountants, much like the manner in which paralegals perform tasks in the law firm setting.

The differential licensing approach might prove applicable to law as a means of regulating unauthorized practice but increasing accessibility to simple legal transactions by low and middle class persons. For example, paralegals could be licensed and designated for certain transactions while clear distinctions of title are maintained between attorneys and paralegals. Paralegal licensing regulations could require less education and no written examination for permission to provide simple legal transactions but maintain bar-like character requirements and oaths to abide by an ethical code. This method seems promising to increase the supply of legal services while also protecting the public from fraud and incompetence.

C. Mental Health Professionals

Psychologists have similar licensing regulations to the

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[74] AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ANNUAL REPORT, SURVEY OF STATE LICENSING REQUIREMENTS 110-114 (1993).

medical and accounting profession, including education and examination requirements.[75] The profession has responded to the problem of unauthorized practice by permitting wide-ranging practice but preserving stringent distinctions of title. A nonlicensed person can provide psychological counseling but commits unauthorized practice only by employing the title "psychologist" without a license.[76] In addition, the denomination of the mental health care professional will often bear on questions of indemnity under insurance policies or third-party reimbursement rights.

This approach may have some use in law provided that consumers respond rationally to title and licensing distinctions. If this method worked, it would enable people to choose freely between paying high prices for a lawyer or paying lower prices for a nonlawyer who they know does not have qualifications similar to a licensed lawyer. This solution would inform the public of the general competence of law practitioners and allow consumers to investigate further as to an individual's specific credentials and reputation. This approach would arguably bring the legal profession into conformity with other consumer choices regarding products and services. At the same time, however, this approach may open the door to fraudulent and incompetent conduct by unqualified providers who can not be effectively policed by

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[75] N.Y. Education Law § 7603 (McKinney 1993).

[76] *See* People v. Abrams, 177 A.D.2d 633, 576 N.Y.S.2d 338 (2d Dept. 1991).

consumer selection and market forces. Unlike the accounting regime, unofficial psychological counselors appear to be able to practice without even the modest showing of qualification required of Public Accountants.

V. The Current Debate Over Nonlawyer Practice

The current debate stems most directly from the 1986 Report by the ABA Commission on Professionalism. The Report highlighted negative public opinion toward lawyers and a lack of access to legal services for the middle class. The Commission suggested limited licensing of paralegals in order to improve the ability of low- and middle-income groups to obtain sufficient legal assistance. This suggestion was also made by the Committee on the Profession of the Association of the Bar of the City of New York. In their 1992 report, *Is Professionalism Declining?*, the Committee unanimously agreed that "the use of paralegals should be greatly increased in certain areas of legal practice and that, as part of this process, paralegals should be trained, tested, licensed and regulated."[77]

The factors the Commission considered in 1986 remain instructive. In 1986, the ABA Commission on Professionalism

[77] Committee on the Profession, *Is Professionalism Declining?*, 47 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 129, 169-171 (March 1992) (most Committee members thought paralegals should handle housing cases and some thought paralegals should also be allowed "to draft wills for small estates, to draft and negotiate simples leases, to handle house closings, to draft health-care proxies, to set up small corporations, to handle bankruptcies for small estates, and for various small types of litigation").

found evidence that middle-class persons have been under-represented and that the quality of services they received was inadequate.[78] In 1990, a New York State Bar Association study found that only 14 percent of legal assistance needed by the poor in New York State was being provided.[79] This meant that approximately 3 million civil legal problems in New York each year were not attended to by professionals. A 1992 study by the ABA's Consortium on Legal Services and the Public found that, while approximately half of low-income and middle-income households had new or ongoing legal problems, 71 percent of the poor and 61 percent of the middle-income group did not seek any legal help.[80]

In response to these figures, ABA President R. William Ide III said "[w]hen we look at these numbers, we must remember that they often represent a serious crisis for a family. [T]he inability to successfully resolve these problems...simply because Americans do not have access to appropriate help is a national tragedy."[81] These statistics explain the increased activity and the growing acceptance of nonlawyer practice. Consumers have turned to nonlawyers to attempt to receive services they were

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[78] ABA COMMISSION OF PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 8 (1986).

[79] *See* NEW YORK STATE BAR ASSOCIATION COMMITTEE ON LEGAL AID, THE NEW YORK LEGAL NEEDS STUDY (1993).

[80] Mark Hansen, *A Shunned Justice System*, A.B.A.J., April 1994, at 18.

[81] *Id.*

unable to obtain from lawyers due to real or perceived barriers of cost, information, or institutional factors.[82]

Various suggestions and theories have been proposed concerning the unauthorized practices of law. One position seeks to maintain the status quo, prohibiting nonlawyer practice "on the books" while taking a lax approach to enforcement. Another option suggests taking the rules seriously and using firmer measures to curtail or perhaps stamp out unauthorized activity. A third option seeks to eliminate all regulations and to allow the market regulation of the field. A final option is compromise incorporating some form of limited deregulation.

Although few advocate keeping the status quo, many members of the profession have indicated their opposition to the authorization of nonlawyers to practice law and their desire to see increased enforcement of the rules prohibiting unauthorized practice of law.[83] A Gallup poll taken for the *ABA Journal* revealed that 86 percent of lawyers thought more action should be taken against paralegals who violated unauthorized practice of law rules. Their primary argument against the authorization of nonlawyer practice stems from doubts about nonlawyer competence. Most warn that paralegals might not know as much as they believe

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[82] The cost barrier is perhaps the most significant factor. For example, at Divorce Do It Yourself Center in Kalamazoo, Michigan, a person can get a simple divorce for a fee ranging between $125 to $275. *See* Chanen, *supra* note 33, at 4. This amount equals a large firm lawyer's hourly rate. Although other lawyers providing simple divorce work charge less, it is doubtful that they can match the lower fees of nonlawyers.

[83] *See* Podgers, *supra* note 43, at 51.

or claim.[84]

Nevertheless, maintaining the status quo seems an unattractive "solution". Maintaining the status quo would continue to cause confusion for both practitioners and the public while leaving major segments of the American public underserved. Confusion might be heightened by the various bar associations' vacillating efforts in enforcement of rules against the unauthorized practice of law. Many laypersons who might have considered entering the market to provide legal services could be wary of prosecution. Furthermore, the status quo appears vulnerable to shady practices the rules seek to prevent while also leaving the judiciary helpless to monitor the unauthorized legal services actually being rendered. In addition, consumers who use nonlawyers would not be able to predict the value of their services.

Increasing efforts to abolish nonlawyer practice would be equally detrimental to the legal profession. Lawyers already suffer a painful image problem. In addition to the oft-heard complaints about attorney greed and aggressiveness, the bar remains vulnerable to the criticism that lawyers themselves are poorly policed.[85] Increased efforts to abolish nonlawyer practice would lead the public to see lawyers as protectionists

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[84] *Id.* at 54.

[85] *See* Wolfram, *supra* note 15, at 190 ("enforcement of competency standards has generally been limited to relatively exotic, blatant, or repeated cases of lawyer bungling"); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981).

trying to keep costs high by maintaining their monopoly. For the legal profession to maintain credibility, a more sensitive approach to nonlawyer practice seems wise.

Another option is formal deregulation of nonlawyer practice, with market forces regulating the industry/profession. This "free market" view is based on the notion that professional self-regulation has anticompetitive effects.[86] Those who accept this view see monopoly or barriers to entry to the market caused by regulation as reducing innovation and competitive pricing. Proponents of market regulation argue that it will result in the best quality at the lowest price. Under the market-based view, clients are viewed as sufficiently knowledgeable about the limitations of nonlawyers so that they are capable of making the choice between a highly qualified lawyer at a high price or a lower-priced nonlawyer with less training or expertise.[87]

Critics of this view argue that licensing regulations are needed because consumers of legal services would otherwise have no way of assessing the quality of the providers. Market proponents counter that the competitive process would adjust to this process by providing incentives to legal providers for publicizing the quality of their services. Proponents also argue that the competitive process should improve the quality and variety of the services. Although this theory sounds attractive, it often falls short in practice because the theory is based on a

[86] *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 140 (1962).

[87] *See* Wolfram, *supra* note 15, at 831.

perfectly competitive market which assumes perfect information, perfect competition and no transaction costs. The real world rarely contains all of these characteristics.

A fourth option, which has been accepted or considered in most states, is limited deregulation of the unauthorized practice of law.[88] This was the solution offered by the ABA Committee on Professionalism in 1986.[89] Although there are different variations of deregulation, this seems a useful response to the issue of nonlawyer practice. It addresses the issue of quality control while also responding to concerns about unmet legal needs.

Of course, this option requires a detailed set of regulations and parameters for full evaluation and implementation. This Report does not attempt to specifically craft a nonlawyer regulatory code. However, a rough outline can be sketched of the type of deregulation we envision. In particular, we find the deregulation option attractive so long as nonlawyers are subject to minimum education and licensing requirements, including some form of character assessment. At a minimum, this would suggest that prior criminal convictions would

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[88] Washington has passed a statute that allows nonlawyers to provide legal services for real estate closings. *See also* NONLAWYER PRACTICE, *supra* note 27, at Appendix A (describing various rules and legislative proposals allowing limited deregulation, including New York, which has two bills under review by committees that would authorize nonlawyer representation in particular matters).

[89] *See* NONLAWYER PRACTICE, *supra* note 27, at 52 (suggesting limited licensing of paralegals as solution to lack of access by middle-class).

bar a person from becoming a practicing paralegal absent proof of rehabilitation or de minimus nature of the offense, as is the case with attorneys. Conviction for fraud or similar misconduct would be expected to completely preclude entry into the paralegal profession. In addition, practicing paralegals should probably hold a college degree and pass at least a basic qualifying examination.

Furthermore, nonlawyer practitioners should generally be restricted to particularized types of legal work that tends to be simpler, more standardizable, and less risky than the traditional legal services provided by members of the bar. For some or all of the tasks practiced by nonlawyers, the state may need to make it a condition of practice that the nonlawyer be affiliated with an attorney in order to increase the prospects for consultation and referral of complex or risky matters to a lawyer. Finally, the state should consider requiring mandatory errors and omissions insurance coverage for nonlawyers or establishing a security fund so that clients injured by nonlawyer malpractice can obtain adequate recompense.

Examples of appropriate types of paralegal practice can readily be drawn from the seemingly unproblematic paralegal activities currently arising in the de facto deregulation of the marketplace. This includes, when working under the supervision of an attorney, legal and administrative tasks such as client and witness interviews, reviewing documents, summarizing documents and deposition testimony, drafting pleadings and motions, some

forms of factual and legal research, and conduct of certain transactions such as residential real estate closings.[90] In addition, paralegals could assist clients in completing certain types of documents such as pro se papers for Housing Court and could represent clients before certain administrative or judicial tribunals such as arbitration panels, family court, and hearings at the State Department of Social Services, the New York City Housing Authority, or the United States Immigration and Naturalization Service or the Social Security Administration.

Conclusion

Although the legal profession continues to lack a consensus regarding nonlawyer practice, it must soon address the problem seriously and without self-interest. Failure to move forward on this issues risks further public doubt as to the responsiveness and integrity of the bar. Although particular details must yet be addressed, we give preliminary endorsement to a deregulated licensing approach that permits greater nonlawyer practice in specified areas but establishes minimal requirements in order to protect the public while simultaneously increasing the availability of low-cost, accessible legal services to all.

January 4, 1995.

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[90] *Id.*

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* Member, Subcommittee on Nonlawyer Practice. The Subcommittee gratefully acknowledges the assistance of Catherine Chang, Fordham Law School Class of 1995.