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Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters

Cover Page Footnote

Skadden Public Interest Fellow and Staff Attorney, The Legal Aid Society, Brooklyn Office for the Aging. B.A. Columbia University; J.D., Fordham University. The author is designing and implementing a legal hotline for the low-income elderly using both lawyer and nonlawyer staff. The author would like to thank the following individuals: Professor Bruce Green, for inviting me to participate in the Conference, Professor Ann Moynihan, for her leadership in our Working Group on the Use of Nonlawyers, the members of the Working Group, particularly Zona Hostoetler, for their comments and suggestions concerning the contours and contents of this Article, and Anne Marie Bowler, my research assistant, J.D. Candidate, Brooklyn Law School, for helping me to prepare this Article for publication. Also, I owe a special thanks to Professor Russel G. Pearce for any lively discussion of the use of nonlawyers.

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RESPONSES

NONLAWYERS AND THE UNAUTHORIZED PRACTICE OF LAW: AN OVERVIEW OF THE LEGAL AND ETHICAL PARAMETERS

*Derek A. Denckla**

INTRODUCTION

IN every state, nonlawyers are generally prohibited from practicing law, deemed the "unauthorized practice of law" ("UPL"). The definition of what constitutes "the practice of law" or "the unauthorized practice of law" is by no means uniform, even within the same jurisdiction. Whatever the definition of UPL, however, the states almost universally limit the practice of law to those who have been licensed by the government and admitted to the state's bar association after meeting certain requirements of education, examination, and moral character. In addition, the members of the bar are subject to professional discipline, which is a form of peer review by other members of the bar, the outcome of which is usually enforced by the state courts. Particularly in this century, the nexus between required bar admission and the states' proscription of UPL has created a "lawyer monopoly" over a great deal of activity outside of the courts, which are the traditional domain of lawyering.

As a result, UPL restrictions often prohibit nonlawyers from either giving out-of-court legal advice or helping prepare legal documents, except where no accompanying advice is given. This type of prohibition overwhelmingly affects people of limited means, who are unable to retain a lawyer based on an inability to pay fees or, in the case of a pro bono lawyer, based on limited availability of free legal help. This Article is intended to give a brief overview of the basic legal and ethical issues involved in the use of nonlawyers to inform further discussion of possible reforms.

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I. OVERVIEW OF LEGAL AND ETHICAL ISSUES INVOLVED IN THE USE OF NONLAWYERS

A. *The Regulation of the Legal Profession*

For the last few centuries in America, with some exceptions, the courts have joined forces with bar associations to regulate lawyers, a system sometimes referred to as "self-regulation," by: (1) dictating the processes for admitting lawyers to practice; and (2) disciplining unprofessional behavior through sanction, suspension, or disbarment.[1]

Invoking "inherent powers," the highest state courts have claimed the jurisdiction—sometimes exclusive—to regulate every aspect of the practice of law, through such activities as specifying conditions for admission, disciplining or disbarring those lawyers who fail to exercise good conduct, and promulgating lawyers' codes of conduct.[2] Although courts ultimately enforce the regulation of the practice of law, bar associations have largely set the agenda for its regulation. The major push to organize bar associations began in the 1870s with the formation of the Association of the Bar of the City of New York (1870) and the American Bar Association (1878). The express goal of these bar groups was to set educational requirements for bar membership. From 1870 to 1920, however, bar associations were instrumental in lobbying for passage of legislation which prohibited nonlawyers from making court appearances.

Beginning in the 1920s, bar associations attempted to gain greater control over the practice of law by spearheading efforts to "integrate" the bar through court rules (pursuant to inherent powers) or statutes that required every lawyer to belong to the state bar.[3] Mandatory bar membership made the bar's lawyer discipline and control more effective. Today, a majority of the states have integrated bar associations.[4]

1. Stanley S. Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. Miami L. Rev. 803, 825 (1976). Lawyers are also controlled by such judicial sanctions as those arising from malpractice lawsuits, contempt motions, fee awards, and procedural rules prohibiting frivolous practice.

2. *See, e.g., Ex parte* Burr, 22 U.S. (9 Wheat) 529 (1824) (regulating attorneys' license to practice); *see generally* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 Minn. L. Rev. 783, 784-85 (1976) (noting that the constitutional creation of a "court" has created incidental powers necessary to the functioning of those courts).

3. *See, e.g., In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265 (Neb. 1937) (stating that the Supreme Court of Nebraska has the right to integrate the bar pursuant to its inherent powers).

4. *See generally* Unauthorized Practice Handbook: A Compilation of Statutes, Cases, and Commentary on the Unauthorized Practice of Law 64-71 (Justine Fischer & Dorothy H. Lachmann, eds. 1972) [hereinafter Unauthorized Practice Handbook] (listing UPL statutes concerning associations by state); Standing Comm. on Lawyers' Responsibility for Client Protection, American Bar Ass'n, 1994 Survey and Related Materials on the Unauthorized Practice of Law/Nonlawyer Practice (1996) [hereinafter 1994 Survey on UPL] (surveying each jurisdiction's definition of the practice of law and overviewing each jurisdiction's activity regarding UPL); *see also* Eileen Malo-

Furthermore, the Supreme Court has ruled that mandatory bar membership for lawyers does not violate lawyers' constitutional rights.[5]

B. *History of the Regulation of UPL*

In the colonial period, courts adopted UPL rules to control those who appeared before them.[6] The courts have used their "inherent powers" to define UPL and craft remedies for UPL activity.[7] Outside the courtroom, however, nonlawyers were free to engage in a wide range of activities which would be considered UPL today, such as giving legal advice and preparing legal documents.[8] Subsequently, the first hundred years of the American republic marked a liberalization of UPL rules, whereby many legislatures passed measures permitting nonlawyers to appear before the courts.[9] As discussed in greater detail below, this era of nonlawyer practice ended shortly after the Civil War with the rise of bar associations and the corresponding growth of lawyer professionalism. Nonetheless, even the first ABA Canons of Ethics adopted in 1908 said nothing about UPL.

Professional bar associations began seeking integration, they also began to organize against UPL. In 1914, the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition

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ney, *Bar Association Dues*, Nat'l L.J., July 14, 1980, at 25, 26 (listing the 33 states and the District of Columbia that have integrated bars).

5. *See, e.g.*, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) (stating that whether "the States have broad power to regulate the practice of law is, of course, beyond question."); Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (noting that the Supreme Court of Wisconsin had the constitutional right to require the costs of improving the legal profession be borne by lawyers).

6. Certain colonies sought to prevent the establishment of a professional lawyer monopoly by permitting nonlawyers to appear before the courts and prohibiting the charging of fees for these services. *See* Henry S. Drinker, Legal Ethics 19 (1953). In the nineteenth century, certain states continued to permit nonlawyers to represent parties in litigation, sometimes by statute. *See id.* Among these states permitting nonlawyers to advocate in their courts were Indiana, Michigan, New Hampshire, Maine, Wisconsin, and Massachusetts. *See id.*; *see also* Erwin N. Griswold, Law and Lawyers in the United States: The Common Law Under Stress 15-16 (1964) (describing a Massachusetts act that allowed nonlawyers to appear before the court on behalf of others until 1930 when authorized by a power of attorney).

7. *See* State v. Cline, 555 P.2d 724, 731 (Mont. 1976) (citing other high court authority in support of courts' inherent powers to define UPL); *see also* Comment, *Control of the Unauthorized Practice of Law: Scope of the Inherent Judicial Power*, 28 U. Chi. L. Rev. 162, 162-63 (1960) (arguing that the reach of some state courts' inherent judicial powers had exceeded their constitutional limits).

8. *See* James W. Hurst, The Growth of American Law: The Law Makers 319 (1950). In contrast to the United States, European countries today still permit nonlawyers to perform such tasks outside the courtroom. *See* Michael Zander, Legal Services for the Community 329 (1978).

9. *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, Am. B. Found. Res. J. 159, 169-75 (1980).

from title and trust companies.[10] By 1930, the American Bar Association ("ABA") had formed its own committee on unauthorized practice and began publishing *Unauthorized Practice News* a few years later.[11] The Canons of Professional Ethics were amended in 1937 to include a strong attack on UPL.[12] Bar associations initiated lawsuits seeking injunctions against individuals and entities purported to be performing UPL.[13] State courts invoked their inherent powers to regulate the practice of law based on "common-law doctrines of exclusive lawyer competence," even upon matters not directly before a particular tribunal.[14]

After many court victories for the organized bar in the 1930s and pursuant to a resolution of the ABA House of delegates in 1940, ABA committees began to negotiate "statements of principles" with other professionals and businesses seeking to limit competition with lawyers by proscribing certain conduct as UPL.[15] Subsequently, these "statements of principles" were seriously undermined by the Supreme Court's decision in *Goldfarb v. Virginia State Bar*,[16] which applied antitrust laws to a bar association for setting minimum prices upon certain legal tasks. In the wake of *Goldfarb*, the United States Justice Department filed suit against another bar association for antitrust violations arising from the enforcement of one of these "Statements of Principles." Shortly thereafter, the ABA's board of governors advised that all "Statements of Principles" should be rescinded,[17] and seven

10. *See* Hurst, *supra* note 8, at 323.

11. *See* ABA, *Report of the 53rd Annual Meeting*, 55 A.B.A. Rep. 94 (1930).

12. *See* ABA Canons of Prof. Ethics Canon 47 (1937) ("No lawyer shall paermit his professional services, or his name, to be used in aid of, or to make possible, the [UPL] by any lay agency, personal or corporate.").

13. *See* Christensen, *supra* note 9, at 181-85.

14. Charles W. Wolfram, Modern Legal Ethics 825 (practicioner's ed. 1986); *see also* Commission on Nonlawyer Practice, American Bar Ass'n, Nonlawyer Activity in Law-Related Situations 17 n.46 (1995) [hereinafter Nonlawyer Activity in Law-Related Situations] (noting that "[a]n early exception to [UPL] were nonprofit corporations such as the New York Legal Aid Society . . . so long as fees were not charged and lawyers were free to exercise their independent judgment on behalf of clients"). In general, courts find not-for-profit corporations exempt from UPL prohibitions. *See, e.g.*, *In re* Education Law Ctr., Inc., 429 A.2d 1051, 1058 (N.J. 1981) (finding that such entities may employ non-lawyers to formulate broad policies). The interplay between UPL rules and rules prohibiting nonlawyer partners or control are discussed in the paper presented at this conference by Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 Fordham L. Rev. 2397 (1999).

15. *See* Christensen, *supra* note 9, at 195-96. For instance, from 1941 to 1969, the ABA successfully entered into "statements of principles" with the following entities: accountants, architects, banks with trust departments, claims adjusters, collection agencies, liability insurance companies, life insurance companies, professional engineers, law book publishers, real estate title companies, realtors, and social workers. *See* Wolfram, *supra* note 14, at 826.

16. 421 U.S. 773 (1975)

17. *See* James Podgers, *Statements of Principles: Are They on the Way Out*, 66 A.B.A. J. 129 (1980).

states and the ABA disbanded their Unauthorized Practice committees.[18]

In general, UPL prosecutions have declined over the last thirty years for a variety of reasons.[19] A 1992 ABA survey found, however, that twenty-two state bars still retain "active" UPL committees, and eleven of these UPL committees began activity *after* 1981.[20] Recently, there has been a somewhat justified perception that nonlawyer practice is a "rising tide,"[21] and, as a result, there has been a limited "revival of UPL enforcement efforts by bar associations."[22]

Therefore, while *Goldfarb* and other concurrent factors may have ushered in a slightly more level playing field in the delivery of legal services, we are still left to grapple with the vast bulk of statutes, legal precedents and ethical rules that arose from the ABA's half-century campaign against UPL. These anti-UPL sources of law and regulation—arising from a desire to eliminate competition rather than protect the public interest—greatly enlarged the areas of practice that now must be performed exclusively by lawyers. These expanded areas of practice have created an expectation among lawyers—no matter how unjustified—and a tradition in practice as to the tasks that only lawyers should perform.

C. *Regulating Unauthorized Practice Today*

In most states, high courts have claimed that the courts have the authority to define and regulate UPL and the practice of law. In addition, almost all states' legislatures have effected statutes that prohibit UPL, sometimes making UPL a criminal misdemeanor.[23] In addition,

18. *See* Manual, Laws. Man. on Prof. Conduct (ABA/BNA) 21:8005 (1984); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 14-15 (1981).

19. Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 24. The ABA attributes the decline in UPL enforcement to several factors, which are as follows: (1) widespread use of work-reducing technology, such as the typewriter and computer, which allowed lawyers to hire nonlawyers for ministerial tasks formerly performed by lawyers or clerks "reading the law"; (2) relaxing UPL rules in the 1960s to permit the use of paralegal or legal assistants to perform what was formerly considered "lawyer's work"; (3) explosive growth in the number of administrative proceedings before state and federal agencies in which nonlawyers were permitted to represent others; (4) high cost to the bar of prosecuting numerous UPL cases; (5) states' attorneys general and prosecutors giving low priority to UPL cases; (6) state courts' reluctance to find UPL except in the case of actual harm to the clients or public; (7) U.S. Supreme Court case law carving out constitutionally-protected exceptions to UPL prohibitions; and (8) negative public reaction to UPL restrictions. *See id.* at 23-32.

20. *See* American Bar Ass'n, State Legislative Clearinghouse Briefing Book: Unauthorized Practice of Law tab D (1992).

21. *See* Sherri Kimmel, *Stemming the Tide of Unauthorized Practice*, 13 Me. B.J. 164, 164 (1998); James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, Ariz. Att'y, Mar. 1994, at 24.

22. Podgers, *supra* note 21, at 56.

23. Some states' courts have struck down legislative attempts to modify UPL rules as unconstitutional usurpations of judicial power. *See, e.g.*, Merco Constr. Eng'rs, Inc.

the organized bar has prohibited its members from aiding UPL through its disciplinary actions to enforce ethical rules.

1. Defining UPL[24]

a. *Professional Responsibility*

The ethical rules that regulate a lawyer's professional responsibility provide only a loose framework for understanding UPL. Neither the 1969 ABA Model Code of Professional Responsibility ("Model Code"), nor the 1983 ABA Model Rules of Professional Conduct ("Model Rules") define UPL. However, Model Rule ("MR") 5.5(b) prohibits lawyers from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes [UPL]."[25] Similarly, the Model Code's Disciplinary Rule ("DR") 3-101(A) proscribes against "aid[ing] a non-lawyer in [UPL]"[26] while Canon 3 affirmatively states that "A Lawyer Should Assist in Preventing [UPL]."[27]

The Comment to MR 5.5(b) explains: "The definition of the practice of law is established by law and varies from one jurisdiction to another."[28] In addition, the Model Code's Ethical Consideration ("EC") 3-5, meant to explicate Canon 3 and DR 3-101(A), instructs that "[i]t is neither necessary nor desirable to attempt the formulation of... what constitutes the practice of law."[29] In support of this proposition, EC 3-5 states: "What constitutes [UPL] in a particular jurisdiction is a matter for determination by the courts of that jurisdiction."[30]

Nonetheless, EC 3-5 does take a stab at a "functional" definition:

> [T]he practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to

v. Municipal Court, 581 P.2d 636, 638 (Cal. 1978) (holding that "legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules . . . adopted . . . by the judiciary"). Other states' courts have endorsed statutes regulating UPL out of comity for a coordinate branch of government. *See, e.g.*, State *ex rel.* Frieson v. Isner, 285 S.E.2d 641, 654 (W. Va. 1981) (considering the intrusion upon the judiciary "minimal" and "inoffensive").

24. *See generally* Center for Prof'l Responsibility, American Bar Ass'n, Definitions of Practice of Law: 1984 Survey on Unauthorized Practice of Law Regulation (1985) (conducting a survey of numerous jurisdictions as to the definition of the practice of law); 1994 Survey on UPL, *supra* note 4 (summarizing the way in which different jurisdictions define the practice of law); Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 Nova L. Rev. 363 (1980) (discussing what constitutes UPL).

25. Model Rules of Professional Conduct Rule 5.5(b) (1998).

26. Model Code of Professional Responsibility DR 3-101(A) (1981).

27. *Id.* Canon 3.

28. Model Rules of Professional Conduct Rule 5.5(b); *id.* cmt. 5.3.

29. Model Code of Professional Responsibility EC 3-5.

30. *Id.* EC 3-5 n.2.

relate the general body and philosophy of law to a specific legal problem of a client.[31]

EC 3-5 carves out some exceptions to the "professional judgment of a lawyer" rule for "occupations that require a special knowledge of law in certain areas," such as police officers, court clerks and many governmental employees.[32]

Under the same aegis as UPL, the Model Code and the Model Rules both seek to protect the independence of the "professional judgment of a lawyer" in the following general ways: prohibiting lawyers from forming partnerships with a nonlawyer to practice law;[33] and proscribing the sharing fees with a nonlawyer, except where the nonlawyer distributees of a lawyer's estate are to receive a portion of a fee in the event of his or her death or where nonlawyer employees participate in a retirement plan based on profit-sharing.[34] In addition, both the Model Code and the Model Rules recognize certain exceptions to UPL restrictions. For instance, a lawyer may hire nonlawyer assistants "so long as the lawyer supervises the delegated work and retains responsibility for their work."[35] Furthermore, the Comment to MR 5.5 states that the UPL rule "does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law . . . [and] nonlawyers who wish to proceed pro se."[36]

b. *Statutes*

All states have statutes that restrict the practice of law to licensed attorneys.[37] Because these statutes are often vaguely worded, however, they fail to define UPL succinctly. One common type of UPL statute is the so-called "integration act," which limits the practice of law to members of an integrated bar association.[38] In addition, two-thirds of the states have made UPL a criminal misdemeanor.[39]

31. *Id.* EC 3-5.
32. *Id.* EC 3-5.
33. *See* Model Code of Professional Responsibility DR 3-103; Model Rules of Professional Conduct Rule 5.4(b).
34. Model Code of Professional Responsibility DR 3-102; Model Rules of Professional Conduct 5.4(a).
35. Model Rules of Professional Conduct Rules 5.3 & cmt., 5.5; *see also* Model Code of Professional Responsibility DR 4-101(D), DR 7-107(J) (requiring lawyers to use reasonable care in preventing their employees from revealing confidences of a client or making statements prohibited under DR 7-107).
36. Model Rules of Professional Conduct Rule 5.5 & cmt.
37. *See generally* 1994 Survey on UPL, *supra* note 4, at 55-248 (analyzing statutory provisions in all fifty states).
38. "Integrated" in this context means exclusive or complete, as in an "integrated contract."
39. [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 21:8008 (1984) ("Given the scarcity of conclusive definitions of the practice of law, such [misdemeanor] prosecutions could be challenged on grounds of [constitutionally invalid] vagueness.").

UPL statutes usually proscribe three broad categories of activity: (1) representing another in a judicial or administrative proceeding; (2) preparing legal instruments or documents which affect the legal rights of another; and (3) advising another of their legal rights and responsibilities.[40] Some statutes name specific individuals and organizations which are not permitted to practice law, such as title insurance companies and corporations.[41] Exceptions to UPL statutes always include self-representation and sometimes include lay representation before certain local courts or state administrative agencies.[42]

c. *Case Law*

Court decisions on UPL, like UPL statutes, do not announce a single clear definition of the practice of law but have proceeded on a case-by-case basis,[43] which makes for wide variation between different states.[44] The case law, however, has arrived at certain methods for defining the practice of law and, by extension, what constitutes UPL, which may be summarized as follows:

(1) Professional Judgement of a Lawyer—activity requiring legal skills or special knowledge beyond that of the average nonlawyer;[45]

(2) Traditional Areas of Law Practice—activity traditionally performed by lawyers;[46]

(3) Personal Relationship—activity characterized by the special personal relationship between lawyer and client;[47]

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40. [Manual] Laws. Man on Prof. Conduct (ABA/BNA) 21:8004 (1984).

41. For sources containing discussion of UPL statutes, see *supra* note 4 and accompanying text.

42. *See supra* note 4 and accompanying text (discussing UPL statutes).

43. *See, e.g.*, *In re* Unauthorized Practice Rules Proposed by the South Carolina Bar, 422 S.E.2d 123, 124 (S.C. 1992) ("[I]t is neither practicable nor wise to attempt a comprehensive definition [of the practice of law] by way of a set of rules . . . [but] the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.").

44. *See* [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 21:8004-05 (1984).

45. *See, e.g.*, Baron v. City of Los Angeles, 469 P.2d 353, 358 (Cal. 1970) (upholding regulations prohibiting laymen from engaging in UPL); Agran v. Shapiro, 273 P.2d 619, 626-28 (Cal. App. Dep't Super. Ct. 1954) (holding accountant engaged in UPL when discussing client's tax liability with taxing authorities). *But see* Zelkin v. Caruso Discount Corp., 9 Cal. Rptr. 220, 224 (Dist. Ct. App. 1960) (holding that an accountant did not engage in UPL when discussing settlement of his client's tax liability because he did not read or cite any case law to taxing authority).

46. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 15 (Ariz. 1961) (prohibiting realtors from giving legal advice concerning real estate transactions).

47. *See* New York County Lawyers Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967).

(4) Incidental Legal Services—activity frequently performed by nonlawyers as an incident to another business transaction,[48] as long as "difficult or doubtful legal questions are [not] involved";[49]

(5) Actual Harm—activity performed by nonlawyers that results in actual harm to the client or public;[50]

(6) Standard of Care—activity performed by nonlawyers held to the same standard of care as lawyers;[51] and

(7) Balance of Interests—activity is weighed as to the interests of consumers in reduced costs and increased convenience and the interests of other licensed vocations to use their expertise.[52]

Furthermore, the statutes and case law have jointly identified certain areas of activity that are most likely to be characterized as UPL:

(1) Court Appearances—Almost every American court has prohibited nonlawyers from appearing before them,[53] except in certain lower courts where nonlawyers may represent another person by court rule or statute;[54]

(2) Administrative Agencies—Federal administrative agencies may permit nonlawyers to appear before them based on their internal rules, but nonlawyer practice among state agencies varies by jurisdiction, according to statutory authorization and sometimes the permission of the state's high court;[55]

48. *See, e.g.*, *In re* Bercu, 78 N.Y.S.2d 209, 221 (App. Div. 1948) (holding that a qualified lawyer must be sought by a taxpayer when a tax question is so difficult that it goes beyond the duties of a regular accountant), *aff'd mem.*, 87 N.E.2d 451 (N.Y. 1949); Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 633 (Wash. 1985) (endorsing the right of the public to benefit from incidental legal services performed by nonlawyers).

49. State Bar v. Guardian Abstract & Title Co., Inc., 575 P.2d 943, 948 (N.M. 1978).

50. *See id.* at 949 (holding that nonlawyers who filled in forms drafted by a lawyer were not engaged in UPL because there was no "great loss, detriment or inconvenience to the public").

51. *See, e.g.*, *Cultum*, 694 P.2d at 633 (allowing nonlawyers to prepare legal forms as long as they "compl[ied] with the standard of care demanded of an attorney"); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (holding non-lawyers liable even to those not in privity for negligent UPL).

52. *See, e.g.*, *Cultum*, 694 P.2d at 633-34 (examining the benefits of allowing nonlawyers to perform certain legal tasks).

53. *See* Weber v. Garza, 570 F.2d 511, 513-14 (5th Cir. 1978); *see also* Stokes v. Village of Wurtsboro, 474 N.Y.S.2d 660, 661 (Sup. Ct. 1984) (holding that the power of attorney does not a give nonlawyer power to represent another in lawsuit).

54. *See, e.g.*, Md. Code Ann., State Gov't § 9-1607.1 (1995) (stating that nonlawyer advocates are permitted in administrative hearings); Oregon State Bar v. Wright, 573 P.2d 283, 288-89 (Or. 1977) (holding that an Oregon statute permits a nonlawyer to represent another in justice or peace courts).

55. *See infra* note 66 and accompanying text.

(3) Legal Advice—Courts sometimes deem nonlawyers who give advice as to the legal consequences of a matter to be engaged in UPL;[56]

(4) Corporations—Most states have statutes or case law aimed at preventing corporations from practicing law,[57] which are supported by the Codes and Rules of Professional Responsibility;[58]

(5) Real Estate Transfers—While some states hold that a nonlawyer may not prepare or fill out any documents for a real estate transfer,[59] the majority of jurisdictions permit this practice, but only where no charge for the service is made;[60]

(6) Insurance Adjusters—In general, courts have not permitted adjusters to represent clients in filing claims against insurers, even where authorized by statute;[61] and

(7) Collection Agencies—Most state courts have permitted collectors to contact debtors and negotiate payment, but additional steps beyond that are often considered UPL.[62]

State courts have assumed varying amounts of control over the regulation of the practice of law. For instance, some state courts have announced their exclusive jurisdiction over regulating the practice of law as an extension of the separation of powers doctrine inherent in

56. *See, e.g.*, Florida Bar v. Larkin, 298 So. 2d 371, 373 (Fla. 1974) (barring a retired lawyer from giving advice on wills for a fee); People v. Life Science Church, 450 N.Y.S.2d 664, 673-74 (N.Y. Sup. Ct. 1982) (finding that a church engaged in the unauthorized practice of law by giving tax advice to prospective ministers), *appeal dismissed*, 461 N.Y.S.2d 803, 804 (App. Div. 1983). The prohibition on advice has been extended by some states to preclude giving personalized instructions on how to use do-it-yourself legal kits. *See, e.g.*, Grievance Comm. of Bar v. Dacey, 222 A.2d 339, 347 (Conn. 1966) (deeming defendant's informational booklet to be outside the permissible "general information" category), *appeal dismissed*, 386 U.S. 683 (1967).

57. *See* Christensen, *supra* note 9, at 181-85.

58. *See* Model Rules of Professional Conduct Rule 5.4(d) (1998); *see also* Model Code of Professional Responsibility DR 3-103 (1981) (forbidding lawyers from forming partnerships with non-lawyers where any partnership activities consist of the practice of law).

59. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 14-15 (Ariz. 1961) (listing instances where a non-lawyer would be considered to be engaging in the unauthoized practice of law).

60. *See, e.g.*, Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771, 774 (Ill. 1966) (distinguishing between ordinary broker work which may seem "legal" but is nevertheless permissible, and more particularized work in which it is impermissible for anyone other than a lawyer to engage).

61. *See, e.g.*, Gross v. Reliance Ins. Co., 462 N.Y.S.2d 776, 778 (Sup. Ct. 1983) (holding that an insurance adjuster is not generally authorized to act on behalf of an insured in claims for losses).

62. *See* State *ex rel.* Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812, 814 (Ala. 1976) (ruling that a collection agency's threat to file suit is UPL); State *ex rel.* Freebourn v. Merchants' Credit Serv., 66 P.2d 337, 341-43 (Mont. 1937) (holding that a collection agency which hired lawyers as employees to take legal action had committed UPL); State *ex rel.* State Bar v. Bonded Collections, Inc., 154 N.W.2d 250, 257-58 (Wis. 1967) (finding that a collection agency which had hired a lawyer and directed the lawyer to sue was engaged in UPL).

the state's tricameral system of government. The effect of this exclusive domain and control over the practice of law has meant that some state courts have invalidated legislative[63] or executive[64] action that permitted a relaxation of prohibitions on UPL.

Courts in other jurisdictions have ruled that their inherent powers to regulate the practice of law are concurrent with the power of the co-equal branches of government to regulate the practice of law.[65] In addition, each state court's inherent powers are subject to the federal preemption. Thus, where a federal administrative agency permits a nonlawyer to appear before its hearing officers, the states are without power to prohibit this practice as UPL.[66]

Based on the case law, certain exceptions to UPL restrictions have taken shape which are widely recognized by the states and may be summarized as follows:

(1) Self-Representation is a constitutional right;[67]

(2) Publishers have a First Amendment right to create and sell do-it-yourself legal kits, so long as there is no personal contact between the seller and customers involving how to use the kits;[68]

(3) Document Preparers, or scriveners, are permitted to help others with filling out forms, so long as no advice is given;[69]

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63. *See* Bennion v. Kassler Escrow, Inc., 635 P.2d 730, 735-36 (Wash. 1981) (invalidating a statute that authorized nonlawyers involved in transfers of real property to draft and complete documents incident to the transaction because the legislature encroached on the court's inherent authority to regulate the practice of law).

64. *See* West Virginia State Bar v. Earley, 109 S.E.2d 420, 432 (W. Va. 1959) (striking down a state administrative agency rule permitting nonlawyers to appear before the state worker's compensation board).

65. *See, e.g.*, Florida Bar v. Moses, 380 So. 2d 412, 418 (Fla. 1980) (upholding a Florida statute that permitted nonlawyers to represent others before the state worker's compensation board).

66. *See* Sperry v. Florida *ex rel.* Florida Bar, 373 U.S. 379, 388 (1963).

67. *See* Faretta v. California, 422 U.S. 806, 807 (1975); Model Code of Professional Responsibility EC 3-7 (1981).

68. *See In re* Thompson, 574 S.W.2d 365, 369 (Mo. 1978); New York County Lawyers' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967); Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (Or. 1975). *See generally* Patricia J. Lankin, Annotation, *Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law*, 71 A.L.R.3d 1000, 1006-07 (1976) (discussing the "[v]iew that sale of 'kits,' absent a personal attorney-client relationship, does not constitute the unauthorized practice of law"). These materials have become more and more accessible, especially with the advent of the personal computer. An innovator in this area is NOLO Press, but now even Microsoft Word (as well as other popular word processing programs) comes equipped with "templates" for legal forms.

69. *See, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) (holding that it was proper for the defendant to advertise and engage in secretarial services provided that no legal advice was given); State Bar v. Cramer, 249 N.W.2d 1, 8-9 (Mich. 1976) (deciding that a document preparer may only copy information provided by another).

(4) Law student practice is permitted with certain qualifications;[70]

(5) Nonlawyer representation is permitted in certain administrative proceedings;[71]

(6) Nonlawyer participation is protected in the exercise of federal and constitutional rights.[72]

For at least the last one hundred years, courts and legislatures have been attempting to define the practice of law and its inverse, UPL. However, lawyers and nonlawyers alike attempting to forge new ground are forced to rely on a vague assortment of defined areas that do not cohere in a uniform whole.

D. *Enforcement of UPL Laws*

Bar associations and prosecutors may seek the following remedies against nonlawyers found in violation of UPL laws: (1) injunction; (2) criminal prosecution; (3) criminal contempt; and (4) *quo warranto* writs. Injunctions are the most common method employed to curtail UPL. Formally, these injunctive actions should be brought by the state's attorney general in order to protect the public interest.[73] Most states, however, have granted the integrated bar standing to enjoin UPL.[74] Criminal prosecutions against UPL are rare.[75]

Contempt may be sought in two forms: direct and indirect.[76] A litigant may move for direct contempt against a nonlawyer appearing in a court proceeding for a client or an interested party may initiate an action for indirect contempt for UPL occurring outside the court-

70. *See, e.g.*, People v. Perez, 594 P.2d 1, 6-7 (Cal. 1979) (denying the defendant's claim that he had inadequate legal representation notwithstanding the fact that one member representing him was not yet a member of the bar). States differ with respect the rules adopted by the bar and the courts for law student practice. *See* Fannie J. Klein et al., Bar Admission Rules and Student Practice Rules 913-1225 (1978).

71. *See Sperry*, 373 U.S. at 399-400 (noting that the Administrative Procedure Act, 5 U.S.C. 35555(b) (1994), authorizes each agency to permit nonlawyer participation in its proceedings); Florida Bar v. Moses, 380 So. 2d 412, 416-18 (Fla. 1980).

72. *See* Johnson v. Avery, 393 U.S. 483, 488-89 (1969) (holding that without a reasonable alternative it was not UPL when nonlawyer inmate helped another in preparing post-conviction litigation); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding that nonlawyer solicitation for litigation is protected by the First Amendment freedom of association in keeping with one's political beliefs). For a more thorough discussion of this aspect of UPL, see Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241 (1999).

73. In 1960, the National Conference of Commissioners of Uniform State laws promulgated a Model Act Providing Remedies for the Unauthorized Practice of Law, permitting only injunctive relief for UPL sought by the attorney general who could delegate his authority to the bar.

74. *See* Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 Colum. L. Rev. 501, 506-08 (1962) [hereinafter *Remedies Available to Combat UPL*]. Attorney class actions have also been permitted. *See id.* at 508-12. Only South Carolina denies the bar the right to bring such injunctive suits against UPL activity. *See* Rhode, *supra* note 18, at 12.

75. *See* [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 21:8008 (1984).

76. *See Remedies Available to Combat UPL*, *supra* note 74, at 512-15.

room. In addition, contempt may be imposed against a nonlawyer who fails to comply with an injunction forbidding the UPL activity. Contempt may result in fines or sometimes imprisonment or both.[77]

Finally, the least common UPL enforcement is undertaken through writs *quo warranto*. Writs *quo warranto* are usually brought by a state's attorney general (or others where the attorney general refuses to act) to restrain a corporation from engaging in conduct beyond the scope of its charter, including unlawful activity such as UPL.[78]

E. *Rationale Behind UPL Doctrine*

The rationale invoked by courts to prohibit UPL is reflected in ethical considerations ("ECs") of the Model Code.[79] EC 3-1 of the Model Code explains that "[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services."[80] EC 3-2 specifies that "[t]he sensitive variations in the considerations that bear on the legal determinations often make it . . . essential that the personal nature of the relationship of client and lawyer be preserved."[81] EC 3-2 also defines "[c]ompetent professional judgment" as "the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment."[82]

By contrast, EC 3-3 cautions that a nonlawyer "is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer."[83] Furthermore, EC 3-3 states that "[t]he public interest is best served in legal matters by a regulated profession committed to such standards," such as the Disciplinary Rules which protect the public from breached confidences, improper solicitation, divided loyalties, and lack of independent exercise of judgment.[84] Also, EC 3-3 cites the attorney-client privilege as another benefit to the public.

Finally, EC 3-4 describes the vulnerabilities of potential clients of legal services who are "not in a position to judge whether he or she will receive proper professional attention" for a legal matter concerning "the confidences, the reputation, the property, the freedom, or even the life of the client."[85] Thus, EC 3-4 finds that "[p]roper protection of members of the public" requires that lawyers be "subject to the regulations of the legal profession."[86]

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77. *See id.* at 512-14.
78. *See id.* at 516-18.
79. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 18.
80. Model Code of Professional Responsibility EC 3-1 (1981).
81. *Id.* EC 3-2.
82. *Id.* EC 3-2.
83. *Id.* EC 3-3.
84. *Id.* EC 3-3.
85. *Id.* EC 3-4.
86. *Id.* EC 3-4.

In brief, these ECs reflect the dominant justifications for prohibiting UPL and restricting the practice of law to members of the bar:

(1) protecting the public against harmful incompetence and unscrupulous conduct;[87]

(2) protecting the administration of justice from incompetent or unscrupulous nonlawyers;[88]

(3) supplying a system of discipline to regulate lawyers;[89] and

(4) rewarding lawyers with an economic advantage over their potential and actual competitors in exchange for their submitting to regulation.[90]

1. Client Protection

The notion that permitting nonlawyers to practice law would harm clients rests on two basic assumptions: (1) under UPL rules, lawyers are more likely to protect client interests than nonlawyers would without UPL rules; and (2) clients would be worse off without UPL rules.[91] The first assumption is backed by the belief that lawyers are both more competent and more scrupulous than nonlawyers would be in handling legal matters. These assumptions are erroneous. First, while lawyers do have special knowledge, they may not be any more competent than a nonlawyer specialist in performing certain specific tasks. For instance, from this author's own experience, nonlawyer advocates who advise tenants on a daily basis about how to trek through the thicket of New York City's housing court often help train lawyers who are volunteering their services to poor tenants pro bono.

Second, lawyers have no exclusive claim to integrity despite the operation of disciplinary rules which ostensibly enforce good behavior. Studies of the lawyer discipline system suggest that lawyers rarely suffer any consequences for incompetence or other failings.[92] Accordingly, Professor Charles Wolfram has opined that if nonlawyers were

87. *See* Elliot E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA. L. Rev. 438, 439 (1965) ("The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests.").

88. [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 21:8004 (1984); Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 126; Wolfram, *supra* note 14, § 15.1.2, at 828-29.

89. See Wolfram, *supra* note 14, § 15.1.2, at 828-29.

90. *See id.*; Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 712 (1977); *see also* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 Cal. L. Rev. 487 (1965) (examining the judiciary's treatment of occupational licensing).

91. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 126; Wolfram, *supra* note 14, § 15.1.2, at 829.

92. *See, e.g.*, Rhode, *supra* note 18, at 16-17 (examining state bar organizations and their unauthorized practice committees).

permitted to practice law, then "[t]he law of malpractice, contract and fiduciary limits on fee charges, and agency rules requiring loyalty to a principal would probably protect clients almost as well [as the lawyer discipline system]."[93] In addition, many other professions—often those historically accused of UPL, such as realtors, stockbrokers, and accountants—must pass certification tests for competence and are subject to discipline for incompetent or unethical behavior. Finally, there is a growing movement in the business community for corporations to adopt and adhere to a code of business ethics.[94] By contrast, recent commentaries by prominent lawyers bemoan the decline of "professionalism" among lawyers and seek its revival.[95]

The second assumption that clients are better off under a system of UPL rules is based on the paternalistic belief that the public needs the protection which the UPL system provides.[96] The argument in favor of UPL rules "assumes that clients cannot be trusted to choose for themselves whether they want to pay for the extra protection of a generalist instead of the narrower protection of a nonlawyer specialist."[97] In addition, even "clients who are aware of the limitations on the abilities and ethics of nonlawyers might rationally want to hire them despite their shortcomings because, in a free competitive market for legal services, those shortcomings will bring lower prices."[98] Various ABA studies of the civil legal needs of the public have found that a significant portion of the legal needs of low and moderate income households are not addressed by any part of the justice system.[99] The cost of a lawyer's services is a common factor cited for not seeking a lawyer's services.[100] Furthermore, many tasks that lawyers now perform exclusively could be competently performed by nonlawyers because these tasks do not necessarily require a lawyer's professional

93. Wolfram, *supra* note 14, § 15.1.2, at 831.

94. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1266 (1995).

95. *See id.* at 1230; *see also* Lisa G. Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659 (1990) (examining forms of deception used by attorneys in dealing with their clients).

96. *See* Wolfram, *supra* note 14, § 15.1.2, at 832 ("Nonlawyers are hardly ever consulted about the wisdom of particular [UPL] rules .... [T]he protection [of nonlawyers by UPL rules] is probably unwanted and thus paternalistic in a most objectionable way.").

97. *Id.* at 831.

98. *Id.*

99. *See* Consortium on Legal Services and the Public, American Bar Ass'n, Agenda for Access: The American People and Civil Justice 1-2 (1996); Consortium on Legal Services and the Public, American Bar Ass'n, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally 38 (1989); Barbara A. Curran, The Legal Needs of the Public: The Final Report of a National Survey 152-59 (1977).

100. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 78.

judgment.[101] As a result, national organizations with large membership bases, such as the American Association of Retired Persons, have campaigned to end UPL restrictions because the consumer public is not being served effectively by lawyers and should have a choice as to who represents them.[102] Furthermore, when the citizens of Arizona were given an opportunity to act upon UPL through a referendum, UPL rules were roundly rejected.[103] This suggests that the public may not desire the "protection" that the bar and the courts have instituted on their behalf.

The principal negative reaction to relaxing UPL rules is that along with a wider range of prices for legal services will come a "tiered competency system" which will not be in the best interest of the public.[104] This argument fails because such a tiered competency system already exists, especially between lawyers and self-represented persons, where

101. Curran, *supra* note 99, at 231 (reporting that 82% of the nonlawyers responding to a 1974 survey agreed that many things that lawyers do could be done by others as competently and less expensively).

An analogy to medical services may prove helpful. Today, for instance, a pregnant woman has several options for delivering her baby: (1) she can give birth at home with the help of friends and family; (2) she can hire a birth assistant or doula who has no formal medical training to help her with the birth; (3) she can hire a midwife who is trained in delivering babies alone; (4) she can hire a nurse-midwife, a nurse specializing in delivering babies; or (5) she can hire a obstetrician and give birth in a hospital. Because all of these options are legal, none constitutes the unauthorized practice of medicine. Should there be complications with her birth, she can seek the assistance of a doctor at the hospital. The patient can assess her desire for these services based on cost, comfort and her beliefs.

In this analogy, the doctor is akin to the lawyer. In the event of a relaxation of the UPL rules, the client would be faced with a whole range of options based on cost, comfort, and her beliefs. Similarly, should she face complications with her legal problem, she can always retain a lawyer.

102. *See* Morrison, *supra* note 24, at 367.

103. In 1961, the Supreme Court of Arizona found that title companies and realtors were engaged in UPL by preparing documents used in the transfer of real estate. *See* State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 14 (Ariz. 1961). The following November, Arizonans voted on Proposition 103, which would allow realtors and the like to prepare real estate transfer documents. The measure received 300,000 votes, the highest total votes for a proposition at that time with 172,000 votes in favor. *See* M. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A. J. 139 (1963).

Another instance of adverse public reaction to UPL arose when the Florida Supreme Court affirmed the Florida Bar's successful prosecution of Rosemary Furman who had a business preparing documents for pro se individuals. *See* Florida Bar v. Furman, 376 So. 2d 378, 381 (Fla. 1979). Furman defied the court order to terminate her business and the bar obtained a contempt ruling against her. Florida Bar v. Furman, 451 So. 2d 808, 815 (Fla. 1984), *appeal dismissed*, 469 U.S. 925 (1984). Public outcry against these rulings was so strong that the Florida Supreme Court eventually adopted a rule that permits nonlawyers to help prepare certain documents and give advice on administrative matters. *See* Rules Regulating Fla. Bar Rule 10-2-1.

104. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 126.

the gap in competence is at its maximum.[105] The minimum level of competence that lawyers are expected to maintain in order to continue to practice law does not necessarily mean that nonlawyers are unable to achieve a similar level of competence. For instance, a study of nonlawyer practice before an administrative agency shows that a party who is represented by *either* a lawyer or nonlawyer is much more likely to meet with success in pursuing their case.[106]

2. Effective Administration of Justice

The notion that absent UPL rules there can be no effective administration of justice seems based on two additional assumptions: (1) clients would retain incompetent nonlawyers ignorant of the rules of procedure, evidence, and legal precedent; and (2) nonlawyers would be more ruthless and less candid than lawyers. These assumptions are largely untested. With regard to the first assumption, the incompetent nonlawyer would be liable to his or her client for malpractice, as discussed above. Such ineffectiveness before the courts would undoubtedly besmirch the reputation of that particular nonlawyer and deter most potential clients from engaging his or her services, but it is conceivable that nonlawyers found liable for malpractice on one occasion would still be hired again by clients ignorant of their misdeeds. The same can be said, however, of lawyers who have been found liable for malpractice and merely sanctioned by the bar. As to the second assumption, courts have inherent and statutory power to impose the same sanctions against nonlawyer representatives that are currently imposed upon lawyers for unethical tactics or lack of candor.[107] Even in many cases of UPL, courts have simply held nonlawyers to the same standard of care as lawyers as a way of assessing the nature of the nonlawyer's conduct.

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105. The range of lawyers' fees already reflects a tiered system of competence based on a particular lawyer's perceived level of competence which will usually command a higher fee.

106. In 1992, claimants before the Social Security Administration represented by lawyers obtained 73% favorable decisions while those represented by nonlawyers received 71% favorable decisions. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 113 n.393. This difference hardly represents a statistically significant difference from Tier 1 to Tier 2, so to speak. In the same study, however, however, self-represented persons prevailed only 57% of the time. *See id.* This disparity in effectiveness suggests a significantly tiered system of competence between the represented and unrepresented parties. *See* William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1027 (1977) (finding that represented claimants appearing in Federal Employees Compensation Act proceedings tend to prevail in more cases than unrepresented claimants).

107. *See* Richard A. Posner, The Economic Analysis of Law 346 (2d ed. 1973).

3. Professional Discipline

Another rationale in favor of UPL rules is that such rules create an effective system for discipline of those who render legal services for others. Without UPL, the self-regulation and ethical standards of the legal profession would be hobbled because: (1) the deterrent effects of the penalties of disbarment and suspension would be removed; and (2) lawyers would be substantially disadvantaged competitively by complying with ethical precepts when other practitioners would not be so constrained in their ability to solicit clients and advertise to the public. In a legal services market without UPL restrictions, however, in which clients can choose the services of nonlawyers, professional lawyers will probably still command the highest fees and enjoy the best repute of all legal services providers.[108] Thus, a disbarred or suspended lawyer would not be able to partake in the distinct economic and social advantages of bar membership.

Furthermore, it is evident that society should insulate lawyers from competition in order to preserve lawyer codes upon the condition that "the net social value of such constraints more than offsets the costs imposed by the resulting lawyers' monopoly."[109] On more than one occassion, the Supreme Court has found that this condition for preserving lawyer codes has not been met. For example, in *Bates v. State Bar*,[110] the Court held that rules prohibiting lawyer advertising constituted an unconstitutional interference with freedom of speech.[111]

4. Minimizing Competitive Practices

Without UPL, the fear is that lawyers will behave competitively for clients like any other business, which will ultimately hurt clients, harm the legal system, and erode professional discipline. According to Professor Russell Pearce, the practice of law has recently undergone a radical paradigm shift from being construed solely as a profession to "the widespread perception is that law practice is a business."[112] Like the ECs which justify UPL restrictions, "the Professional Paradigm rests on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy."[113] In support of this paradigm, there exists a "Business-Profession dichotomy," whereby business, which seeks to maximize profit, is incompatible with professionalism, which places the good of clients and society above lawyer self-interest.[114]

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108. *See* Pearce, *supra* note 94, at 1273.
109. *See* Wolfram, *supra* note 14, § 15.2.1, at 833.
110. 433 U.S. 350 (1977).
111. *See id.* at 382-83.
112. Pearce, *supra* note 94, at 1232.
113. *Id.* at 1231.
114. *Id.*

The encroachment of the Business Paradigm onto the Professional Paradigm may elicit a range of responses from the organized bar—from maintaining the status quo to deregulating the practice of law to permit market forces alone to take control. Professor Pearce advocates a "Middle Range" approach between these poles by "allowing nonlawyers to provide legal services but retaining a role for the organized bar with bar membership serving as a certificate rather than a license."[115] In contrast to the rationale for UPL rules, Professor Pearce believes that the Middle Range approach "may very well improve the quality of legal services, the administration of justice, and the contribution of lawyers to the public good . . . . [The] increased competition would likely result in better quality services at a lower cost."[116]

CONCLUSION

The rationale for UPL restrictions raises many questions about the need for maintaining a lawyer monopoly upon the practice of law. A 1995 report on Nonlawyer Activity in Law-Related Situations recommended that any changes in UPL must be undertaken on a state-by-state basis.[117] However, if the whole system of rationale is suspect to its core, then national organizations, such as the ABA, should take action.

Today, there are more lawyers per capita than ever before.[118] However, the legal needs of low- and moderate-income persons remain seriously unmet. As a functional matter, the lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services. UPL restrictions appear to be the main barrier blocking the development of affordable legal services options for the public. Thus, UPL laws, rules, and rulings should be eased or undone in order to make way for greater public access to legal services and, hopefully, as a result, greater access to justice for all.

115. *Id.* at 1232.

116. *Id.* at 1232-33.

117. *See* Nonlawyer Activity in Law-Related Situations, *supra* note 14, at 134-42.

118. *Cf.* Howard Erichson, *Strengthening Ethics in a Million-Lawyer World*, Nat'l L.J., Aug. 3, 1998, at A24 (estimating that following the results of the July 1998 bar examinations, the total number of lawyers in the United States would surpass one million).